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LOEB v. KIMMERLE et al.

L. A. 13339.

Supreme Court of California.

Feb. 29, 1932.

1. Assault and battery 🔑35.

Implied finding that defendant not taking part in actual assault committed by codefendant was mental participant, and that defendants were acting in concert, *held* supported.

2. Assault and battery 🔑24(1).

Complaint for assault and battery need not allege that there was conspiracy between indirect actor and one committing assault to recover from indirect actor.

> Complaint need not contain allegation of conspiracy, since the actionable wrong is the tort committed, and the liability is determined by the ultimate fact of whether the alleged indirect actor participated in the commission of the wrong; the evidence establishing the conspiracy being merely proof of the ultimate fact.

3. Appeal and error 🔑880(2).

Defendant could not complain of exclusion of codefendant's evidence.

4. Appeal and error 🔑1078(4).

Assignment of error to exclusion of evidence not supported by argument or citation of authority *held* insufficient.

5. Trial 🔑76.

Sustaining objection to question already asked and answered *held* not error.

6. Assault and battery 🔑27.

Excluding cross-examination testimony of assaulted plaintiff regarding telephone conversation showing that plaintiff came to stockholders' committee offices, anticipating trouble, *held* error; assault having grown out of friction between committeemen.

7. Appeal and error 🔑1048(6).

Error in excluding assaulted plaintiff's cross-examination testimony regarding telephone conversation *held* not prejudicial, where testimony of other party to conversation regarding conversation was uncontradicted.

8. Appeal and error 🔑201(2).

Remarks of judge while ruling on objections to evidence *held* not reviewable, where trial judge's attention was not directed to claimed misconduct.

9. Trial 🔑91.

Refusing to strike out testimony admitted without objection *held* proper.

> Refusing of motion to strike out testimony was proper, since one cannot take a chance on answer to question being favorable, and, when disappointed, have motion to strike out take the place of an objection.

10. Witnesses 🔑280.

Cross-examining witness as to why he did not, when giving testimony on previous occasion, state defendant referred to codefendant as "big Irishman" as testified in assault and battery action being tried, *held* objectionable as being argumentative.

11. Appeal and error 🔑933(5).

Court assumed statement in defendant's affidavit, supporting motion for new trial for jury's misconduct, regarding matter particularly within plaintiff's knowledge but not denied by him, to be true.

12. Appeal and error 🔑1015(5).

Trial court's determination, on motion for new trial, of question of fact regarding jury's alleged misconduct, *held* binding on appellate court.

13. Appeal and error 🔑1001(1).

Verdict supported by substantial evidence should not be disturbed unless it reasonably appears that errors probably caused jury to render verdict which they would not have rendered otherwise.

14. Assault and battery 🔑43(3).
Trial 🔑296(2).

Instruction regarding liability of joint tort-feasor not actually participating in commission of assault *held* erroneous, but not to require reversal, in view of further instruction.

> Instruction to the effect that if one man carries out a plan originated by both of them, or carried out a plan originated by one of them for the benefit of the other or for benefit of both of them, they are equally to blame in eyes of law, and equally liable for injuries or damages inflicted was erroneous, yet in view of further instruction that unless jury believed that defendant did agree with codefendant on some plan to commit some wrongful act

which resulted in an assault on plaintiff, then verdict should be for defendant, there was no grounds for reversal of judgment, since it was hardly reasonable to suppose that jury accepted and followed the obscure misstatement of law rather than the clear definite and explicit direction given at close of instruction.

15. Appeal and error 🔑882(8).

If defendant was injured by court's rulings against him caused by defendant's own lapse in asking improper questions or making untenable objections, injury was one of which defendant could not complain.

16. Appeal and error 🔑1048(6).
Witnesses 🔑275(2).

In action for assault and battery, sustaining objection to cross-examination question as to whether defendant referred to codefendant as "big Irishman," as testified by witness, *held* error, but not prejudicial, under circumstances.

Sustaining of objection was not shown to have been prejudicial error, since witness did not appear personally at the trial, but his deposition was produced and read, and the objection which court sustained was to a question which had been asked and answered by the witness in his deposition, and as the answer to the question was not before court, it could not determine whether defendant was or was not prejudiced by sustaining of objection.

17. Appeal and error 🔑683.

Before appellant can successfully complain of ruling of court excluding answer given in deposition, answer to question must be incorporated in record on appeal in order that appellate court may pass on materiality thereof.

18. Appeal and error 🔑901.

Appellant must show error and prejudice during trial before appellate court may reverse judgment.

19. Appeal and error 🔑724(2).

General statement that rulings made by trial "judge seemed to be constantly against me" *held* insufficient assignment of error.

20. Trial 🔑140(1).

Truth of testimony of witnesses is for jury.

21. Assault and battery 🔑40.

$50,000 compensatory damages for loss of eye, fracture of left malar bone, injury to nose and hand, and shock to nervous system, *held* excessive by $25,000.

22. Damages 🔑208(1).
New trial 🔑74.

Assessment of damages is, first, within peculiar province of jury, and, second, for trial judge in passing on motion for new trial.

23. Appeal and error 🔑1004(1).

Appellate courts will not disturb assessment of damages unless verdict is so grossly excessive as to suggest passion, prejudice, or corruption on part of jury (Code Civ. Proc. § 657, subd. 5).

24. Appeal and error 🔑743(1).

Statement that improper references were made to criminal case and fact that defendant had been paroled *held* insufficient assignment of error.

Statement was insufficient assignment, since no specific quotations were made and no reference given to transcript where improper references could be found.

In Bank.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Arthur M. Loeb against H. J. Kimmerle and another. Judgment for plaintiff, and defendants appeal.

Judgment modified, and, as so modified, affirmed.

Superseding opinion of District Court of Appeal in 3 P.(2d) 969.

H. J. Kimmerle, in pro per.

Tanner, Odell & Taft, of Los Angeles, for appellant Spurlin.

Paul Barksdale D'Orr and Thomas A. Reynolds, both of Los Angeles, for respondent.

CURTIS, J.

This case came to us by an order of transfer here after decision by the District Court of Appeal of the Second District, Division Two. We were unable to agree with the conclusion of said court, that the judgment against the defendant Spurlin should be reversed for the reasons stated in the opinion of said appellate court, or for any reason appearing in the record. We were, and now are, in accord with the conclusion reached by said court, that the judgment for compensatory damages is excessive and should be reduced from the sum of $50,000, the amount fixed by the verdict of the jury, to the sum of $25,000.

We adopt as a part of our opinion the following from the opinion of the District Court of Appeal:

Each defendant has appealed from the judgment rendered in this case which was in favor of the plaintiff in the sum of $50,000 compensatory and $2,948.60 actual damages. We shall consider first the appeal by De Kalb Spurlin.

The action was one to recover for the injuries inflicted upon respondent as the result of an assault and battery by the appellant Kimmerle. The testimony adduced by respondent indicated that his left eye was injured to such an extent that it was rendered blind, his left malar bone was fractured, his nose injured, one hand hurt, together with other minor injuries. The appellant Spurlin took no part in the actual beating which was administered. It was claimed by respondent that Spurlin and Kimmerle were jointly interested in the act and had an understanding that they were going to rid a committee of Julian Petroleum Corporation Stockholders of which Loeb and Spurlin were members, of either what is called the "Jewish" or perhaps the "Julian" interest. It is now the contention of this appellant that the evidence is insufficient to warrant the implied finding of the jury that he was a conspirator or in other words united and co-operated in the assault. A résumé of the testimony produced by respondent and pertinent to the question thus raised follows: The respondent Loeb, the appellant Spurlin and L. L. Horchitz, ——— Conlon, ——— Rubin and C. C. Julian were elected at a mass meeting held June 10, 1927, the members of a stockholders' committee of the corporation. Spurlin was elected chairman. There existed factional differences among the stockholders which were apparently carried over into the committee. L. L. Horchitz was made secretary of the committee and two rooms were secured for its use in the Wilcox building. On June 20th, at a meeting of the committee attended by Loeb, Spurlin, Horchitz, and Rubin, Loeb offered a resolution that Spurlin resign as chairman thereof, and according to the testimony of the respondent "Mr. Spurlin bolted out of the door; he never waited to hear the end of it." The respondent also testified that he remained in the office until "four or half past four," but did not see Spurlin again that afternoon or evening. However, the appellant Spurlin took his evening meal at the home of and stayed all night with his friend whom he had known for twenty years, the other appellant, H. J. Kimmerle, where they discussed the happenings of the afternoon, although it was testified by the former that he "went out with the primary purpose of listening to Julian on the radio." Mr. Horchitz arrived at the committee's offices the following morning about 8:40 or 9 o'clock. Mr. Spurlin was already there and met him at the door with the statement: "I don't want you here, get out," at the same time holding the door, whereupon Horchitz forced his passage, breaking the glass in the door in his successful effort. This altercation was reflected in the daily press, which at the time followed very closely every incident connected with the Julian affair. Kimmerle, reading an account of the incident, called up his friend Spurlin to ascertain if he had been hurt and arranged to meet him about noon either at the office or at a nearby restaurant for lunch. It was also arranged that Kimmerle would if possible make arrangements for other and different offices in the Stock Exchange building and assist Spurlin in moving that afternoon. They met at the luncheon establishment and there they were interviewed by a reporter for one of the daily newspapers, who testified that the appellant Spurlin asked him to come back to his table; that he went and was there introduced to the appellant Kimmerle; that they briefly discussed the fight which had taken place that morning, whereupon, in the words of the witness, Spurlin "told me if I wanted to see some action or see something doing, to come up to the Wilcox building to that office that afternoon. I asked him what he meant, I asked him to explain, but he did not. He just said to be up there. Then I asked him who Mr. Kimmerle was. He said 'This big Irishman is a friend of mine and is going to see that I get a square deal.' Mr. Kimmerle said: 'Yes that is it.'" Mr. Carey went to the offices of the committee during the afternoon, but too late for the "action." As reporters will, he asked Kimmerle what had happened and was referred to Spurlin. The latter responded to an inquiry as to what had happened to Loeb as follows: "We have sent him back to C. C. Julian where he belonged." Another newsgatherer, representing a different newspaper, was present and an eyewitness of the fracas. After Loeb had been forcibly and violently ejected, this reporter, a Mr. Bolger, said to Kimmerle (Spurlin being present according to the witness' recollection), "You know that Spurlin is a physical coward," to which Kimmerle replied: "Yes I know that, and that is why I am here," and also volunteered the information that "the Jewish element was to be eliminated—the committee had been made up of a majority of Jews, and they were to be eliminated and that they had done their work and they had gone now, that they had been put there for a purpose and their purpose had been satisfied and they had gone." Within five minutes of this conversation Bolger asked Spurlin if the committee would continue to function and Spurlin said to him: "When you burn one rat the rest will usually leave the ship; and he didn't expect any of the committeemen would be back." Another eyewitness was J. A. Oldaker, who testified that immediately after this unfortunate affair Mr. Kimmerle announced to all who were in the room and in the immediate presence of the appellant Spurlin that "he came up there to clean house and he was going to clean it out." The manager of the Wilcox building testified that shortly after the assault Spurlin invited him and Kimmerle into the inner office, where

Kimmerle made the statement that "Mr. Spurlin was very nervous and quite sick over being pushed off the committee, and that he was there to clean house." After the offices had been moved and on June 23, the stockholders' committee issued a statement over the name of the appellant Spurlin, as chairman, asking for proxies in which it was said among other things: "Since organizing this committee we have been side tracked and hampered by insidious propaganda from many quarters. It has been a real battle, one which has not only required moral courage but physical strength, and in order to purge this committee of these individuals with sinister motives we have been required to use both moral and physical strength, and where necessary we have not failed to use both." This pronouncement follows one earlier in the report to the effect that the respondent Loeb in a time of excitement had stated that he had been put on the committee "by C. C. Julian for C. C. Julian, and that he had no stock and no interest in the stockholders." Not only this pamphlet purported to be issued by the committee with the appellant Spurlin as chairman, but also there is evidence that Spurlin and Kimmerle and others consulted about it before it was printed; that while Spurlin may not have seen the exact language first quoted, nevertheless he told Kimmerle to "go ahead—fix it up." We must add one more significant bit of testimony before we proceed to an examination of the sufficiency of the evidence. The respondent testified that he was sitting in the outer office reading a newspaper when the appellants returned from luncheon; that appellant Spurlin stepped over to him and said: "Mr. Loeb, would you mind accompanying me into the inner office? I want to speak to you;" that as soon as they entered the inner office the appellant Kimmerle stripped for action by removing his hat and coat; that the last-named appellant took a seat at the desk opposite the respondent, whereupon the following occurred: Spurlin remarked to Kimmerle "This is one of the Jews," and the latter said: "What the hell are you doing around here? Who the hell sent you up around here?" Respondent queried: "With what authority do you speak to me?" Kimmerle, striking his fist on the desk, responded, "Never mind who I am, you are sent up here by C. C. Julian," whereupon, the respondent says, he walked out of that office and to the desk in the outer office followed by Kimmerle and it was there the attack took place.

Of course, there is testimony in the record contrary to much of that which we have set down. For example, appellant Spurlin testified that it was respondent who bolted the meeting of the 20th and not he; that he did not know that the reference to the use of force was in the report to the stockholders until after it was printed and delivered; and that he had telephoned to the police station after the altercation with Horchitz and arranged for an officer to be present at about 1 o'clock p. m.

[1] The question with which we are confronted, however, is not whether the evidence is ample to have supported a contrary verdict, nor whether we think the weight of evidence points to a different result, but whether there is substantial evidence which, if believed, warranted the jury in arriving at the conclusion to which it came.

The test by which we are to determine the liability of the appellant is this: Did he unite or co-operate in inflicting a wrong upon the respondent? In More v. Finger, 128 Cal. 314–319, 60 P. 933, 935, it is said: "The plaintiff is entitled to relief for the injury from such of the defendants as she can show have united or co-operated in doing her the wrong." To the same effect reference may also be had to Nevin v Gary, 12 Cal. App. 1, 106 P. 422, and Revert v. Hesse, 184 Cal. 295, 193 P. 943. In Smith v. Blodget, 187 Cal. 235–242, 201 P. 584, 587, the same rule is phrased in these words: "It is the civil wrong, not the conspiracy, which constitutes the cause of action, and therefore the plaintiff may bring his suit along any lines which he deems most likely to afford him redress for the particular injury which he has sustained, and, if successful in proving an injury of the nature claimed, may recover judgment in that action against all those who have united or co-operated in inflicting that injury." See, also, Frost v. Hanscome, 198 Cal. 550, 246 P. 53.

Applying the test to the present situation, what must we say are the allowable deductions from the recited testimony? The resolution was directed towards the removal of Spurlin and not of Kimmerle, the latter of whom was not even a member of the committee. The invitation to Carey to witness some action was issued by Spurlin and not by Kimmerle. It was Spurlin as chairman of the committee who reported that they had not hesitated to use force. True, Kimmerle participated in the preparation of the report and talked it over with Spurlin and prepared the final draft at Spurlin's direction, but we repeat he was not a member of the committee. Again it was Spurlin who invited respondent into the inner office for a few words, but without protest of any kind permitted Kimmerle to prepare for the assault by removing the handicap of his coat and immediately, in response to Spurlin's statement, "this is one of the Jews," launch his verbal assault. Spurlin stood by while his friend of many years' standing and at whose house he had stayed the night before announced that he had come "there to clean house and he was going to clean it out," and it was Spurlin who made the remark that, "When you burn one rat the rest will usually leave the ship." Leaving out of consideration for the time being the contrary testimony and reducing that set forth to its significant elements, it is impossible to say that the jury was not justified in deducing therefrom that appellant Spurlin was the mental participant and Kimmerle the physical—that they were acting in concert and each knew the intent and purpose of the other.

[2] Appellant next assails the judgment because, he says, the verdict is against law and gives as his reason therefor the fact that the complaint did not charge or set out facts indicating a conspiracy so as to warn him that he was being held as a party to the assault because he did conspire with Kimmerle. In our discussion of the previous contention we have already observed that "it is the civil wrong, not the conspiracy, which constitutes the cause of action." Smith v. Blodget, supra. In Herron v. Hughes, 25 Cal. 555, we find this succinct statement of the rule, which has been quoted with approval in the more recent case of Bowman v. Wohlke, 166 Cal. 121, 135 P. 37, Ann. Cas. 1915B, 1011: "Where two or more are sued for a wrong done, it may be necessary to prove previous combination in order to secure a joint recovery, but it is never necessary to allege it, and if alleged it is not to be considered as of the gist of the action. That lies in the wrongful and damaging act done. In Saville v. Roberts, 1 Ld. Raym. 378, Mr. Chief Justice Holt said: 'An action will not lie for the greatest conspiracy imaginable if nothing be put in execution; but if the party be damaged the action will lie. From whence it follows that the damage is the ground of the action, which is as great in the present case as if there had been a conspiracy.'" So, too, in More v. Finger, supra, it is said in addition to what we have already quoted: "The complaint alleges that the plaintiff was deprived of the note by the wrongful acts of the defendants, and that they entered into a conspiracy for that purpose, but the conspiracy thus alleged is not the gist of the action. The gist of the action is the injury done to the plaintiff by these wrongful acts, and this injury is actionable, whether it is the result of a conspiracy or not. The averment of a conspiracy is immaterial, and could be proved without such averment, or, if averred, need not be proved." Considerable reliance is had by appellant upon the case of McPhetridge v. Smith, 101 Cal. App. 122, 281 P. 419, but we find no statement therein which indicates that in an action for the tort of two or more persons it is essential to a recovery against an indirect actor and participant therein that he confederated and conspired with the one who directly acted. In fact, the case is in full accord with those authorities from which we have already extracted excerpts. Sound reason brings us to the same conclusion. The actionable wrong is the tort committed. The liability is determined by the ultimate fact of whether the defendant participated in the commission of the wrong. The evidence establishing the conspiracy is merely proof of the ultimate fact.

[3-7] A number of instances where testimony on cross-examination or direct was excluded by the court are assigned as error. Some of these instances are objections sustained to the questions of the other defendant of which this appellant may not complain, another is supported by neither argument nor citation of authority, and in the case of at least one assignment the question was already asked and answered. It is unnecessary to comment further upon them, but there is one line of proffered evidence which we find demands considerable attention. The plaintiff introduced a chain of circumstances to show Spurlin's connection with the assault. Kimmerle contended and testified that upon his arrival at the office of the committee on the afternoon of June 21st he attempted to talk to Loeb about adjusting the friction existing among the members of the committee and read a resolution adopted at the mass meeting of the stockholders to the effect that the people who had put up the money for stock should be in charge of the affairs of the Julian Petroleum Corporation; that thereupon Loeb said: "I do not know anything about such a set of resolutions; I am sent up here by C. C. Julian for C. C. Julian; I do not care a damn about any resolutions"; that thereupon, he (Kimmerle) told respondent that he didn't belong in the office of the committee but did belong in C. C. Julian's office and ought to go there; that thereupon Loeb attacked him. During the cross-examination of the respondent appellant's counsel ascertained that Horchitz had called respondent on the telephone after the fight between Horchitz and Spurlin in the morning and attempted to elicit from him a conversation to the effect that Horchitz had told him to come on up to the committee's rooms and not to be a coward and to show thereby, inferentially at least, that Loeb had come up anticipating trouble, thus tending to corroborate Kimmerle's version of the affair and the version of appellant Spurlin that arrangements had been made for the presence of a police officer so that the move to the new offices might be made peaceably. The respondent argues that it is immaterial what Horchitz may have said to respondent and further that assuming its materiality Horchitz admitted the conversation and hence its rejection becomes harmless. We entertain no doubt that the testimony was material, that the cross-examination should have been permitted particularly in view of Spurlin's account of the meeting on the afternoon of the 20th to the effect that it was respondent who left the meeting and not he. It is difficult for us to conclude that the error was prejudicial for the reason that Horchitz subsequent-

ly testified that he did telephone to the respondent and say that he didn't want Loeb to abandon the ship and act a coward just at that time. Loeb responded to the request and appeared. There is no contradiction of the testimony of Horchitz and we fail to see how respondent's statement of the same matter could have altered or affected the result.

The same disposition must be made of appellant's claim that Police Officer Hynes was not permitted to testify concerning his assignment to the Julian case and that when he did start for the offices at about 1 p. m. on the 21st he was invited to lunch by Horchitz. He was permitted to state that Spurlin had called him twice, once about 10 a. m. and once about 12 noon, asking him to be present and that he did go to lunch about 1 o'clock with Horchitz and the latter testified that it was at his invitation.

[8] Complaint is also made of remarks of the judge concerning the materiality or effect of evidence as the trial proceeded, while ruling upon objections. It is sufficient to say that we have scanned the record in vain to find where counsel directed the trial judge's attention to this claimed misconduct for the purpose of rectifying the damage if any was done. On one occasion when such a course was pursued the judge did admonish the jury to disregard his remarks, thus indicating no desire on his part to influence them by suggestion. And of course under a familiar rule, to support which it is unnecessary for us to cite authorities, it is impossible for us to sustain appellant's position.

[9] The respondent's wife was asked to testify concerning his average income for a period of ten years prior to the trial. No objection was interposed that the proper foundation had not been laid, nor that the testimony was hearsay. The witness was cross-examined as to her knowledge and the means by which she came to that knowledge. Some time later in the trial counsel made a motion to strike her testimony "on the earnings of her husband." We cannot support the claim of appellant. He "cannot lie by and take a chance upon an answer being favorable, and, when disappointed, have a motion to strike out take the place of an objection." Price v. Northern Electric Ry. Co., 168 Cal. 173, 142 P. 91, 95; People v. Lawrence, 143 Cal. 148, 76 P. 893, 68 L. R. A. 193; Pinto v. Seely, 22 Cal. App. 318, 135 P. 43.

[10] It is next claimed that the court committed error during the cross-examination of Mr. Carey, who it will be remembered testified that he met Mr. Spurlin at the luncheon establishment on June 21st just previous to the affray; that Spurlin invited him back to the table where Kimmerle was and informed him that if he wanted to see some action or see something doing, to come up to the Wilcox building that afternoon; and further that in response to a query as to who Mr. Kimmerle was, Spurlin replied, "This big Irishman is a friend of mine and is going to see that I get a square deal." After being confronted with his testimony before the grand jury on another feature, he was shown the transcript of his testimony in a previous civil action wherein the respondent here was plaintiff and Kimmerle was defendant, which testimony read that Spurlin replied to the inquiry that Kimmerle was a friend of his, leaving out all reference to "big Irishman." Counsel then asked Carey why he did not at the time of giving the testimony just referred to use the designation "big Irishman," and the court very properly sustained an objection on the ground that the question was argumentative. Then counsel queried: "Well, did he say 'big Irishman,' or didn't he?" An objection that it was immaterial was promptly sustained. Without doubt this was error and an altogether too restricted view of the proper cross-examination of the witness. Whether the error requires a reversal of the action must await a later paragraph.

[11, 12] It is also argued by appellants that the plaintiff and the jury were guilty of misconduct of such nature as to necessitate a retrial of the issues. The circumstances appearing from the affidavits in support of this contention are as follows: On the opening day of the trial a Mrs. Chester Brown, who had been serving with the jury panel, was drawn as a prospective juror. She was examined and passed for cause. However, she was peremptorily challenged by the plaintiff, it subsequently appearing that she was the wife of a gentleman whom the plaintiff had known in South America several years before. That during the first recess after being excused Mrs. Brown engaged in conversation with the plaintiff and his wife and thereafter during the trial of the action, as she was not needed elsewhere as a juror, she remained in attendance during the remaining sessions. She also during the same time conversed with members of the jury. The jury was instructed and charged with the delivery of a verdict about 10:45 o'clock a. m. on the morning of March 15. About 11:30 a. m. of the same day Spurlin was about to leave the courtroom when the clerk stated that he had better wait a few minutes because unless they arrived at a verdict before noon it would be necessary for each side to pay one-half of the expenses of luncheon. What occurred next is subject to conflicting versions. The appellant and one of his counsel aver that Mrs. Loeb said: "Why Mrs. Brown has invited the jury and us out to lunch," whereas one of plaintiff's counsel says the remark was: "Mrs. Brown said she intended to take the jury out to lunch to day." They also differ as to the response of the clerk of the court, counsel for appellant averring that he said to Mrs. Loeb: "You can't do that. The case has not been decided," and counsel for respondent swearing that the clerk responded that Mrs. Brown had been planning for some time to give a lunch to the members of the panel when they had completed their service. The appellant averred that he had been informed and believed, and therefore swore, that the jury and Mr. and Mrs. Loeb did actually have lunch at about 1:30 p. m. of the same day with Mrs. Brown at her residence. This was after verdict rendered. There is no denial of this averment either from counsel or from the plaintiff or his wife, and it being a matter particularly within the knowledge of Mr. and Mrs. Loeb, we must assume it to be true. We are, however, faced with this problem. If the invitation were extended to the members of the jury and before verdict, so that they understood that the Loebs would be present it was a most serious interference with the due administration of justice and should not be countenanced. If, however, the invitation had not been extended, but was only an unexpressed intent, there was no such interference. The trial judge upon the motion for a new trial resolved that question in favor of the respondent and we are bound by his determination of that question of fact as fully as we would be upon any other issue of fact.

[13, 14] We now turn to appellant's claim that the court misinstructed the jury. Our attention is directed to an instruction covering the subject of the liability of one who does not actually participate in the commission of an assault for the damages resulting therefrom when done by another. In general the instruction is a correct statement of the law, but we find in it this serious misstatement: "If one man carries out a plan originated by both of them, *or carries out a plan originated by one of them for the benefit of the other or for the benefit of both of them,* they are equally to blame in the eyes of the law and equally liable for any injury or damages inflicted." (Italics ours.) While the remainder of the instruction was correct, we must observe that in a latter part the court told the jury that the plaintiff was required to prove his case by a preponderance of the evidence "bearing in mind all of the instructions of the court as to the liability and responsibility of one defendant for the acts of another." The first-quoted part of the instruction is so complete in itself that even though the latter part correctly stated the law, yet the most that we can say is that they are contradictory and we have no way of knowing which the jury accepted as their guide. We have already stated the test by which the liability of this appellant should have been determined. Certainly he could not be responsibile for the origination and execution of a plan by his codefendant without his co-operation even though it were for his benefit.

It is earnestly contended by the defendant Spurlin that the foregoing errors are sufficient to demand a reversal of the judgment against him. It may be conceded that the evidence, when considered as a whole, is very close concerning the participation of the defendant Spurlin in the assault upon the plaintiff. Defendant calls attention to the fact that the evidence shows that he had arranged for a police officer to be present at the time when the assault took place, and that it is unreasonable to believe that if he intended to commit an assault upon plaintiff he would want an officer of the law present at the time of such assault. This question, however, was one for the determination of the jury, and as long as there is to be found in the record substantial evidence in support of their verdict, it should not be disturbed on appeal unless it reasonably appears that the errors complained of materially influenced the jury in their deliberations and probably caused them to render a verdict which they would not have rendered had said errors not been committed. The defendant insists that in at least two instances the errors committed by the court had that effect. One such error, defendant claims, was the giving of the instruction mentioned above, and the other error consisted of the remarks of the court in ruling on objections to the admissibility of evidence made during the trial.

We will first consider said instruction and the misstatement of the law contained therein and hereinbefore commented upon. The misstatement of law, although quoted above, is restated here, and is as follows: "If one man carries out a plan originated by both of them, or carries out a plan originated by one of them for the benefit of the other or for the benefit of both of them, they are equally to blame in the eyes of the law and equally liable for any injury or damages inflicted." The appellate court held that this was an erroneous statement of the law, and, although the latter part of the instruction contained a correct statement of the law, the two statements were in conflict and that, "We have no way of knowing which the jury accepted as their guide." While this conclusion of the District Court of Appeal, 3 P.(2d) 969, is literally correct, yet when we consider the instruction as a whole, and carefully examine the two statements which are held to be conflicting, we seriously question whether the jury had any difficulty in determining the proper course it should pursue under the direction of the court set forth therein. The latter statement of the instruction was as as follows: "Unless you believe that the defendant Spurlin did so agree with the defendant Kimmerle on some plan to commit some wrongful act which resulted in an assault on the plaintiff, then your verdict should be for the defendant Spurlin." With this instruction as a whole before the jury, while as stated above we have no means of knowing which of the two conflicting statements the jury followed, yet it is hardly reasonable to suppose that they accepted and followed the rather involved and obscure statement—or, more properly, misstatement of the law—contained in the first part of the instruction, rather than the clear, definite, and explicit direction of the court given at the close of the instruction. We cannot feel that the jury were to any extent misled by anything contained in this instruction. The giving of it, therefore, is no ground for a reversal of the judgment.

[15] The contention that the remarks of the court in passing upon objections to the admissibility of evidence made during the trial unduly and improperly influenced the jury to the prejudice of the defendant Spurlin, we think, is equally without merit. We have already discussed these remarks generally in a previous part of this opinion and held that no error was shown to have been committed by the court in the making of any of said remarks. A long list of these remarks has been culled from the record and set out in the defendant's brief. We have carefully gone over them and find but slight if any criticism of any of them. It is true that the court in a large number of instances ruled against the defendant. If the jury drew any improper inference against the defendant by reason of these adverse rulings, the unfavorable light in which the defendant was thus caused to appear was due not to any fault of the court, but to defendant's own lapse in asking improper questions or making untenable objections. If the defendant Spurlin was injured by this condition, existing during the trial, and we very much doubt that he was, it was an injury of which he cannot complain, as he brought it upon himself. It is not an injury that would justify a reversal of the judgment.

[16-18] We will now revert to the ruling of the court sustaining an objection to a question, propounded to the witness Carey and heretofore referred to and held to constitute error. It is contended by the defendant Spurlin that the ruling of the court in this respect was so erroneous and prejudicial to defendant's rights as to demand a reversal of the judgment. This witness did not appear personally at the trial, but his deposition had prior thereto been taken and it was produced and read at the trial. The ruling of the court of which defendant complains was made during the reading of this deposition, and the objection, which the court sustained, was to a question which had been asked and answered by the witness in his said deposition. Whether the defendant was prejudiced by the court's ruling would depend upon the asnwer which was contained in the deposition. If the answer was favorable to the defendant then it might be held that he was prejudiced by the ruling of the court excluding the answer. On the other hand, if the answer was such that defendant was not benefited or aided thereby, then he was not prejudiced by the refusal of the court to permit the answer to be read to the jury. The answer to the question, to which the court sustained the objection, is not before us, and we have no means of determining whether the defendant was or was not prejudiced by the sustaining of said objection. It is the duty of the defendant, who is one of the appellants, in this case, to show error and prejudice during the trial before an appellate court may reverse the judgment. This the defendant has not done on this appeal in respect to the ruling of the court sustaining the objection of the plaintiff now under discussion. This precise point, it appears, has never been directly before the appellate courts of this state. In no case do we find that the courts have held that the appellant, before he can successfully complain of a ruling of the court excluding an answer given in a deposition, must incorporate the answer to such question in the record on appeal in order that the appellate court may pass upon the materiality of the question. We do find cases which, in our opinion, are alike in principle. There are numerous cases holding that before an appellate court will reverse a judgment on the ground that the trial court erred in sustaining an objection to the introduction in evidence of a written document, the writing itself must be made a part of the record on appeal, and unless it is the judgment will be affirmed. In the case of Euless v. Westphal, 71 Cal. App. 611, 616, 235 P. 742, 744, we find language which is pertinent to the question now under discussion, in which the court said: "If there was any evidence which would compel the court to interpret the letter as a binding contract of employment within the terms of the statute of frauds, it was the duty of the appellant to place that evidence before us on this appeal. From the fact that he has not done so, we may fairly assume that this evidence was adverse to him, because if it had been favorable he would have placed the facts before this court so that we would have been in a position to determine whether prejudice resulted from the error complained of." In the case of McCormick Saeltzer Co. v. Grizzly, etc., Co., 74 Cal. App. 278, 285, 240 P. 32, 35, the trial court had excluded from evidence a certain written instrument. In disposing of the error which the appellant claimed the trial court committed in its exclusion, the court said: "The contents of the instrument do not appear in evidence. The court permitted it to be marked for identification, and yet it does not appear in the record on appeal. * * * Since it is not included in the transcript, and the contents of the document are not before this court, it is impossible to determine whether it was competent or not. Therefore, in the absence of any showing to the contrary, this court must assume that the ruling of the trial court in excluding the document was proper." The case of Oldershaw v. Matteson & Williamson Co., 19 Cal. App. 179, 184, 125 P. 263, 265, is more nearly in point. There the trial court excluded a whole deposition, and the appellant assigned this ruling as error and appealed on that ground. In deciding the case, the court said: "Among other errors of law specified is that the court erred in excluding the depositions of C. D. Oldershaw and Annie Cox Oldershaw. It appears that the depositions of these parties were offered in evidence and objection thereto sustained upon the ground that the same were incompetent, irrelevant, immaterial, and not proper cross-examination. The depositions, however, are not incorporated in the bill of exceptions, and hence the record contains nothing upon which the alleged erroneous ruling of the court can be reviewed." In Adams v. Weaver, 117 Cal. 42, 49, 48 P. 972, 974, the trial court rejected the deposition of one of the parties to the action on the sole ground that said party was present in court and was examined as a witness. On appeal the court held that the deposition was not properly rejected on said ground, but further held that it could not review said ruling for the reason that the deposition had not been incorporated in the record on appeal. In deciding this point, the court said: "But the deposition is not in the record, and there is nothing there which gives the slightest intimation of its contents, except only 'that it was duly and legally taken.' Therefore, it does not, of course, appear that appellant was prejudiced by the ruling. * * * The judgment of a trial court will not be reversed for the exclusion of evidence, unless it appears that there was no sufficient ground for such exclusion. But in the case at bar the contents of the deposition may have been utterly immaterial, or inadmissible as evidence, and therefore the conclusion that the court erred in excluding the deposition does not follow from the mere fact of its exclusion, the deposition itself not being before us." There can be no difference in principle in the rule which the court has invoked when the whole of a deposition is excluded as the result of a ruling of court than when only a part of such deposition, or single answer therein, has been ruled out by the trial court. On appeal it is utterly impossible for the reviewing court in either case to decide whether the party who sought the admission of this evidence has been injured or not by its exclusion unless the excluded evidence is in some manner brought to its attention. This is the condition in which we find the record in the present appeal. The excluded evidence is not before us. We have not the slightest intimation as to its nature or character. We are therefore unable to say whether the defendant Spurlin was injured or not by the action of the court in sustaining the objection to the question asked the witness Carey. No prejudicial error having been shown, the judgment should not be disturbed.

This disposes of all the questions raised by the defendant Spurlin, except that the verdict is excessive. The question as to the excessive amount of the verdict was considered by the District Court of Appeal in its discussion of the appeal of the defendant Kimmerle. We are in accord with the conclusion reached by the appellate court in determining that question and also its treatment of this case in so far as its affects the defendant Kimmerle. We adopt, therefore, as our own that portion of said opinion of the District Court of Appeal, 3 P.(2d) 969, in which these matters are given consideration. It is as follows:

We have yet to consider the appeal of H. J. Kimmerle.

[19] This appellant says: "The rulings made by the judge seemed to be constantly against me," and then refers to certain pages of the transcript where we may find examples. It is obvious that such a general statement is not a sufficient assignment of error either in the exclusion or rejection of testimony to warrant us in ruling upon any question. However, by reason of a reference in the opening brief of this appellant to the brief of the appellant Spurlin, we have examined all of the assignments wherein it is claimed that the court committed error in the rejection of testimony offered by this appellant or in the admission of testimony over his objection, and it is sufficient to say that we can find nothing of which he can rightfully complain.

[20-23] It is next said that the verdict was excessive and that "Loeb and his wife had testified to an earning capacity greatly in excess of the facts." Here, too, it is patent that we are not authorized to consider the truth or untruth of their testimony. That duty rested with the jury.

The adoption of the appellant Spurlin's brief on the point by this appellant, however, renders it necessary for us to examine the argument therein contained that the verdict of $50,000 for strictly compensatory damages is excessive; it being remembered that there was also awarded to the plaintiff the sum of $2,948.60 as special or actual damages. In addition to our former recitals of injury, to wit: the loss of the left eye, a fracture of the left malar bone, an injury to the nose and one hand, we ought to set down that respondent's testimony also indicates that his general nervous system was affected; that from time to time he required sedatives to induce sleep; that at the time of the trial he was unable to read for more than fifteen minutes at a time by reason of the fact that reading brought on severe headaches; and that he had been up to the time of the trial unable to follow his business and had lost the power of concentration. There is testimony also to the effect that respondent is and had been for many years a contractor with an income therefrom in the neighborhood of $10,000 per annum. It should be noted, however, that in one of respondent's answers he admitted financial inability to enter into the contracting business, although he also asserted that his health would not permit it either. The life expectancy of respondent was shown to be 27.45 years. Can we say that the verdict is so large that it bears upon its face the imprint of passion or prejudice? Succinctly put, such is the test, codified in this state and found in subdivision 5 of section 657 of the Code of Civil Procedure and judicially announced as early as the case of Aldrich v. Palmer, 24 Cal. 513. To determine what is a just and reasonable compensation is a difficult task, one not possible of exact ascertainment. For that reason the assessment of damages is first of all the peculiar province of the jury and second, that of the trial judge when passing upon a motion for a new trial. Reneau v. Hirsch, 88 Cal. App. 1, 262 P. 1100. Whence it follows that the appellate courts will not disturb the verdict unless it is so grossly excessive as to immediately suggest to the mind "passion or prejudice, or corruption on the part of the jury." Reneau v. Hirsch, supra, with cases there cited; Morris v. Standard Oil Co., 188 Cal. 469, 205 P. 1073. Some aid is furnished us by the precedent of Maede v. Oakland High School District (Cal. Sup.) 298 P. 987, 989, which was a case where a high school boy, aged fifteen, was injured by an explosion in the vocational training class of the Technical high school. As stated in the opinion, the injury resulted "in the loss of one eye, a cut on the nose and slight cuts on the chest." The jury returned a verdict in the sum of $35,000. The District Court of Appeal under the announced doctrine refused to disturb it, although it was made to appear from the record that at one time the trial judge was inclined to believe it excessive. 291 P. 874. However, the Supreme Court transferred the cause to itself for decision and reduced the judgment to $16,000, saying on the point: "We now come to the consideration of the question earnestly urged by appellants, which is whether or not the damages as assessed herein are so far excessive and disproportionate to the injuries sustained by respondent, as measured by other awards judicially sanctioned in this and other states of the Union as fair compensation for like injuries, as to require reduction on the ground that they appear 'to have been given under the influence of passion or prejudice.' Section 657, subd. 5, Code Civ. Proc. It being impossible to restore a lost member of the body, the law undertakes to do the next best thing humanly possible, in lieu of restoration, which is to compensate the loss with a money consideration. Out of the long experiences of the past, in which all the elements and inconveniences of loss have been considered, weighed, and appraised, a standard, not invariable, it is true, has been adopted by courts of law. The average amount for particular injuries, as fixed by the verdicts rendered by juries and approved by courts, has its place in arriving at the estimate. The compensation assessed in the instant case, compared with a long list of cases in which the loss of an eye was, as here, the single damage to be compensated, so greatly exceeds the amounts of award in the average cases as to justify the claim on the part of the school district and the officers that the verdict of the jury was the result of passion and prejudice. It is rather coincidental that Damgaard v. Oakland High School District of Alameda County et al. [Cal. Sup.] 298 P. 983, supra, presents a case in point of injury very similar in all respects to the instant case, even to the loss of an eye, caused through an explosion which occurred during an experiment conducted in the chemistry department of the same high school district in which respondent herein was injured. The jury in that case assessed the damage at $15,000. Respondent here did not suffer any damages greater than was suffered by the Damgaard youth. There is nothing in either case that would seem to justify a preference of one over the other. Nevertheless, out of an abundance of caution, we have concluded that a judgment of $16,000 will be just in the circumstances of the case."

We have also considered another element. As is said in O'Meara v. Haiden, 204 Cal. 354, 268 P. 334, 60 A. L. R. 1381, radical changes have taken place in social conditions in the past few years, particularly with respect to incomes and the cost of living. However, considering the rather unsatisfactory testimony of annual earnings as distinguished from income from investments, as well as the fact that the fracture of the malar bone was slight, and the verdict in the Maede Case, we feel compelled to the conclusion that the verdict here could only have been arrived at as the result of prejudice and passion. For that reason it is excessive. In view of the fact that the testimony does indicate an extreme shock to the nervous system, we think the amount allowed in the Maede Case may in fairness be here increased and further that $25,000 will, as fairly as it is humanly possible, compensate the respondent for his loss.

Appellant next presents the alleged misconduct of Mrs. Brown and the jury, but that matter was fully covered while considering the appeal of Spurlin.

[24] Finally appellant, without giving us any specific quotations from or reference to the transcript says that improper references were made to the case of the criminal assault and the fact that he had been paroled. This, too, is an insufficient assignment of error.

The judgment herein is modified by reducing the award of the jury for compensatory damages from $50,000 to $25,000 and as so modified said judgment is affirmed as to each of the two defendants.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; SHENK, J.; SEAWELL, J.

NEEDHAM v. ABBOT KINNEY CO.*

L. A. 11645.

Supreme Court of California.

March 14, 1932.

Rehearing Granted April 11, 1932.

1. Brokers 🔑49(1).

Letter stating, in any deal satisfactory to principal, principal would pay usual commission, authorized broker to negotiate with other parties than those mentioned in letter.

The letter from principal to broker, although stating in substance that principal would be willing to allow parties named to enter into negotiations looking toward a deal, also stated that, in "any deal" satisfactory to principal, principal would expect to pay the usual realty board commission.

2. Brokers 🔑43(3).

Letter authorizing broker to sell lands, specifically covering properties owned by principal, sufficiently described lands under statute of frauds (Civ. Code, § 1624, subds. 5, 6).

3. Brokers 🔑43(3).

Real estate broker's contract, as regards statute of frauds, need not describe land specifically, if terms of employment can otherwise be made definite (Civ. Code, § 1624, subds. 5, 6).

4. Frauds, statute of 🔑119(2).

Person is estopped to assert statute of frauds, where such assertion would amount to practicing a fraud.

5. Brokers 🔑69.

5 per cent. allowed on actual sales made under contract between principal and other brokers through plaintiff broker's efforts *held* fair and reasonable.

6. Brokers 🔑49(1).

Land sold through other brokers through plaintiff's efforts *held* within authorization granted to plaintiff contemplating any satisfactory deal with respect to any of principal's properties.

In Bank.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by Paul A. Needham against the Abbot Kinney Company. From a judgment for plaintiff, defendant appeals.

Affirmed.

Superseding opinion in 4 P.(2d) 622.

Call & Murphey, R. C. Gortner, Walter E. Bennett, and Asa V. Call, all of Los Angeles, for appellant.

Arthur G. Baker and Joseph Hansen, both of Los Angeles, for respondent.

PRESTON, J.

Appeal from judgment for plaintiff, a real estate broker, in an action to recover a reasonable compensation for services rendered to defendant corporation in connection with the disposition of some of its properties.

The trial court found that on August 19, 1925, defendant executed a writing whereby it employed and authorized plaintiff, as its broker and agent, to negotiate for and consummate any deal satisfactory to it with respect to any or all of its properties, including the premises here involved, and agreed to pay him the regular realty board commission, that is, a reasonable compensation, for his services; that plaintiff immediately commenced performance thereunder, and about September 24, 1925, presented to defendant the two real estate brokers comprising the copartnership of Oliver & Carver, who were ready, willing, and able to make a deal for said lands, and who, as a result of plaintiff's efforts, entered into a written contract with defendant about July 1, 1926, in a deal for the subdivision and sale thereof, for the gross principal selling price of $1,182,800, said deal being satisfactory to defendant; that Oliver & Carver thereafter made sales of lots in said subdivision, aggregating the principal sum of $420,300; that the agreed and reasonable commission and compensation to be paid by defendant to plaintiff was 5 per cent. of said $420,300, or $21,015, with interest at 7 per cent. figured on 5 per cent. of the amount of each respective sale as of the date thereof, said interest then amounting to $3,309.25. Judgment was thereafter entered for plaintiff in accordance with these findings, and defendant appealed.

The above-mentioned written authorization executed by appellant to respondent reads:

"Venice, California, August 19, 1925.

"Mr. Paul A. Needham, Los Angeles, California.

"Dear Sir: The properties owned by the Abbot Kinney Company are not on the market, and are not for sale. However, in consideration of the overtures you have made and the representation that you believe Mr.

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*For subsequent opinion see 17 P.2d 109.

Adolp Ramish, Mr. Leo Harvey and Mr. Joshua Marks may be interested in considering the purchase of some of our holdings, we would be willing to allow them to enter into negotiations looking toward a deal.

"In any deal satisfactory to us we would expect to pay the usual Realty Board Commission.

"Yours very truly,
"Abbot Kinney Company.
"[Sgd] Thornton Kinney, President."

Respondent did not consummate any deal with Mr. Ramish and his associates, but instead introduced Oliver & Carver to appellant as prospective purchasers. After prolonged negotiations, during which the latter made various offers to purchase, ranging from about $485,000 to $600,000, it became apparent that satisfactory terms could not be agreed upon, and hence no sale resulted. However, on February 4, 1926, these parties did execute a contract, whereby Oliver & Carver agreed to take over the subdivision and selling agency for some of appellant's holdings. Respondent had followed the course of their negotiations, and, after the signing of said contract, he demanded his commission. Later, and on July 1, 1926, a new and satisfactory agency agreement, in place of that of February 4th, was made, pursuant to which Oliver & Carver actually took over the subdivision and made sales of lots therein aggregating approximately $420,300, 5 per cent. of which sum was awarded by the trial court to respondent as his reasonable compensation as aforesaid.

The agreement of July 1st was withheld from record, and its contents concealed from respondent until time of trial, which necessitated the filing by him of a second amendment to his original complaint, containing allegations conforming to proof, and stating a cause of action for a reasonable compensation based upon said satisfactory consummation of the negotiations between the parties. The court found all these allegations, not inconsistent with its other findings, to be true, and permitted recovery thereunder.

[1] It is appellant's contention that the above-quoted letter authorized respondent to negotiate a deal only with the proposed purchasers therein named; that it did not employ him to render other services or to find or deal with other agents or subdividers, and that it was insufficient under the statute of frauds. We concur in the view adopted by the trial court that by the last paragraph of said writing, to wit, "In any deal satisfactory to us we would expect to pay the usual realty board commission," authority was intended to be and was conferred upon respondent to negotiate with other parties for any deal satisfactory to appellant with respect to any or all of its properties and to receive a usual or reasonable compensation for his services; also that the writing satisfied the said statute (section 1624, subds. 5 and 6, Civ. Code, as it read prior to the 1931 amendment [St. 1931, p. 2260]), which required agreements, or some note or memorandum thereof, for the "leasing," "sale," or "authorizing or employing an agent or broker to purchase or sell" real property, to be in writing and subscribed by the party to be charged or his agent.

[2, 3] Appellant claims that the authorization was insufficient under the statute because it failed to describe precisely the properties involved. However, it did specifically cover "the properties owned by the Abbot Kinney Company," and this language, together with the remainder of the letter, was sufficient to confer upon respondent a general power to negotiate a deal with respect to any or all of the holdings of said company. The rule in this respect is well stated in Pray v. Anthony, 96 Cal. App. 772, 274 P. 1024, 1026, as follows: "* * * The essential part of a contract to employ a real estate broker, so far as the statute of frauds is concerned, is the matter of the employment and consequently need not describe the land specifically, if the terms of the employment can be made definite without it. * * * The well-established rule is, therefore, that broker's contracts are not to be declared void merely because of a defect, uncertainty or ambiguity in the description of the property to be sold, when such defect can be cured by allegations and proof of extrinsic facts or circumstances. * * *" See, also, many cases cited in support of this holding.

A brief review of some of the evidence favorable to respondent follows: Respondent testified that Mr. Carleton, appellant's auditor and business manager, approached him in August, 1925, with respect to developing or disposing of appellant's properties; that thereafter he spent much time studying its holdings, and prepared a detailed written report thereof for Mr. Kinney, appellant's president; that he first submitted the properties to Ramish and associates; that later, to satisfy them upon the question of what financial returns could be gotten from certain lots as a subdivision, he asked Oliver & Carver to report thereon; that the latter firm became so enthusiastic about the subdivision that they wanted it for themselves, and he therefore introduced them both to Mr. Kinney and Mr. Carleton for the purpose of opening negotiations looking toward their purchase of the property instead of negotiating further with the Ramish people. Prior to this time, however, he stated he had asked Mr. Kinney for a letter of authorization, including an expression that he would receive the realty board commission in any deal that was satisfactory to appellant, whereupon Mr. Kinney had dictated said letter of August 19th. He testified that he had suggested that the understanding would be much clearer if the last clause were worded to say that, "in this or any other deal with these or any other parties," appellant would expect to pay said usual commission, but Mr. Kinney had answered that that was rather involved, and he felt the simpler expression would be more easily understood, and that respondent could be sure that, if he made any deal, they would want to pay him his commission. Respondent further testified that during all of September he negotiated with Oliver & Carver; that later they raised their offer to $600,000, which was the price set by appellant, but, the terms being unsatisfactory, the result of all the negotiations was the agency contract finally executed by these parties. He stated that Mr. Kinney assured him that everything was going nicely and that some memorandum of his commission would be entered in the papers by his attorneys; that later one of the attorneys asked him to call, stating that they were ready to sign up; that Mr. Kinney felt morally obligated to pay him a commission and had authorized them to offer $500, which offer, of course, was not acceptable.

Mr. Kinney testified that prior to August 19, 1925, he discussed with respondent the sale of all appellant's properties; that they later talked of a sale of the particular property here involved, and on August 19th he gave respondent the above letter; that shortly thereafter respondent reported that he could not make a deal with the Ramish people, and would like to try some one else, mentioning Oliver & Carver, and asking for a more specific letter than that of August 19th to protect him in the matter of his compensation. Mr. Kinney further testified that he then "kind of stalled it along * * * told him he would not need any letter if he made a sale to them, we would protect him and give him a commission. * * *" He stated that, after appellant entered into the contract with Oliver & Carver, he again discussed with respondent the matter of his commission and of having another letter.

Mr. Carleton gave testimony of a like tenor. He stated: "I remember after I came back he (respondent) spoke of his commission on a basis of $600,000 in case a sale was consummated and he asked me what it would be, and I said it would be 5% of the sale price." He further testified that Mr. Kinney was present at that conversation; that "I remember Mr. Kinney figuring that after paying $30,000 we would have a $570,000 note." Quoting further from the record:

"Q. Now going back to the time of the letter of August 19, the writing of that, Mr. Carleton, was anything said there limiting Mr. Needham in any way to the particular associates that were named in there, Ramish and Marks and Harvey? * * * A. No, I remember Mr. Needham saying that he had some other people * * * in the event that Mr. Marks and Mr. Ramish did not go through with the deal.

"Q. Did Mr. Needham make that remark that he had some other people besides these associates before or after the letter was written? * * * A. Why it was during the time, it must have been before the letter, because he said he was negotiating with these people and had been prior to this letter, and he also mentioned that he had other people in mind.

"Q. Besides Ramish and his associates? A. Yes, besides Ramish and his associates. * * *"

Mr. Carver, of Oliver & Carver, testified that respondent first approached him relative to the subdivision, and he offered $485,000, making a deposit thereon by a $500 check, but that it seemed after some time that a direct purchase could not be made, and they let appellant know they would be interested in obtaining the sales agency for the property; that the subject of respondent's commission was discussed in his presence several times, appellant figuring that a sale on a basis of $600,000 for the property would net them $570,000; that Mr. Kinney wanted to know if any commission would be due respondent if the property should not be sold and Oliver & Carver were merely a sales agency; that they said there was no realty board ruling—they did not know, but felt that perhaps some commission would be due, whereupon Mr. Kinney said he felt also that some compensation was due respondent for the work he had done. Testimony was later adduced to the effect that the realty board recognized the right of a procuring agent to compensation where the owner had been benefited by his own choice of a change from the original deal as presented by the agent and that the percentage upon which respondent's compensation was finally figured was fair and reasonable.

[4] From the above and other evidence it is clear that appellant did not intend, by said letter, to limit respondent's authorization. Furthermore, although no mention has been made of the point, and we are not here determining it, the evidence to our mind would have opened the door for respondent to present the contention that appellant was estopped to assert the statute of frauds by reason of its assurances to him that the writing was sufficient and that his compensation would be provided for. It has long been the rule that a person will be held estopped to assert the statute of frauds, where such assertion would amount to practicing a fraud. See a discussion of this subject in Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am. St. Rep. 154; Zellner v. Wassman, 184 Cal. 80, 85, 193 P. 84; and Keller v. Gerber, 49 Cal. App. 515, 522, 193 P. 809.

[5, 6] We may also add that it is clear from the above and other evidence on the subject not here reviewed that the sum awarded

respondent, based on actual sales made under said Oliver & Carver contract, was both fair and reasonable, and that the land sold through Oliver & Carver was within the subject-matter of the authorization granted to respondent, which contemplated any satisfactory deal with respect to any or all of appellant's properties, as aforesaid. That the deal made was entirely satisfactory to appellant Mr. Kinney himself admitted, saying: "The contract that we signed, sure, was satisfactory to us; otherwise we would not have signed it."

No other questions merit discussion. We are thoroughly in accord with the action of the court below in this cause, and find in the record no prejudicial error.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.

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215 Cal. 219

McAFEE v. LOS ANGELES GAS & ELECTRIC CORPORATION et al.

L. A. 11482.

Supreme Court of California.

March 16, 1932.

1. Malicious prosecution 🔑16.

Public policy requires that prosecutors should be exempt from civil liabilities except where elements of malice and want of probable cause concur.

2. Malicious prosecution 🔑64(2).

Probable cause must be affirmatively proved by plaintiff in action for malicious prosecution.

3. Malicious prosecution 🔑71(2).

In action for malicious prosecution, where circumstances are admitted or clearly proved by uncontradicted testimony, it is court's province to determine question of probable cause.

4. Malicious prosecution 🔑20.

"Probable cause" in action for malicious prosecution is a suspicion founded upon circumstances sufficiently strong to warrant reasonable man in believing that charge is true.

[Ed. Note.—For other definitions of "Probable Cause," see Words and Phrases.]

5. Malicious prosecution 🔑71(2).

In action for malicious prosecution, uncontradicted evidence as to probable cause for prosecution for illegal connection with gas pipe *held* question for court.

6. Malicious prosecution 🔑64(2).

In action for malicious prosecution, evidence *held* to show that defendants had probable cause to believe that plaintiff had connected gas service pipe and house line with rubber hose contrary to statute.

> Plaintiff had applied more than once to gas company to make connection, and was inconvenienced and irritated by the delay. He was only male member in household. Garden hose connection was made with expertness. Gas was used through this connection for two months without further communication with company or receipt of gas bill.

7. Malicious prosecution 🔑71(2).

Conflict of testimony on immaterial points in action for malicious prosecution *held* insufficient to create material conflict so as to take question of probable cause to jury.

> Evidence showed conflicting statements by prosecutor as to whether he knew that plaintiff had applied to gas company for connection when prosecutor swore to complaint charging plaintiff with making connection with intent to defraud, under Pen Code, § 498. There was also conflict in testimony of the prosecutor as to whether he had informed deputy city prosecutor that there was a gas meter under plaintiff's house. Conflict on such matters related to immaterial points.

8. Malicious prosecution 🔑64(2).

False allegation of immaterial fact in criminal complaint *held* not to show malice and want of probable cause in action for malicious prosecution.

> Plaintiff was charged with violation of Pen. Code, § 498, in language of statute. It was alleged that he had connected gas service pipe and house line by means of garden hose, "so that the gas did not pass through the meter provided and installed by" the gas company. No meter had been installed by the company, but the presence of a meter on the premises was not essential to offense denounced by Pen. Code, § 498; it being sufficient if gas is taken by any means so that amount used is not measured and registered.

9. Malicious prosecution 🔑64(2).

Prosecutor's statement as to why plaintiff was being taken to police station *held* not to show malice, where prosecutor had never seen plaintiff before and was impersonally discharging duty to employer.

10. Malicious prosecution 🔑16.

Prosecutors are not liable for indignities suffered in jail by plaintiff where they acted without malice and with probable cause.

In Bank.

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Action by John G. McAfee against the Los Angeles Gas & Electric Corporation and another. Judgment of nonsuit, and plaintiff appeals.

Affirmed.

Superseding opinion of District Court of Appeals, 4 P.(2d) 621.

Porter C. Blackburn, Marion P. Betty, and George A. Prichard, all of Los Angeles, for appellant.

Paul Overton, S. W. Guthrie, and Neil G. Locke, all of Los Angeles, for respondents.

SHENK, J.

This is an appeal from a judgment of nonsuit in an action for damages for malicious prosecution.

The plaintiff was engaged in the real estate business and also conducted an automobile parking station near Tenth and Hill streets in the city of Los Angeles. In 1926 he sold the lot on which he was residing with his wife and daughter with the privilege of moving the house to another location. The house was moved to 1634 Sixty-Second street. During the moving and thereafter the plaintiff with his family continued to live in the house. After the house was moved and on June 1, 1926, he made a written application to the defendant to connect the gas service pipes with the gas range and water heater in the house. After waiting a few days he called the office of the defendant company to inquire why the gas pipes had not been connected up, and was informed that the defendant had not been notified by the city plumbing inspector that the service pipes were free from leaks, which was a condition precedent, under a city ordinance, to the right of the defendant to install a meter and connect up the service. Several days intervened before the plaintiff again called the gas company with a like inquiry, and was informed that the connection could not be made until the approval of the city inspector had been received. It was the custom of the city inspector to submit daily sheets to the gas company approving gas connections at various locations. On June 11, 1926, the city plumbing inspector tested the gas pipes at the plaintiff's location and found the same in satisfactory condition, but for some reason not disclosed by the record the approval of the plaintiff's connection was not included in the city's reports. On July 3d the plaintiff left with his family for Catalina Island and returned to his home on July 15, 1926, at which time he tested the gas stove and water heater and found the same supplied with gas. He did not again communicate with the defendant company, and received no gas bills for the months of July and August. He had been a customer of the gas company for many years.

On September 15th the defendant Ellenson, an employee of the defendant company, whose business it was to investigate the use of gas in violation of law, received information of the condition of the gas connection at the plaintiff's home. Upon inspection thereof he found a piece of three-quarter inch garden hose connected at one end with the service pipe and at the other end with the house line. Both ends of the garden hose had a one-half inch nipple with bushings. Pieces of galvanized wire were tied around the nipples to keep the gas from leaking out of the hose. The defendant Ellenson testified that he then proceeded to the defendant company's office and found that the plaintiff had filed the application for the gas connection on June 1, 1926, and that no approval had been received from the city to make the connection. He then proceeded to the office of the city prosecutor, and, after laying the facts before a deputy in that office, signed a complaint prepared by the deputy charging the plaintiff with a violation of section 498 of the Penal Code, a misdemeanor. A warrant was issued on the filing of the complaint, and Ellenson proceeded with two police officers to the location of the plaintiff's auto park business. Ellenson had never seen the plaintiff before, but had theretofore ascertained his whereabouts from Mrs. McAfee when he was at the plaintiff's home that morning. The warrant of arrest was served by a police officer on the plaintiff at his place of business and he was taken to the police station. The bail had been fixed at $500. When the plaintiff was "booked," it was too late for the plaintiff to obtain the money from the bank, and he was detained at the jail over night. The next morning the plaintiff procured a reduction of the bail to $100, which was provided, and he was released about 1 o'clock in the afternoon of the 16th.

A plea of not guilty was entered, and a jury was demanded. Upon a trial of the misdemeanor action the jury returned a verdict of not guilty on September 30, 1926, and the present action was commenced on September 14, 1927.

There was no substantial dispute as to the foregoing facts. The trial court concluded that there was not a sufficient showing of want of probable cause and granted the motion for a nonsuit at the close of the plaintiff's case in chief.

[1-4] The following propositions are well established in the law of malicious prosecution: "Public policy and public security alike require that prosecutors should be protected by the law from civil liabilities; except in those cases where the two elements of malice in the prosecutor, and want of probable cause for the prosecution, both concur.

Though malice be proved, yet if there was probable cause, the action must fail. Malice may be inferred from want of probable cause, but want of probable cause cannot be inferred from malice, but must be affirmatively shown by the plaintiff. * * * Where the circumstances are admitted, or clearly proved by uncontradicted testimony, it is the province of the court to determine the question of probable cause and the Court may order a nonsuit." Potter v. Seale, 8 Cal. 217, 220. See, also, Redgate v. Southern Pacific Co., 24 Cal. App. 573, 141 P. 1191 and cases therein cited. Probable cause has reference to the common standard of human judgment and conduct. Griswold v. Griswold, 143 Cal. 617, 620, 77 P. 672. It is defined as "a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true." Potter v. Seale, supra; Burke v. Watts, 188 Cal. 118, 204 P. 578; 16 Cal. Jur., p. 738.

[5, 6] Tested by the foregoing rules, the facts above outlined presented a question of law for the court as to whether probable cause for the prosecution existed. It was undisputed that the plaintiff made application for the gas connection on June 1st. The delay in the installation caused him inconvenience and irritation which he frankly admitted. He was the only male member, and was in charge and control of the household and premises. The garden hose connection was installed under the house with expertness. He used the gas by this means for two months after this connection was installed without receiving a gas bill or further communicating with the company. These basic and undisputed facts would give rise to the reasonable suspicion that the plaintiff made the garden hose connection or caused the same to be made.

[7] The plaintiff, however, seeks to establish a conflict in the evidence which, it is claimed, should have been resolved only by the jury. This contention is predicated on the following condition of the record: On the trial of the present action the defendant Ellenson testified that after he saw the condition of the gas connection he went to the office of his employer, the gas company, and made an investigation as to whether the plaintiff had applied for gas on the premises, and found that such application had been made. He was then confronted with the transcript of his testimony on the trial of the criminal action in which he stated that when he swore to the criminal complaint he did not know that the application for the gas connection had been made by the plaintiff. We cannot conclude that this state of the record created a material conflict. It is obvious that it is immaterial in a prosecution under section 498 of the Penal Code whether an application for a gas connection had or had not been made. It is also asserted that a conflict was presented as to whether Ellenson informed the deputy city prosecutor that there was a gas meter under the house. Ellenson first testified that he did so inform the deputy. Upon further questioning he stated that he did not remember whether he did or not. Assuming that a conflict in the evidence was thereby presented, it was likewise on an immaterial point.

[8] Finally it is contended that the charge laid in this complaint and verified by the defendant Ellenson contained a false statement of fact, and therefore that the prosecution was malicious and without probable cause. Section 498 of the Penal Code provides: "Every person who shall willfully, with the intent to injure, or defraud, make or cause to be made, or uses or causes to be used, any pipe, tube, or other instrument or conduit in connection with any main, service-pipe or other pipe or conduit owned or controlled by any other person for conducting or supplying illuminating or fuel gas, in such manner as to supply such or any illuminating or fuel gas to any burner, or outlet by or at which illuminating or fuel gas is consumed or otherwise used or wasted without passing through any meter provided for the measuring and registering the quantity of gas passing through such pipes, tubes or other conduits, or willfully acts in any other manner so as to evade, or cause the evasion of payment therefor * * * is guilty of a misdemeanor."

The misdemeanor complaint charged the offense in the language of the statute, and averred that the garden hose connection was made "so that the gas did not pass through the meter provided and installed by" the defendant company. It appears without dispute that no meter had been installed by the company. It is argued by the plaintiff that such an allegation was essential to state a cause of action under the Code section; that the defendant Ellenson knew that the meter had not been installed; that the commencement of the prosecution with such knowledge was malicious and without probable cause. We do not deem the presence of a meter on the premises essential to an offense under the statute, nor an allegation of its presence necessary to the statement of a cause of action thereunder. The essence of the offense is the use of gas by any contrivance and under the circumstances denounced by the statute in such manner as to supply such gas "without passing through any meter provided for the measuring and registering the quantity of gas" so used. It is not and may not be contended that the statute is invalid or that the complaint sworn to by the defendant Ellenson does not state a public offense thereunder. The allegation included therein and complained of may be treated as surplusage, and its presence in no wise prejudiced the rights of the plaintiff.

[9] Furthermore, the evidence in support of the allegation of malice is not sufficient to support the prosecution of the present action. The allegation is directed to the actions of the defendant Ellenson in showing the piece of connecting hose to the plaintiff after the latter's arrest and on the way to the police station in an automobile and stating to him, "That is what you are getting your ride for." Ellenson did not know and had never seen the plaintiff prior to the arrest, and appears to have been discharging his duty to his employer impersonally.

[10] The plaintiff naturally complains of the indignity of being placed under arrest and of his treatment at the police station, in being confined overnight with persons of disreputable character and in quarters and under conditions not to the liking of any one whether he be guilty or innocent, but the defendants were in no way responsible for such quarters or conditions, and the plaintiff may not hold them responsible for the inconvenience and discomfort suffered by him except upon the proof of the essential elements in an action of this nature.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; PRESTON, J.; CURTIS, J.

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215 Cal. 215

WARDEN et al. v. RATTERREE et al.

L. A. 11468.

Supreme Court of California.
March 15, 1932.

1. Municipal corporations 🔑575.

Deed of property, sold for nonpayment of delinquent assessment bond, *held* void because of city treasurer's failure to enter date of bond in sale book (Deering's Gen. Laws 1923, Act 8208, § 5, subd. f).

2. Municipal corporations 🔑526.

Law in effect on date of delinquent assessment bond fixes requirements of valid sale for nonpayment thereof (Deering's Gen. Laws 1923, Act 8208).

3. Taxation 🔑614.

No statutory requirement can be disregarded in proceeding to enforce tax, but form required must be strictly construed; maxim "de minimus" being inapplicable.

4. Taxation 🔑829.

Owner must reimburse purchaser at void tax sale of property only when afforded affirmative relief quieting title as against tax deed or removing cloud thereof.

5. Municipal corporations 🔑579.

Provision for reimbursement of purchaser at void sale for nonpayment of delinquent assessment bond *held* properly omitted from judgment for owner in purchaser's action to quiet title (Deering's Gen. Laws 1923, Act 8208).

6. Municipal corporations 🔑579.

Purchaser of property at void sale for nonpayment of delinquent assessment bond *held* not entitled to lien thereon for sums expended (Deering's Gen. Laws 1923, Act 8208).

7. Appeal and error 🔑524.

Photostatic copies of record of proceedings to sell property for nonpayment of delinquent assessment bond *held* part of record on appeal from judgment for owner in purchaser's action to quiet title, where introduced in evidence without specific objection under stipulation.

In Bank.

Appeal from Superior Court, Los Angeles County; Elias V. Rosenkranz, Judge.

Action by Julia P. Warden, on whose death C. D. Warden, as administrator of her estate, was substituted as plaintiff, against I. C. Ratterree, M. J. McShea, and others. From a judgment for defendant McShea, plaintiff appeals.

Affirmed.

J. Everett Brown, of Los Angeles, for appellant.

Marshall Stimson, Noel Edwards, and Frank G. Falloon, all of Los Angeles, for respondent.

WASTE, C. J.

This is an appeal by the plaintiff from a judgment entered in favor of the defendant McShea in an action to quiet title. The other defendants either filed disclaimers or the action was dismissed as to them. Plaintiff claims title through a deed of the treasurer of the city of Los Angeles, the deed having been given in pursuance of a sale of the property under the Street Improvement Bond Act of 1893, as amended (Deering's Gen. Laws 1923, Act 8208), for failure of the owner to pay a delinquent bond issued on an unpaid assessment. The defendant McShea, as owner of the property, contested plaintiff's title on the ground the sale proceedings were defective and the resulting deed consequently invalid. The trial court made a general finding that plaintiff's deed is void, and accordingly gave judgment for defendant for his costs.

In support of his contention respondent points out: (1) That the notice of sale called for a sale at "10 o'clock a. m." on May 27, 1925, whereas the certificate of sale and the deed thereafter issued state that the property was sold to the plaintiff on said date "between the hours of 10 a. m. and 3 p. m."; (2) that the date of the bond is not set forth in the treasurer's sale book as required by subdivision "f" of section 5 of the act; (3) that there is a variance between the deed, the treasurer's sale book, and the certificate of sale regarding the cost of the certificate, the former reciting that the plaintiff bid in the property for $69.70, "including fifty cents for certificate of sale," whereas the latter two indicate that the property was purchased by the plaintiff for $69.70, including $1 for the certificate of sale; (4) that the certificate of sale improperly states that the property was assessed to an "unknown owner," whereas the evidence shows that the treasurer had knowledge of defendant's ownership of the property and of his address; and (5) that the notice to redeem erroneously recites the amount due as of the date of the notice and not as of the time of the posting thereof, as required by subdivision "j" of section 5 of the act.

[1-3] Under the heading, "the decision * * * is not justified by the evidence," the plaintiff confines his defense of the sale proceedings, under which he claims title, to the fourth ground of attack set out above, and urges that the statement in the certificate to the effect that the property was assessed to an "unknown owner" is not fatal to the validity of such sale. Assuming this to be so, a point we need not decide, the deed under which plaintiff claims title would still be void because of the failure of the city treasurer to strictly comply with the provisions of the act in other particulars mentioned. Subdivision "f" of section 5 of the act provides that before delivering a certificate of sale the treasurer shall enter in a book kept for that purpose, which shall be open to public inspection, "the date, number, and series of the bond, a description of the land sold corresponding with the description of the certificate, the date of sale, purchaser's name, the amount paid. * * *" The date of the bond was not entered in the treasurer's "sale book," as required. The entry of the date of the bond is essential, for it informs all persons interested in the property as to the law which governs the sale. It is the law in effect as of the date of the bond which fixes the requirements for a valid sale. Chapman v. Jocelyn, 182 Cal. 294, 187 P. 962; Jeffreys v. Point Richmond Canal Co., 202 Cal. 290, 293, 260 P. 548. "The maxim, 'De minimus,' has no application in proceedings to transfer title by virtue of statutory proceedings for the enforcement of a tax. * * * In such proceedings no requirement of the statute can be disregarded. * * * The form required becomes substance, and must be strictly pursued, or the deed will be held void." Simmons v. McCarthy, 118 Cal. 622, 625, 50 P. 761, 762; Lewis v. Tulare Rec. Dist., 56 Cal. App. 52, 56, 204 P. 421.

[4, 5] Contending that "the decision is against law" the appellant rather confusedly argues that, as a condition to entering judgment for the defendant owner, the trial court should have provided that plaintiff be reimbursed for all sums expended in buying in the property. The owner of property is required to reimburse a purchaser at a void tax sale only when such owner is afforded affirmative relief quieting his title as against the void tax deed or removing the cloud thereof. Holland v. Hotchkiss, 162 Cal. 373, 375, 123 P. 258, L. R. A. 1915C, 492; Knoke v. Knight, 206 Cal. 225, 228, 273 P. 786. In the present case the judgment merely declares plaintiff's claim of title to be invalid, and decrees that he take nothing by reason of the action, and that defendant recover his costs. Such was the form of the judgment in Knoke v. Knight, supra, in which this court held that the tax purchaser was not entitled to reimbursement for the expenses incurred in buying in the property. A provision for plaintiff's reimbursement had no place in the judgment here appealed from and was therefore properly omitted.

[6] The further contention that the court below erred when it failed to decree that plaintiff was entitled to a lien upon the property until reimbursed is answered by the reasoning in Warden v. Harker (Cal. Sup.) 948, 300 P. 965, wherein an identical contention, based on the 1913 Street Improvement Act (Deering's Gen. Laws 1923, Act 8205) was decided adversely to him.

[7] It is next urged that the trial court "did not rule on the offer of defendant to proposed exhibit 'G' * * * and proposed exhibit 'H' * * * and not being in evidence defendant cannot use same to the detriment of plaintiff." This contention is utterly devoid of merit. Upon the presentation of defendant's case, the plaintiff stipulated that he (defendant) might introduce in evidence photostatic copies of the records of the sale proceedings without identifying them and without producing the originals. Defendant's Exhibits G and H went in under this stipulation and without specific objection from the plaintiff. Inspection of the reporter's transcript discloses that these exhibits were properly offered and received in evidence, and they therefore constitute a part of the record on appeal.

What has already been said sufficiently disposes of plaintiff's final contention that he is entitled to a reversal and to findings and judgment in his favor.

The judgment is affirmed.

We concur: CURTIS, J.; PRESTON, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.

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121 Cal.App. 419

STEELE et al. v. BOARD OF TRUSTEES OF PITTSBURG PUBLIC SCHOOLS et al.

Civ. 8121.

District Court of Appeal, First District, Division 2, California.

March 5, 1932.

Rehearing Denied April 4, 1932. Hearing Denied by Supreme Court May 2, 1932.

1. Schools and school districts 🔑141(1).

Statute providing for notice of discharge to probationary teachers was enacted in interest of both teachers and school board (School Code, §§ 5.681, 5.682).

2. Schools and school districts 🔑141(5).

Where written notices from school board dispensing with services were received by probationary teachers before June 10, service was valid, although clerk had sent notices by unregistered mail (School Code, §§ 5.681, 5.682).

> Service was valid because the serving of a notice is purely a ministerial act; and, according to Civ. Code, § 2349, ministerial acts may be delegated.

3. Schools and school districts 🔑141(5).

That School Code is mandatory does not prevent clerk of school board from sending by unregistered mail notices of discharge to probationary teachers (School Code, §§ 5.681, 5.682).

Appeal from Superior Court, Contra Costa County; H. V. Alvarado, Judge.

Action by Audrey Steele and another against Board of Trustees of the Pittsburg Public Schools and others. From judgment for defendants, plaintiffs appeal.

Affirmed.

M. W. Creagh, Jr., of Pittsburg, for appellants.

James F. Hoey, Dist. Atty., of Martinez, for respondents.

STURTEVANT, J.

Heretofore the petitioners were employed as probationary teachers by the board of trustees of the Pittsburg school district. Prior to the 10th day of June, 1931, the clerk of the district deposited in the mails of the United States written communications directed to the petitioners advising the petitioners that their services would not be needed during the ensuing year. Said letters were actually received by the petitioners prior to the 10th day of June, 1931. Claiming the dismissal to be ineffectual, the petitioners applied for a writ of mandate directing their reinstatement. The defendants answered, and the application was presented to the trial court on an agreed statement of facts. The court made findings in favor of the defendants, and from the judgment entered on the findings the petitioners have appealed.

In 1929 the provisions regarding schools were taken out of the Political Code and made into the School Code. At that time section 1609, subdivision (i), became sections 5.680–5.682; but the wording was not changed. Both parties in their briefs set forth the history of the statute involved. We have duly considered those parts of both briefs. Moreover, we have made a more extended examination of the same subject. However, we find nothing in the history of the statute that throws any light on its proper construction.

[1, 2] The petitioners contend that the statute is mandatory and not directory. For all of the purposes of this decision that contention may be conceded. The plaintiffs also contend that a party relying on service by mail must show a strict compliance with the requirements of the statute. The same comment may be made. Continuing, the petitioners claim the statute was enacted to protect the teachers. There is nothing on its face to show that fact. The entire school system is provided in the interest of the school children and not otherwise. This particular statute was undoubtedly enacted in the interest of the orderly conduct of the business, and therefore, in the interest of both the teachers and their employers. The petitioners also contend that the service provided for in the statute is complete at the time a registered letter is deposited in the mail. School Code, § 5.682; McKeon v. Sambrano, 200 Cal. 739, 255 P. 178; Traders' Credit Corp. v. Superior Court (Cal. App.) 296 P. 99. That contention may also be accepted as settled law, but it would seem to be inapplicable as the petitioners also contend that it is an admitted fact that the notice was not sent by mail in a registered letter and therefore it was not legal. Blalock v. Ridgway, 92 Cal. App. 132, 267 P. 713. The defendants reply that that case is not in point because the facts show the notice there in question was not received until June 16th. Continuing they contend there was not in that case any personal service before June 10th and there was no constructive notice because the letter was not registered. But, in the instant case, they do not claim they made the service by registered mail, but that they did make, within the time specified in

the statute, personal service on the petitioners. They stress the fact that it is admitted the notice was in due form, that it was in writing, and that it was received in person. They then assert that they made personal service, and that personal service is a complete compliance with the terms of the statute which, among other things, provides: "5.681. On or before the tenth day of June in any year the governing board may give notice in writing to a probationary employee that his services will not be required for the ensuing year. 5.682. Such notice shall be deemed sufficient and complete when delivered in person to such employee by the clerk * * * of the governing board of the school district. * * *" They then assert that the clerk intrusted to the employees of the postal department the act of delivering the notices, and that he was not bound to make the delivery in person. In support of the foregoing contentions the defendants cite Heinlen v. Heilbron, 94 Cal. 636, 30 P. 8, 9. They quote as follows: "The 'delivery' which constitutes a personal service under section 1011 need not be made by the individual who is attempting to make the service, but can be effected through a clerk or messenger, or through any agency by which a 'delivery' can be made; and when the notice is so delivered, the service becomes a personal service. The fact that the person upon whom the service is to be made resides or has his office in a different place from that of the person making the service, does not require that the service be made by mail, or preclude a personal service, and the person seeking to make the service can avail himself of any agency,—such as Wells, Fargo & Co., or the instrumentality of the post office department, with as much effect as if he had employed any other messenger. The delivery of the notice through such agency renders the service personal, and the proof of such delivery establishes a personal service." In a sense the case is not determinative. The court was considering sections 1011 and 1012 of the Code of Civil Procedure. Neither section contains words designating who may serve notices; whereas School Code, § 5.682, does. Nevertheless, that case involved the jurisdiction of the court to hear an appeal in a case involving important property rights. See Heinlen v. Heilbron, 97 Cal. 101, 31 P. 838. In Heinlen v. Heilbron, 94 Cal., at page 641, 30 P. 8, 9, the court said: "Jurisdiction, however, as has been frequently held, does not depend upon the proof of service, but upon the fact that service has been made." See, also, Morrissey v. Gray, 160 Cal. 390, 117 P. 438. If such be the rule as to such important matters as the service of process, certainly a more stringent rule will not be applied to the service of notices which serve merely to make of record a fact that has already taken place.

The clerk of a board of trustees of a school district is an officer. See School Code, §§ 2.20 to 2.94. Spreckels v. Graham, 194 Cal. 516, 529, 228 P. 1040. The act of serving a notice is purely ministerial. Couthway v. Berghaus, 25 Ala. 393; Eldridge v. Holway, 18 Ill. 446; 46 C. J. 927. Whether the clerk is an officer or merely an agent, he has the right to delegate the performance of that ministerial act. 46 C. J. 1033; Civ. Code, § 2349. It follows that the service of the notice met every call of the statute.

[3] The petitioners contend that, as the statute named the clerk as the person to serve the notice and as the statute is mandatory, no one else could legally perform the act. That contention is too narrow even under rules of strict construction. By virtue of article 1, § 22, of the Constitution of California, all the provisions of that instrument are mandatory. But no one would contend that the governor must in person take his messages to the Legislature (article 5, § 10), or in person take a vetoed bill to the house in which it originated article 4, § 16. Nor would it be claimed that an owner must in person file a notice of completion or a mechanic must in person file for record his claim of lien (Code Civ. Proc. § 1187); nor that the plaintiff must in person file his notice of pendency of action (Code Civ. Proc. § 409). But all of these statutes are to be strictly followed. A more stringent rule was hardly intended to apply to school trustees, the great majority of whom are horny-handed sons of toil.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

121 Cal.App. 294

MENEFEE et al. v. ROBERT A. KLEIN & CO. et al.

Civ. 719.

District Court of Appeal, Fourth District, California.

Feb. 26, 1932.

1. Guaranty ⚷77(2).

Paper stating that sellers guaranteed purchasers of trust deed note against any loss in purchase *held* "guaranty of collection," precluding recovery thereon until efforts to collect have been made, security exhausted, and extent of loss ascertained (Civ. Code, §§ 2800, 2806, 2807).

[Ed. Note.—For other definitions of "Guaranty of Collection," see Words and Phrases.]

2. Appeal and error ⚷1149.

Appellate court need not reverse correct judgment where evidence could not differ on another trial, but may amend findings and conclusion erroneous in some particulars (Code Civ. Proc. § 956a).

Appeal from Superior Court, Los Angeles County; William Frederickson, Judge.

Action by Richard P. Menefee and another against Robert A. Klein & Co. and another. From an adverse judgment, plaintiffs appeal.

Affirmed.

Vetran Ricca and Gerard Cuoco, both of Los Angeles, for appellants.

Hayes & Engelhardt, of Los Angeles, for respondents.

LAMBERT, Justice pro tem.

On June 1, 1925, Arley F. Darnielle and Edna Darnielle executed a promissory note and trust deed on real property securing the same in favor of Robert A. Klein & Co. The note was in the sum of $2,650, payable in installments of $35 per month with interest at 8 per cent. per annum. The note and trust deed were on July 7, 1925, sold to appellants by Robert A. Klein & Co. for $1,842.87. The note and trust deed were transferred to appellants with the indorsement "Without recourse." At the same time the respondent Robert A. Klein & Co. executed and delivered to plaintiffs the following document:

"Guarantee.

"We, Robert A. Klein & Co. have sold this day to Richard P. and Anna P. Menefee, a Trust Deed Note secured by property, as of legal description on Trust Deed, executed by Arley F. and Edna Darnielle, in the amount of $2,632.67, at Thirty per Cent Discount or $789.80, and hereby guarantee the said purchasers against any loss, or any expense, in the purchase of same.

"[Signed] Robert A. Klein & Co.
"Robert A. Klein, Pres."

[1] After making six monthly payments on the note the Darnielles defaulted in the payments, and appellants brought this action on the above guaranty. The case was tried by the court and judgment rendered in favor of defendants. Appellants prosecute this appeal, contending that the guaranty sued on is an unconditional guaranty. This contention cannot be upheld. "A guaranty is to be deemed unconditional unless its terms import some condition precedent to the liability of the guarantor." Civ. Code, § 2806. "A guarantor of payment or performance is liable to the guarantee immediately upon the default of the principal, and without demand or notice." Civ. Code, § 2807. "A guaranty to the effect that an obligation is good, or is collectable, imports that the debtor is solvent, and that the demand is collectable by the usual legal proceedings if taken with reasonable diligence." Civ. Code, § 2800. Whether or not the condition contended for attached to the guaranty is to be determined by the language of the contract. Adams v. Wallace, 119 Cal. 67, 51 P. 14. There is a well-defined distinction between an unconditional guaranty and a guaranty for collection. This is aptly stated in Pierce v. Merrill, 128 Cal. 464, at page 471, 61 P. 64, 66, 79 Am. St. Rep. 56, by a quotation from Burton v. Dewey, 4 Kan. App. 589, 46 P. 325, as follows: "'There is a well-understood difference between a guaranty of payment and a contract of indemnity against loss as the result of the nonpayment of a debt. In the first case the liability of the guarantor is fixed by the failure of the principal debtor to pay at maturity, or at the time when payment was guaranteed. In the second, the contract partakes of the nature of a guaranty of collection, no liability being incurred until after, by the use of due and reasonable diligence, the guarantee has become unable to collect the debt from the principal debtor.'"

The guaranty in the instant case is clearly one to indemnify appellants against loss or damage by reason of the purchase of the note and trust deed, that is, a guaranty of collection. Until an effort was made to collect the note from the makers thereof and the security exhausted by a sale of the property under the trust deed, and the loss, if any, ascertained, no recovery could be had on this guaranty. In the case of Ohio Electric Car Co. v. Le Sage, 182 Cal. 450, 188 P. 982, 983, which was an action on a guaranty, the guaranty read as follows: "Whereas, we are interested in the Washington Street Electric Garage Company and at our request the Ohio Electric Car Company has consented to deliver certain automobiles to the said Washington Street Electric Garage Company, without payment therefor in cash, and that the said Ohio Electric Car Company has further, at our request, entered into the foregoing contract with the Washington Street Electric Garage Company, we hereby guarantee to hold the Ohio Electric Car Company whole and harmless from any and all loss or damage by reason of any transaction or transactions between it and the Washington Street Electric Garage Company."

The complaint alleged that the plaintiff had sold certain automobiles to the garage company, for which no payment had been received. The court held that the guaranty was one of collection and was governed by section 2800, Civil Code, and at page 453 of 182 Cal., 188 P. 982, 983, it is said: "There is no allegation that the plaintiff has suffered any loss or damage by reason of any transaction with the garage company, or that the plaintiff has taken any legal proceedings to collect from said company indemnities alleged to be due it, or that said company is insolvent, or that for any other reason legal proceedings against them would be unavailing. No facts are alleged to indicate that the debts of the garage company could not have been enforced by ordinary legal proceedings. The appellant contends that the complaint is insufficient against him because of the want of such allegations, and we think this contention must be sustained."

[2] It appears, however, that, while the judgment in this case is correct, the findings and conclusions of law are in some particulars erroneous. This does not necessitate a reversal of the judgment. The evidence could be no different on another trial, and, the judgment being manifestly right, we are disposed to strike finding No. 7 from the findings of the trial court and to add to the conclusions of law in one particular. Section 956a, Code Civ. Proc.; Kirk v. Culley, 202 Cal. 501, at page 507, 261 P. 994; Kennedy v. Nat. Surety Co. (Cal. App.) 295 P. 359. The court found in finding number 7: "The Court finds that said guarantee contained in Paragraph III of Plaintiffs' complaint was executed for the sole purpose of insuring and guaranteeing the Plaintiffs that the Plaintiffs would not be required to pay any sum greater than $1842.87 in purchasing the note referred to in Paragraph II of Plaintiffs' complaint, and that it was intended by the terms and conditions of said guarantee that the Defendant Robert A. Klein & Co., should indemnify and hold the plaintiffs free and harmless from any loss sustained by Plaintiffs, by reason of the Plaintiffs being required to pay more than the said sum of $1842.87 for said note and trust deed."

This finding is not a finding of fact, but a conclusion of law, and is not justified by the other findings or any evidence in the case. It is by this court stricken from the trial court's findings, and this court also makes and inserts in the conclusions of law the following: "The court decides that said guaranty contained in paragraph III of plaintiffs' complaint was executed for the purpose of guaranteeing the plaintiffs against any loss or damage by reason of the purchase of the aforesaid note and trust deed; and that it was intended by the terms and conditions of said guaranty that the defendant Robert A. Klein & Company should indemnify and hold plaintiffs free and harmless from any loss that should be sustained by plaintiffs by reason of the purchase of said note and trust deed; that this action is prematurely brought as no loss or damage by reason of said purchase was alleged or proved."

With the findings and conclusions amended as aforesaid, the judgment appealed from is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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121 Cal.App. 240

ARPER v. INDUSTRIAL ACC. COMMISSION et al.

Civ. 606.

District Court of Appeal, Fourth District, California.

Feb. 24, 1932.

1. Master and servant ⚷362.

Employment in repairing well calculated to last three or four days and cost not over $49 *held* "casual" within Compensation Act (St. 1917, p. 835, § 8 (c).

> The Workmen's Compensation Act (St. 1917, p. 835, § 8 (c), defines "casual" employment as that not contemplated to last over ten days or cost over $100.
>
> [Ed. Note.—For other definitions of "Casual," see Words and Phrases.]

2. Master and servant ⚷361.

Work of repairing well on homestead *held* not "in course of trade, business, profession, or occupation" of owner engaged in insurance business (St. 1917, p. 835, § 8 (c).

> The evidence disclosed that petitioner seeking to annul award of Industrial Accident Commission owned a homestead of 320 acres near city where he conducted his insurance business; that he maintained

his home at such homestead and had a few fruit trees there for his own use; that, although he had previously raised and sold pigeons, he discontinued that business several months before the accident giving rise to this proceeding; so that under these facts the work of repairing a well on homestead was not "in course of trade, business, profession, or occupation" of petitioner within Workmen's Compensation Act (St. 1917, p. 835, § 8 (c), defining that phrase as all services tending toward preservation, maintenance, or operation of business, business premises, or business property of employer.

[Ed. Note.—For other definitions of "Course of Business," see Words and Phrases.]

Certiorari to Industrial Accident Commission.

Proceedings under Workmen's Compensation Act by Thomas Gum, claimant, opposed by G. W. Arper, employer. On petition of employer to annul an award of the Industrial Accident Commission in favor of claimant.

Award annulled.

N. B. Bachtell, of Lancaster, and Sidney N. Bachtell and B. Dean Clanton, both of Los Angeles, for petitioner.

Arthur I. Townsend, of San Francisco, for respondents.

BARNARD, P. J.

The petitioner seeks to annul an award of the Industrial Accident Commission in favor of the respondent Thomas Gum. On September 8, 1930, Gum was employed by the petitioner and was assisting in the repair of a pump upon premises owned by the petitioner, and on that day he sustained an injury to his left hand and forearm causing an amputation thereof about six inches below the elbow joint. After a hearing and a rehearing, the Industrial Accident Commission awarded Gum $3,484.03 as normal compensation, and finding that the petitioner was willfully uninsured at the time, increased the award by 10 per cent., making a total award of $3,832.43. The only defense presented by the petitioner was and is that the employment in question was excepted and excluded from the compensation provisions of the Workmen's Compensation Insurance and Safety Act, in that it was both casual and not in the course of the trade, business, profession, or occupation of the employer. The commission found that the employment in question was not casual and that it was in the course of the trade, business, profession, or occupation of the employer. The only questions presented are whether these findings are supported by the evidence.

We will first consider the evidence as to whether this employment was "casual," within the meaning of that term as defined in section 8 (c) of the act (St. 1917, p. 835). The petitioner testified that the well on his premises was 288 feet deep and that he had a pump which was operated by sucker rods which were connected with a cable; that on the occasion in question he hired Gum to reconnect these sucker rods by repairing a broken cable; that he told Gum that "something had happened to the sucker rods again and we would have to pull the pump and make a repair and asked if he could come out and assist in the work"; that he then contemplated that the work would take four or five days; and that he had been doing the same sort of work for years; and that this was the usual length of time required. He told of three particular occasions upon which the same repair had previously been made, the last one being about a year before the one here in question, at which time the applicant Gum had also assisted in the work. At that time the work had taken three and a half or four days and had cost a total of $49. On the last two occasions the work had been done by the petitioner himself, the applicant Gum, and one other man. Gum was paid fifty cents an hour and his dinner. The petitioner further testified that the previous breaks had been exactly similar to the one that was being repaired on this occasion, and that such a repair "never had cost over $49 in all the years I have been doing the thing." He testified that on this occasion they had raised the pump and taken out four or five joints of pipe in order to get at the break; that they had repaired the break, put the joints of pipe back, and were lowering the pipe back into the well; that they had lowered it to within six feet of the bottom when the applicant allowed it to fall, causing the injuries complained of; that it would not have taken more than a half hour additional to have completed the work, had the accident not happened when it did; and that they had worked three and one-half days when the accident occurred. He also testified that later on, with two other men, he spent several days trying to repair the damages caused by allowing the pump to fall but found the pump so badly broken that he was unable, financially, to complete the repairs. This testimony is largely confirmed by the evidence of Gum. When asked what he did on this particular occasion, he stated that he was going to repair the cable. He then testified that they took the pipe up; that "we got the cable out and rebabbitted and cut the cable off inside of the connection, that connection they have on that wire cable sucker; and we started to put it back down"; and that they were lowering the pipe when the accident happened. The applicant made the following answers to questions asked him by his attorney:

"Q. At the time you were injured, Mr. Gum, how nearly completed was the work which you started out to do on the job? A. One or two links more to put on.

"Q. One or two what? A. Lengths of pipe."

Shortly thereafter he was asked by the referee: "How long would it have taken you to have put on these two lengths of pipe that remained to be put on the pipe at the time of your injury?" To this he replied: "Well, probably —— maybe three hours." At another time, when asked how many more days it would have taken to have completed the work, he replied: "Oh, I couldn't say that; probably, from what I learned, it took ten or twelve days." The ten or twelve days here referred to was work that was subsequently done, which will hereafter be referred to in connection with the testimony of one Mullen. At another time Gum testified that the well was not dug straight, that it had many things the matter with it, and that it would have taken from three to six months to have completely fixed it. He testified that he told the petitioner of these various things and that it was a waste of time to try and fix it temporarily; that the petitioner then told him that he was unable, financially, to do all of these things and that he wanted to fix it temporarily. He testified as follows:

"Q. Then he didn't hire you to do it all? A. No, just temporarily to get through with it, see, but the work of fixing it would take about three months. He didn't hire me permanently there, but just to fix it as quick as I could so he could irrigate."

While he testified in response to the above question from his attorney that the work he started out to do was all completed except putting on one or two lengths of pipe, and while he told the referee that it would take probably three hours to put on the remaining pipe, Gum went on to testify that it would be necessary to put in bulkheads and line up the pipe, which would take two days; to plug up a leakage in the pipe, which would take up two days; and that it would take two more days to loosen the well derrick. When asked if he was told by the petitioner to fix these bulkheads and do this other work, he replied: "When I go to a job I go ahead and fix everything that is needed." He then admitted that the petitioner had not told him to do this work and that he had told him that he wanted the pump fixed temporarily. It may here be observed that while the applicant testified it would take some six days to fix the bulkheads, plug the leakage, and loosen the well derrick, he admitted that these same things had been done a year before when he last repaired this pump, and the uncontradicted evidence is that the entire cost of all the work done at that time was $49, and that it took no more than four days.

[1] We think it fully appears from this evidence, especially from the evidence of the applicant, that this work was casual within the meaning of the act. While the applicant endeavored to claim that additional work was originally contemplated, his admissions show the contrary, and his own evidence is so vague, unsatisfactory, and in places impossible, that it creates no substantial conflict on this point. In support of this finding, counsel for respondent relies particularly upon the following quotation from the report of the referee to the commission: "W. M. Mullen testified that he worked for defendant on said additional work beginning about two weeks after the injury. He helped remantle said pump for 11½ days with another man named William Felton, who also worked on the job. Both men received $4.50 a day for said rigging work which consisted of raising the pump, removing the sucker cable, repairing it and the pump generally. The witness, a man of 35 years' experience in well and pump work, did not know just what work was contemplated just prior to applicant's injury but when he and Felton completed the 11½ days' work for defendant they did not finish the needed repair of said pump even then because it became too expensive for defendant to have it finished."

From this, counsel for respondent argues as follows: "It appears therefore definitely as a matter of fact that injured had worked 3½ days at the time of the injury and that it required at least 11½ more days following the previous 3½ days to complete the job. Even then it does not appear to have been wholly completed. So much for the contention that the work contemplated did not exceed 10 days." The witness Mullen, referred to, testified that some time after the pump fell into the well causing the accident here involved, he worked on the job for eleven and one-half days doing "what is known as wrecking work." He also testified that the work he was doing was incident to the pump having fallen, and being further broken a few days before. When Mullen testified that he did not know whether the sucker rod was broken previous to the drop or not, the referee said: "I think Mr. Bachtell's objection is good as to all work made necessary by the drop of the pump, because it is clear that that work wasn't contemplated at the time the applicant was hired. And unless you can show that Mr. McNeil, I will sustain the objection and not hear any further testimony on this matter, with reference to the work done after the injury. The testimony should be confined to the work done on the work which was contemplated before the injury and before that drop of the pump. Now if you think you can show the materiality you mentioned a while ago, go ahead Mr. McNeil. Otherwise, I suggest passing to something more material."

When the applicant's attorney (McNeil) failed to bring out this information, the referee said: "It is for Mr. McNeil to state whether he can meet the objections stated a while ago, and my questions directed to the same point."

Thereupon, the attorney replied that he had nothing further, and the referee stated: "The whole record can stand for what it is worth as it is, since I have noted my ruling on it and counsel for applicant doesn't see fit to proceed." It is perfectly apparent that Mullen's testimony does not establish that any work was done after the accident which was contemplated at the time the applicant was hired, and that this was fully appreciated at the time by the referee. The facts do not justify the conclusion that has been drawn by respondents' counsel, and which may have been drawn by the commission, from the report of the referee, that Mullen's testimony established that the work contemplated required more than ten days. In our opinion, the evidence does not sustain the finding that the employment in question was not casual.

[2] Taking up the question whether this employment was in the course of the trade, business, profession, or occupation of the petitioner, the following facts appear: The petitioner was at the time of the accident and had been for sixteen years, in the insurance business at Mojave, Cal. He lived on a ranch four miles from Mojave, which was desert land and which he had homesteaded. He had farmed the place while he was proving up on it, but had not farmed it since 1916. About ten acres around the house was inclosed. It was improved with a house, a well, a garage, and some chicken houses. There were also twenty-five fruit trees used for fruit and shade around the house, which had been put out for experimental purposes. They consisted of apricot, fig, apple, peach, and several other kinds of fruit. He used the fruit himself and had never sold or contemplated selling any fruit. He had no chickens but had at the time of the accident about two hundred pigeons. He formerly had had about six hundred pigeons and had sold squabs, but in July, 1930, he had quit selling squabs and was selling the old pigeons as rapidly as he could. Beginning with July, 1930, he destroyed all eggs and prevented the hatching of any more squabs. He used the water from the well in question for domestic purposes and for the purpose of irrigating the trees around the house, giving some water to the pigeons. Section 8 (c) of the Workmen's Compensation Act includes the following: "The phrase 'course of the trade, business, profession or occupation of his employer' shall be taken to include all services tending toward the preservation, maintenance or operation of the business, business premises or business property of the employer. The words 'trade, business, profession or occupation of his employer' shall be taken to include any undertaking actually engaged in by him with some degree of regularity, the trade name, articles of incorporation or principal business of the employer to the contrary notwithstanding."

We think it appears from this evidence that the service of the applicant in repairing this pump was not one tending toward the preservation, maintenance, or operation of either the business, the business premises, or the business property of the petitioner. The few fruit trees were in no manner connected with any business, and the fact that the petitioner owned three hundred and twenty acres of desert land, which he was not farming, does not make the situation any different than would be the case where any man has a few fruit trees around his home. If the petitioner ever could be said to have been in the business of raising pigeons, he had abandoned that business two months before this accident occurred, and while he had a few grown pigeons left, we think it may not be said from the evidence that any service performed by the applicant was in furtherance of that business. Any water that the pigeons might have drank was trivial and incidental, and, in reason and common sense, we are unable to see how it can be held that the petitioner did anything other than hire the applicant for a service upon a purely domestic well. In our opinion, the plain spirit and intent of this act is such as to exclude from its operation such a situation as here appears.

For the reasons given, the award is annulled.

We concur: JENNINGS, J., LAMBERT, Justice pro tem.

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121 Cal.App. 370

In re O'DONNELL, for and on behalf of RODGERS.

Cr. 1195.

District Court of Appeal, Third District, California.

March 2, 1932.

Hearing Denied by Supreme Court March 31, 1932.

Criminal law ⚷1211.

Ex-convict convicted of carrying concealed firearms, not connected with any other offense committed while carrying firearms, *held* not subject to additional punishment (St. 1923, pp. 696, 697, §§ 2, 3, 5; Pen. Code, § 1168).

St. 1923, p. 696, § 2, defines offense of carrying firearms by aliens and ex-convicts, and provides for punishment upon conviction thereof by imprisonment in the state prison for not less than one year, nor more than five years. Section 3 of the same act provides that upon conviction of any person of felony or attempting to commit felony while armed with any of prescribed weapons shall "in addition to the punishment prescribed for the crime for which he has been convicted, be punishable by imprisonment in a state prison for not less than five nor for more than ten years."

Application by Eugene H. O'Donnell, for and on behalf of Roy Rodgers, for a writ of habeas corpus.

Writ granted.

Eugene H. O'Donnell, Leland J. Lazarus, and Edwin J. Regan, all of San Francisco, for Roy Rodgers.

U. S. Webb, Atty. Gen., and J. Charles Jones, Dep. Atty. Gen., for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The record in this cause shows that the above-named Roy Rodgers, a person having suffered three prior convictions for felonies, was on the 21st day of June, 1928, found guilty of violating section 2 of chapter 339, p. 696 of the Statutes of 1923, for which offense he was sentenced to the state prison at Folsom. Thereafter, and on the 2d day of September, 1931, the state board of prison terms and paroles fixed the term of imprisonment of said Roy Rodgers, as punishment for the offense of which he had been convicted, at 15 years. Thereafter, and on or about the 7th day of October, 1931, the board of prison terms and paroles granted to said Roy Rodgers parole for the period of the last 2 years of said sentence, and at the same time, for meritorious service rendered to said institution, additional credits of six months.

Upon this hearing it is not denied or contended that if the petitioner's contention as to the construction which should be given to the law under which Roy Rodgers was convicted and sentenced is correct, his term of imprisonment expired on the 24th day of August, 1931, and that he is now entitled to his liberty.

The section of the act under which Rodgers was convicted relates to the carrying of firearms by aliens and ex-convicts, and so far as pertinent here reads as follows: "On and after the date upon which this act takes effect, no unnaturalized foreign born person and no person who has been convicted of a felony * * * shall own or have in his possession or under his custody or control any pistol, revolver or other firearm capable of being concealed upon the person. * * * Any person who shall violate the provisions of this section shall be guilty of a felony and upon conviction thereof shall be punishable by imprisonment in the state prison for not less than one year, nor more than five years."

It will thus be seen that the act applies specifically to two classes of persons—convicts and unnaturalized, foreign born persons—and constitutes a substantive offense in and of itself, for the punishment of which imprisonment is specified for a period of from one to five years. This offense, so far as section 2 is concerned, has no relation to, and is not dependent upon, any other act or offense committed by the proscribed persons. No other penalty is affixed for the carrying of a concealed weapon; the evident intent of the Legislature being that public safety requires that certain classes of people go unarmed.

After providing that certain classes of persons should refrain from the carrying of concealed weapons, the Legislature having in mind that any one committing a felony, such, for instance, as burglary or robbery, going armed, would do so with the intent of killing any one who should interrupt or attempt to interrupt the commission of such offense, or who, after committing a felony, to which a severe penalty is attached, would, if armed, resist arrest even to the extent of taking life, provided additional penalties which should be added to the penalties otherwise specified in the codes as penalties for the offenses for which such person is arrested, prosecuted, and convicted. Thus, if a person armed with a deadly weapon should commit a burglary under such circumstances, in addition to the penalty provided for the offense of burglary, there should be added an additional term of imprisonment graduated according to the previous offenses, if any, of which the person prosecuted for burglary, or other felony, may have been convicted. This we think clear from the reading of section 3 of the act to which we have referred, to wit: "If any person shall commit or attempt to commit any felony within this state while armed with any of the weapons mentioned in section one hereof or while armed with any pistol, revolver [etc.], * * * upon conviction of such felony or of an attempt to commit such felony, he shall in addition to the punishment prescribed for the crime for which he has been convicted, be punishable by imprisonment in a state prison for not less than five nor for more than ten years. Such additional period of imprisonment shall commence upon the expiration or other termination of the sentence imposed for the crime of which he stands convicted and shall not run concurrently with such sentence." It is then provided that in dealing with ex-convicts there shall be an added period of time in the sentence. This section and the sections of the Code which are amendatory thereof relate to the conviction not of the offense of carrying a concealed weapon, but of the felony for which the accused is prosecuted. Thus, using the illustration of burglary, it relates to the offense of burglary for which the defendant is arrested, prosecuted, and convicted. It is not an added punishment for the carrying of a concealed weapon, as provided for in section 2. Section 2 of the act provides its own punishment for an ex-convict. The words in the statute "armed with a deadly weapon at the time of his commission of the offense," refers to the time of commission of the felony, for example, burglary, for which the defendant is prosecuted and convicted, and does not refer to his conviction for the separate and distinct offense of carrying a concealed weapon. Thus, in order to make the defendant liable to the added penalty, it is necessary that the defendant, at the time of the commission of the burglary, was armed with a deadly weapon, or at the time he was arrested for the commission of the crime of burglary, he was likewise armed with a deadly weapon. It does not mean that an ex-convict arrested and prosecuted for the simple offense of carrying a concealed weapon, shall have added to his punishment any of the periods provided for in what was originally section 3 of the act of the Legislature, approved June 13, 1923, or the provisions of the Penal Code enacted since said date.

The words found in one of the paragraphs of section 1168 of the Penal Code, to wit: "The following shall be the minimum term of sentence and imprisonment in certain cases, notwithstanding any other provisions of this code, or any provision of law specifying a lesser sentence"—do not modify, amend, change, or in any manner whatsoever limit or enlarge the language of section 2 of the act of the Legislature approved June 13, 1923, under which Roy Rodgers in this case stands convicted. All that is said after the words which we have quoted in section 1168 of the Penal Code relates only to added penalties which are affixed in the event that the defendant was armed at the time of committing the principal offense for which he was arrested, prosecuted, and convicted, or was so armed at the time he was arrested for the commission of such principal offense, and not to an arrest for simply carrying a concealed weapon, and being a member of the proscribed class.

Subdivision (b) of section 1168 (4) of the Penal Code as it now reads enforces the interpretation which we are here giving to the statute and Code provisions. Subdivision (b) reads: "For a person previously convicted of a felony either in this state or elsewhere, and armed with a deadly weapon, either at the time of his commission of the offense, or a concealed deadly weapon at the time of his arrest, fifteen years," explicitly stating that the defendant must be armed with a deadly weapon at the time of the commission of the principal offense for which he is arrested, prosecuted, and convicted, or must be so armed at the time he is arrested for the commission of the principal offense for which he is prosecuted and convicted.

It follows from what we have said that Roy Rodgers, in whose behalf this petition for a writ of habeas corpus is prosecuted, has served, in view of the credits allowed him, the maximum period of time for which he could be legally sentenced, and he is now entitled to his discharge; and that the prayer of the petition for a writ of habeas corpus on his behalf should be granted; and it is so ordered.

We concur: PRESTON, P. J.; R. L. THOMPSON, J.

121 Cal.App. 378

KENNEY v. LOS FELIZ INV. CO., Limited, et al.

Civ. 8344.

District Court of Appeal, First District, Division 2, California.

March 3, 1932.

Rehearing Denied April 2, 1932. Hearing Denied by Supreme Court May 2, 1932.

1. Interest 🔑1.

Word "interest" means premium paid for use of money usually recognized as a percentage.

[Ed. Note.—For other definitions of "Interest," see Words and Phrases.]

2. Mines and minerals 🔑54(2).

Where contract for sale of oil lands provided for application of proceeds from royalty to interest and then to principal on next minimum installment payment, proceeds in excess of minimum requirement *held* required to be applied to principal.

> Proceeds from royalty in excess of the amount required to meet next monthly minimum payments were required to be applied to principal and not to interest which was not due, since, under the express terms of the note, interest was payable monthly on the first day of each month on the balance of the principal then remaining unpaid, and, when interest was paid for one month, no interest was due until the first day of the following month, whereas under the terms of the note so much of the principal in excess of $5,000 was due and payable on the first of each month as represented the excess in the royalty proceeds.

3. Evidence 🔑450(5).

Where contract is fairly susceptible of two constructions, ambiguity arises rendering extrinsic evidence admissible.

4. Evidence 🔑461(1).

In case of ambiguity in contract, resort may be had to declarations of parties during negotiations to explain intention of parties (Code Civ. Proc. § 1861).

5. Evidence 🔑450(8).

Contract for sale of oil lands *held* ambiguous as to application of proceeds from royalty in excess of monthly minimum installment requirements; hence extrinsic evidence was admissible (Code Civ. Proc. § 1861).

> The purchase contract and note provided that maker should not be personally liable for any payment of principal, that principal and interest should be payable solely out of proceeds derived from 50 per cent. of royalty, and that, if required monthly payments on principal in installments of $5,000 or more were not made as each installment became due, the note should be deemed in default, while deed of trust given to secure note provided that 50 per cent. of proceeds of oil royalty should be applied first to interest and then to principal on next minimum payments due under the installment note, and therefore there was an ambiguity as to whether proceeds in excess of monthly installment requirements should be credited to minimum payments due in succeeding months or whether it should be immediately applied to reduction of principal, leaving monthly installments to be paid as they became due.

6. Bills and notes 🔑152.

Note payable only out of 50 per cent. of proceeds of oil royalty *held* nonnegotiable instrument (Civ. Code, §§ 3082, 3085).

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action for declaratory relief by Franklin R. Kenney against the Los Feliz Investment Company, Limited, and others. From the judgment, the named defendant appeals.

Reversed.

Chapman & Chapman, of Los Angeles, for appellant.

Newlin & Ashburn and Paul Sandmeyer, all of Los Angeles (A. W. Ashburn and Paul Sandmeyer, both of Los Angeles, of counsel), for respondent.

NOURSE, P. J.

This is a proceeding for declaratory relief. Plaintiff had judgment, and the defendant Los Feliz Investment Co., Limited, appeals upon a typewritten transcript.

The controversy arises out of a transaction for the sale of oil properties located in the Santa Fé Springs district. On March 1, 1929, the Los Feliz Investment Company, Limited, sold the property to C. G. Willis for the full sum of $1,000,000, $125,000 of which was paid at the time and a note, or contract, for the payment of the balance, was executed, together with a deed of trust wherein the Bank of America of California was named as trustee. At the time of this transaction, the property was covered by an oil and gas lease to the Wilshire Oil Company whereby the lessor was to receive 13⅔ per cent. of all oil and gas produced from the premises. The pertinent portions of what is termed a promissory note are as follows: "$875,000.00 Los Angeles, California March 1st 1929. *In installments as herein stated*, for value received, I promise to pay to Los Feliz Investment Co., a corporation, or order, at Los Angeles, California, the principal sum of Eight Hundred Seventy Five Thousand ($875,000.00) Dollars, with interest from date hereof on unpaid principal at the rate of seven (7) per cent per annum payable monthly principal payable *in installments* of Five Thousand Dollars ($5,000.) *or more* on the 1st day of each and every calendar month beginning on the 1st day of May, 1929. Anything herein to the contrary notwithstanding, it is understood that the Maker of this Note shall not be personally liable for the payment of any part of the principal or interest thereof, but such principal and interest shall be payable solely and only out of the proceeds that may be derived from 50% of 13–2/3% of the oil and gas that may be produced, saved and sold from the property covered by the trust deed executed to secure this note, together with any proceeds that may be derived from the sale of said property in the event of foreclosure under said trust deed, all as therein provided. Nevertheless, it is understood and agreed that if said *minimum payment* of Five Thousand Dollars ($5,000.) per month and interest is not made as and when *each installment* becomes due, even though 50% of the 13–2/3% of the proceeds of oil do not equal that amount, then this note shall be deemed in default, and the holder thereof shall have all rights of foreclosure set forth in the trust deed executed as security for this note." The pertinent portions of the deed of trust read, "It Is Understood that 50% of 13–2/3% of all oil and gas that may be produced, saved and sold from the above described premises *shall be applied* on the hereinafter described note, if, *as and when produced*, such payments to be applied *when received*, first to interest and then to principal, on the *next minimum payments due* under said installment note; the balance of the proceeds derived from 13–2/3% of the oil and gas produced and saved from the demised premises shall belong to and be delivered to C. G.

Willis or assigns, if, as and when produced, saved and sold." (Italics in both note and deed are ours.)

Concurrently with the execution of these papers, Willis, by a separate written document, personally guaranteed the payment of the difference between the sum constituting the total amount paid upon the note, plus the amount received from a sale under foreclosure and the sum of $475,000 with interest from March 1, 1929. On April 2, 1929, Willis sold the property to the plaintiff subject to this deed of trust, and at the same time assigned all his rights to oil in the premises, and plaintiff was substituted as the party in escrow in place of Willis. All moneys obtained through the royalty were delivered to the trustee, which applied 50 per cent. thereof to the interest and installments due upon the promissory note, and delivered 50 per cent. to the plaintiff less such sums as were necessary to meet shortages in the monthly payments under the terms of the note. A controversy arose between the parties as to the proper application of these funds; the theory of the plaintiff being that, under the terms and conditions of the promissory note, the minimum payments due on the first of each month were the monthly interest and the $5,000 installment of principal, and that so much of said 50 per cent. of the royalty should be applied when received on the next unpaid minimum payment falling due as is necessary and sufficient for that purpose, and that the balance thereof should be applied on subsequent monthly minimum payments. On the other hand, the Los Feliz Investment Company contended that, under the terms and conditions of the promissory note and deed of trust, all proceeds realized from said 50 per cent. of the royalty should be credited only on the minimum payment due on the first day of the next succeeding month, plus interest then due, and that, if there be in any one month any excess over the minimum amount of principal and interest due for the next payment, such excess should be credited upon the principal sum due. Thus under plaintiff's theory all excesses in any month's proceeds should be credited to the minimum payments due on both principal and interest in the succeeding months over such number of months as may be covered by such excess, whereas, under the theory of the investment company, such excess, after payment of the interest and installment due on the first day of the following month, should be immediately applied to a reduction of the principal, and the plaintiff should then be required to continue the monthly installments of $5,000 and interest in order to prevent a default under the contract. The importance of the controversy is indicated by these facts: From August 1, 1929, to February 1, 1931, the trustee received in excess of the minimum payments on principal and interest due during that period the sum of $264,756.54. Under plaintiff's theory, this sum, together with what was obtained during the course of the trial, would cover all payments of interest to become due up to and including January 1, 1934, and all payments of principal due up to and including December 1, 1933, with a balance of $2,835.85 to be applied to the principal installment due on January 1, 1934. Under the theory of the investment company, this full sum, after payment of principal and interest due March 1, 1931, would be applied to a reduction of the principal, and the plaintiff would therefore be required to continue the payment of the monthly installments together with interest until the entire principal was paid. The trial court adopted the theory of the plaintiff, and found that the only monthly payments *required* to be made upon the promissory note were the sum of $5,000 on account of principal, plus interest for one month upon the unpaid balance of the principal; that this installment of principal plus one month's interest "is the aggregate defined in the said note and deed of trust as constituting the minimum payment to be made monthly thereon"; that the installments mentioned in the said note and the said deed of trust and the minimum payments mentioned in said instruments are the equivalents of each other, "and that there is no obligation under the said note or deed of trust to pay for any month any sum, out of the proceeds of sale of oil and gas or otherwise, in excess of said 'minimum payment' as above defined"; that the investment company is obligated immediately upon the receipt of said sums of money to apply the same in liquidation and payment of the next succeeding installment or installments due or to become due under the said promissory note, and thereby pay the next succeeding minimum payment or payments which have not been theretofore paid, and which will become due and payable. It was then found that, as a result of this method of application of the proceeds under said deed of trust, all interest on said promissory note due or to become due, including January 1, 1934, was fully paid, and all installments upon the principal were paid to and including December 1, 1933. Under a separate issue raised in the pleadings as to the time of payment of the proceedings to the trustee, the trial court found that the proceeds thereof, when received by the plaintiff, but not before receipt thereof, should be paid to the trustee, to be by it paid over to the persons entitled to it under the terms of the deed of trust. A further finding was made that the instruments involved in the controversy were not ambiguous or susceptible of interpretation by means of practical construction. Pending the trial of the action, plaintiff continued to pay, but under protest, monthly installments of $5,000, together with interest, amounting to the sum of $26,702. 86, for which sum the trial court gave plaintiff judgment.

On this appeal, it is urged by the appellant that the trial court erred in its interpretation of the documents; that it erred in finding there was no ambiguity in the documents and in rejecting evidence offered to show the intentions of the parties, and that it erred in giving the judgment for the sum paid under protest upon the ground that said payments were not made under duress. The position of the appellant upon the first point is that the promissory note called for the payment of principal in installments of $5,000 *or more* on the first day of each calendar month; that the terms of the deed of trust which were made a part of the same transaction called for the application of the full 50 per cent. of the proceeds of the royalty to these monthly payments, but that neither the promissory note nor the deed of trust called for the payment of *more* on account of interest than is due on the next succeeding month. It is then argued that this excess payment of principal is compulsory so far as permitted by the proceeds from the royalty, and is not optional with the maker of the note. The appellant emphasizes that the note does not permit payments "on or before" the first day of the month, and in this respect argues that the case differs from Los Angeles Investment Co. v. Wilson, 181 Cal. 616, 185 P. 853, and similar cases cited by appellant which *permit* the maker of the note or the purchaser under a contract of sale to reduce the principal at a greater rate than the monthly installment named in the contract. Thus it is said in the Wilson Case (page 619 of 181 Cal., 185 P. 853, 854): "The agreement did not require the payment of any sum greater than $36 a month for 120 months. Payment of a greater sum was optional with Mrs. Wilson. If she chose to pay more than $36 at any one time (as she did), such payment must be considered as having been made 'on or before' any date on which she failed to make payment of $36." The respondent does not concede a difference in these relations, but argues for the finding made by the trial court that the words "payment," "minimum payment," and "installments" used in the promissory note and the deed of trust are interchangeable and the equivalents of each other. But respondent does not explain the use of the words "or more" in connection with the payment of principal, and these words were apparently overlooked by the trial court as well. The reasonable construction of this portion of the note would seem to be that, inasmuch as the application of the 50 per cent. of the royalty was compulsory, the trustee was directed to apply such excess to such principal and interest as was then unpaid or due on the first day of the following month, and that any excess over such amount should be applied on the payment of principal alone. This would seem to follow from the terms of the deed of trust, which read: "Such payments to be applied when received, *first* to interest and then to principal, on the next minimum payments *due* under said installment note." Under the express terms of the note, interest is made payable monthly on the first day of each month upon the balance of principal then remaining unpaid, and, when interest is paid for one month, no interest is *due* until the first day of the following month, whereas under the terms of the note so much of the principal in excess of $5,000 is due and payable on the first of each month as represents the excess in the royalty proceeds. As illustrating the unreasonableness of respondent's theory, interest might be paid (as was ordered in the judgment) for a period far in advance of its due date, though the royalty proceeds at some future date might be so great as to retire the principal prior to the period for which interest is paid. The excess proceeds from the royalty were shown to have been something over $264,000 in a period of less than two years, and it is reasonable to assume that successful production from the wells may bring in a like amount at some time in the future. Thus the entire principal on the note may be paid prior to the time for which payments of interest are credited under the terms of the judgment, and, these interest payments having been paid at the request of the respondent, they would become voluntary payments which, not having been due when paid, he would be unable to recover.

[1, 2] But we are not in accord with the trial court's interpretation of the use of the word "installment" as applying to the payment of both interest and principal. The word "installment" is one of common use, and has a well-accepted meaning. Century Dictionary defines installment as "Partial payments on account of a debt due." Standard Dictionary gives this definition: "A partial payment of a price or debt due." Bouvier's Law Dictionary gives this definition: "A part of a debt due by contract and agreed to be paid at a time different from that fixed for the payment of the other part." The word "interest" has a well-accepted meaning as a premium paid for the use of money usually recognized as a percentage. Hagan v. Commissioner's Court, 160 Ala. 544, 49 So. 417, 37 L. R. A. (N. S.) 1027. This difference between an installment and interest is recognized in Holmes v. Royal Loan Ass'n, 166 Mo. App. 719, 150 S. W. 1111, 1113, where it is said that an installment means a part of a greater amount, and is a word only fitly used in connection with an ascertained amount, whereas interest is a certain rate of percentage of the sum loaned for the time the money is detained. We find no uncertainty in the use of these words in the note and deed of trust. The principal in the note is expressly made payable "in installments as herein stated." The interest is made payable monthly on the *unpaid balance* of principal at the rate of 7 per cent. per annum. However, immediately following the provision relating to payment of interest, the note recites "principal payable in installments of Five Thousand ($5,000) Dollars or more." This distinction is carried into the terms of the deed of trust, where it is provided that 50 per cent. of the proceeds from the royalty shall be applied, first, to interest and then to principal "on the next minimum payments due under said installment note." In the escrow instructions executed by respondent's assignor and the appellant concurrently with the execution of the note and deed of trust, the trustee was informed that it would "on or about the 25th day of each month receive said payments representing royalty payments on account of a certain oil and gas lease to be applied as received in accordance with the terms of the deed of trust." In explanation of these instructions, it is in evidence that the parties contemplated the return from the proceeds of the royalty on or about the 25th day of each month, and they desired the trustee to use the moneys received from that source in the payment of the interest and principal due on the first day of the following month. Thus, when they used the expression in the deed of trust "on the next minimum payments due under said installment note," they contemplated the two minimum payments which would then become due, to wit: The minimum payment of $5,000 on the principal and the minimum payment of the interest which was then reckoned to be due upon the unpaid balance. We do not find in the use of the word "payments" in the plural anything which *compels* the construction that the parties contemplated the payment of interest and principal before the due date, but are inclined to the view that the parties were concerned with an express declaration that the proceeds from the royalty should be applied to the interest and installment due on the first of the following month, so that, if this amount equalled what was then due, no further demands should be made upon the maker of the note for payment of either principal or interest for that particular month. In other words, if the proceeds from the royalty were sufficient to meet the monthly "payments" as they became due on the first day of the month following their receipt, then no further demand was to be made upon the maker of the note for either principal or interest for that month. However, we do not decide whether the excess over the next monthly minimum payments due should be applied as a flat reduction of the principal then due or applied over a series of future monthly payments of principal, because that is a question that the trial court must decide with the proper evidence before it, but we do hold that such excess should be applied to principal and not to interest which is not due.

[3-6] This brings us to the second point raised by appellant—that the trial court erred in rejecting evidence of the negotiations and conduct of the parties which was offered by appellant for the purpose of disclosing the true intent of the parties in this connection. It is a settled rule that, when the language employed is fairly susceptible of either one of two constructions contended for without doing violence to its usual and ordinary import, an ambiguity arises where extrinsic evidence may be resorted to for the purpose of explaining the intention of the parties, and that for this purpose conversations between and declarations of the parties during the negotiations at and before the execution of the contract may be shown. Balfour v. Fresno C. & I. Co., 109 Cal. 221, 41 P. 876. And this course is expressly authorized by the terms of section 1861, Code of Civil Procedure. We are not in accord with the holding that the deed of trust and the note are not fairly susceptible of either one of the interpretations here contended for, and for that reason the trial court erred in rejecting this evidence. The respondent defends the ruling on the ground that he is a holder in due course and without notice, but in this connection it should be borne in mind that the paper referred to as the note is not a negotiable instrument, as it does not contain an unconditional promise to pay, but is payable upon a contingency and only out of a particular fund. Sections 3082, 3085, Civ. Code.

Appellant attacks the portion of the judgment which awarded respondent the sums paid by him upon interest and monthly installments during the course of the trial. In this connection the trial court found that these moneys were paid under duress. The appellant now argues that, if respondent's theory is correct, they were voluntary payments, and for that reason not recoverable. The question cannot be decided with accuracy, because the judgment does not segregate the amounts paid upon interest from those paid upon principal. If appellant's construction of the contract is correct, the amounts paid upon principal were due and not recoverable by respondent. If the trial court should determine upon a retrial of the case that the proper construction of the contract is that the excess receipts from the royalty over the payment of principal and interest due upon the first of the following month should be applied wholly to payment of principal installments for a period of months in the future, then the respondent would be required to pay the interest due upon unpaid principal on the first day of each month, notwithstanding the payment of a principal installment for that period. It is not possible, therefore, for us to determine upon this record whether the moneys included in the judgment were justly due at the time they were paid or not, and that question must be left for determination by the trial court after a proper construction has been placed upon the contract.

Judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.

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121 Cal.App. 466

MARSH et al. v. CALVARY PRESBYTERIAN CHURCH OF WILMINGTON.

Civ. 7141.

District Court of Appeal, Second District, Division 1, California.

March 8, 1932.

Rehearing Denied April 5, 1932. Hearing Denied by Supreme Court May 5, 1932.

Appeal and error ⚷758(3).

Reviewing court need not search record to establish whether findings referred to were supported by evidence (Rule 8 of Rules of Supreme Court and District Courts of Appeal).

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action for money, brought by Norman F. Marsh and another against the Calvary Presbyterian Church of Wilmington. From an adverse judgment, plaintiffs appeal.

Affirmed.

Clay & Handy, of Los Angeles, for appellants.

Clock, McWhinney & Clock, of Long Beach, for respondent.

HOUSER, J.

The appeal herein is taken under what is known as the "alternative method," as provided by section 953a et seq. of the Code of Civil Procedure.

No attempt is made by appellants to comply with that part of rule VIII of "Rules of the Supreme Court and District Courts of Appeal," which provides that: "The briefs must present each point separately, under an appropriate heading, showing the nature of the question to be presented."

The most that appears from the briefs of appellants is that in a general way it is claimed that the trial court erred in its application of the law to what are asserted to be the facts of the case, and particularly that said court erred in its interpretation of the law as regards the provisions of a certain contract which was entered into between plaintiffs and the defendant. But nowhere in said briefs, or elsewhere, with either appropriate, or any reference to the record, is it specifically contended by appellants that any particular finding of fact made by the trial court is not supported by the evidence, nor that the judgment is not supported by the findings of fact. The only endeavor by appellants at a possibly attempted compliance with the rule to which attention has been directed is marked by the statement which appears in their opening brief that they "believe that every finding against the truth of the allegations of the complaint is not sustained by the evidence and especially call attention to finding II, which holds contracts have been let for the construction of the church; finding XI declares the cost is $62,644.51, and finding XIII which declares $2500.00 has been paid and that the said amount is greatly in excess of that owed by defendant to plaintiffs."

In such circumstances, it is not incumbent upon this court to search the record for the purpose of establishing whether the findings of fact to which reference has been had are, or either of them is, supported by the evidence.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

In re HUBBELL'S ESTATE.

BANK OF ITALY NAT. TRUST & SAVINGS ASS'N et al. v. EVERS et al.*

Civ. 8338.

District Court of Appeal, First District, Division 2, California.

March 5, 1932.

Hearing Granted by Supreme Court April 4, 1932.

Appeal and error ⚷832(1).

Petition for rehearing on appeal from decree of distribution *held* properly denied, where allowance of petitioner's claims would modify, in favor of wife not party to appeal, decree of distribution now final as to her.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

On petition for rehearing.

Petition denied.

For former opinion, see 8 P.(2d) 173.

Thomas E. O'Donnell, of Hollister, and **Peter A. Breen**, of San Francisco, for appellants.

Lee M. Olds, Hartley F. Peart, and Gus L. Baraty, all of San Francisco (Russel Shearer,

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 15 P.2d 503.

of San Francisco, of counsel), for respondents.

PER CURIAM.

The petition for a rehearing is denied. The will provided certain specific legacies, the creation of certain trusts, and for a residuary legacy in favor of the decedent's wife. The decree of distribution followed the will. The notice of appeal was addressed to the executors and the coappellant and their attorneys. The surviving wife is not a party to the appeal, but she, as residuary legatee, was awarded any moneys out of which an allowance for interest could be paid. The issues are not separable and independent. To allow the claims of petitioners will require a modification of the decree in favor of the surviving wife who is not a party to this appeal, and as to whom the decree has become final. In their petition for a rehearing the petitioners for the first time cite Wold v. League of Cross, 107 Cal. App. 344, 290 P. 460, and In re Estate of Clark, 190 Cal. 354, 212 P. 622. The Wold Case could be cited in support of the main opinion. The Clark Case was in effect an adversary contest between two different sets of claimants asserting heirship.

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121 Cal.App. 398

COOK v. HATCHER.

Civ. 4438.

District Court of Appeal, Third District, California.

March 4, 1932.

1. Nuisance 🔑33.

Evidence *held* to sustain finding that dairyman so conducted ranch, hogpens, etc., as to constitute nuisance.

> Facts disclosed that a highway separated plaintiff's and defendant's property; that defendant's cow corral was about 95 feet, cow barn about 85 feet, calf shed about 130 feet, and the hogpen about 160 feet, from plaintiff's dwelling house; that defendant piled offensive manure near the highway which defiled the atmosphere; that the herd consisted of 46 head in addition to calves; that defendant engaged in breeding cattle in the corral immediately in front of plaintiff's front yard sometimes when plaintiff had company; that defendant's cows were accustomed to give birth to calves in the corral; that plaintiff's property was north of the highway and the prevailing winds were from the south; and that defendant had 80 acres in his ranch.

2. Nuisance 🔑5.

That dairying, breeding cattle, and hog-raising is lawful *held* not to justify conducting such business so as to create nuisance.

3. Nuisance 🔑3(2).

In determining whether dairying, breeding cattle, hog-raising, etc., is unreasonable use of property creating nuisance, location and manner of use must be considered.

4. Nuisance 🔑35.

Injunction restraining operating dairy and hog-raising so as to create noises distracting, odors offensive, and breeding practices unsightly, to adjoining owner, *held* not too broad or indefinite.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action to abate nuisance by Howard A. Cook against Earl K. Hatcher. From the judgment for plaintiff, defendant appeals.

Affirmed.

Huston, Huston & Huston, of Woodland, for appellant.

Gaddis & McDonald, of Woodland, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff had judgment in an action to abate a nuisance, from which judgment the defendant appeals.

The nuisance complained of consisted in the operation of a dairy, breeding, and propagating dairy cattle and maintaining hogs in a pen on appellant's property in front of and just across the public highway from the respondent's dwelling house.

The record shows that the appellant and respondent each owned 80 acres of land situate in the county of Yolo about two miles north of the village of Yolo, which lands are separated by a county highway 60 feet in width. The highway runs in an easterly and westerly direction. The respondent's property lies north of the highway, and the appellant's property lies immediately to the south thereof. The respondent's dwelling house is situate on his premises 35 feet north of the north boundary of the highway, and faces in a southerly direction. This dwelling house has been occupied by the respondent for over 29 years. The wife and stepdaughter of respondent have lived with respondent on said premises for about three years prior to the beginning of this action. The prevailing winds in the section of the country where the premises owned by the appellant and respondent are situate are from a southerly direction, so that odors emanating on either of the premises are carried to the northward.

[1] The record shows that the defendant was using his property as a dairy ranch and for raising hogs and breeding cattle. In so doing he used barns, corrals, and pens situated across the highway to the south of the respondent's property. The cow corral maintained by the defendant adjacent to the southerly boundary line of the highway is about 95 feet distant from the respondent's dwelling house. The cow barn on defendant's property is situate about 32 feet south of the fence adjacent to the highway. The distance from the defendant's cow barn to the respondent's dwelling house is 85 feet; the calf corral is distant to the southeasterly from the respondent's dwelling house about 85 feet; the calf shed is about 130 feet distant; the hogpen is adjacent to the highway a distance from the dwelling house of the respondent of about 160 feet. It would serve no useful purpose to recite all of the offensive matters detailed in the record or to review the testimony of the various witnesses in relation thereto. It is sufficient to say that the testimony abundantly establishes and supports the finding of the trial court that the appellant in this action, for a considerable period of time, so conducted the dairy ranch, hog pens, etc., as to constitute the same a nuisance. We have only to recite the facts that the defendant piled offensive manure piles in such quantities, close to the southerly boundary line of the highway to which we have referred, that the offensive substances composing such piles, which may be left unsaid (all testified to literally as shown by the record) so befouled the atmosphere as to interfere with the use, comfort, and enjoyment of the respondent's property. Among other things, the defendant maintained a corral for his cattle where they would be driven into the barn at 2 o'clock in the morning for milking, turned out early in the morning, after which the barns would be cleaned and the offensive matter piled in such a way that the odors therefrom would be carried across to the respondent's dwelling house. The herd of cattle consisted of some 46 head, in addition to which a number of calves were kept in an adjoining corral. The testimony shows that the odors were nauseating and sickening, and that these odors would permeate the dwelling house of the respondent and seriously interfere with the respondent's family when they were eating their meals. To quote from the record: "The odors which were blown from appellant's barn, calf-corrals, calf-sheds, hog-pens, cow-corral and manure piles in appellant's yard and dwelling house were sickening and disgusting, and seriously interfered with living conditions on respondent's premises."

Again, the record shows that the appellant engaged in the practice of breeding cows in the cow corral immediately across the highway and in front of the respondent's front yard. This would occur when the respondent had company, as well as when the respondent was there alone.

The record also shows that the appellant kept his herd of cows in a corral in front of the respondent's premises, where they were accustomed to give birth to calves. The hogs and the cows were fed on milk and other substances which soured and added to the ordinary odors emanating from the pigpen.

The testimony shows that the appellant's dwelling house was distant 600 feet from the nearest barn or corral which we have mentioned and in such direction that the odors from the premises which we have been describing were not carried thereto.

The court in its findings and in its decree did not order the abatement or removal of the cow barns, sheds, corrals, etc., maintained by the appellant, but did decree that they be so used as not to create a nuisance or to cause offensive odors emanating therefrom so that they would be carried to the respondent's premises, and also not to conduct breeding practices on his premises in such a way as to become unsightly and offensive.

The record further shows that the appellant is the owner of 80 acres of land, from which it necessarily follows that the barns, corrals, shed, pigpens, etc., maintained by the defendant, could readily be so situated that the conduct thereof would not constitute a nuisance.

[2] Upon this appeal it is contended that the testimony is insufficient to support the findings of the court that the acts of the defendant, and the manner in which he conducts his business, constitute a nuisance. As hereinbefore stated, the sickening details set forth in the record are such that we do not care to spread them further upon the record in this case, and will content ourselves with the simple statement that the evidence shows beyond controversy that the manner in which the appellant has conducted his dairy, hog raising and cattle raising practices were such as to, not only support the findings of the trial court, but to preclude any other findings. The contention of the appellant in this particular appears to be based upon the theory that conducting a dairy, feeding hogs, and breeding cattle is a lawful and ordinary business attendant upon farming operations, all of which may be conceded, but it does not follow that, because one is engaged in a lawful occupation, he is entitled to conduct that business in such a manner as to constitute it a nuisance.

A large number of cases have been cited by counsel, both for the appellant and for the respondent, a few of which only will it be necessary to consider. As these cases bear upon the injunction order issued by the court in this cause, which, by the appellant is claimed to be too broad, we will consider, not only the fact of the acts of the appellant constituting a nuisance, but also the scope of the injunction order.

The leading case upon the subject of nuisances in our state is that of McIntosh v. Brimmer, 68 Cal. App. 770, 230 P. 203, 204, where the distinction is drawn between a reasonable and unreasonable use of one's premises. In the Brimmer Case the defendant was keeping a number of chickens in such a place and in such a manner that the dust created by the scratching of the chickens would be blown over and upon vines and trees of the plaintiff's premises near by. In the Brimmer Case it appears that the defendant had located his chicken yards close to the premises occupied and belonging to the plaintiff. It was there held that the nuisance did not arise by reason of the business being such per se, because the business of raising chickens was perfectly lawful, but it arose from the manner in which the defendant maintained his chicken yards. The opinion in the Brimmer Case first lays down the proposition that one must so use his own property as not to destroy the property of another.

[3] In considering the question of reasonable use it appears that under some circumstances the use of one's property would be perfectly reasonable, and under other circumstances wholly unreasonable. Thus, if the barns, sheds, cow corrals, pigpens, and manure piles, and all the practices of the defendant in connection therewith, were so distant from the plaintiff's dwelling house that the obnoxious and unsightly practices would not be visible and the offensive odors arising from the barns, corrals, and pigpens would not be carried to the plaintiff's premises, then there would be nothing unreasonable in the use thereof by the defendant. The location must be considered, and if one locates his own business, which otherwise is lawful, in such a place, and conducts it in such a manner that foul odors emanating therefrom permeate the dwelling house of another, and seriously interfere with the comfort, use, and enjoyment thereof, and conducts unsightly practices immediately in front of one's dwelling house, then and in that case the use is wholly unreasonable, and will be so declared by the courts.

In the opinion in the Brimmer Case occurs a paragraph to which appellant calls our attention, seeking to apply it to the case at bar. The paragraph is as follows: "It is important to consider whether the acts complained of in any particular case cause an injury to property or only to the personal comfort of the complaining party. For there is a marked distinction between an action for nuisance in respect to an act producing a material injury to property, as where trees or fruit are injured by dust or noxious gases, and an action brought in respect to an act producing personal discomfort only, such, for example, as noises, disagreeable smells, et cetera. As to the latter, the person complaining of the annoyance must submit, in the interest of the public generally, to the discomfort usually incident to the circumstances of the place and the trades carried on around him. But the same rule does not apply where the injury is to property."

As applied to the case at bar this paragraph does not correctly state the law, as the cases cited in the opinion following this paragraph abundantly demonstrate. Thus, in the case of Pennoyer v. Allen, 56 Wis. 502, 14 N. W. 609, 613, 43 Am. Rep. 728, cited in the opinion, it was held that any business which necessarily and customarily impregnates large volumes of the atmosphere with disagreeable, unwholesome, or offensive matter may become a nuisance to those occupying property in the vicinity, in case it is too near and the atmosphere is so contaminated as to substantially impair the comfort or enjoyment of the neighbors. We quote further from the case of Pennoyer, relied upon by the court in the Brimmer Case, to wit: "The ownership of land carries with it the rightful use of the atmosphere while passing over it. Title to land gives to the owner the right to impregnate the air upon and over the same with such smoke, vapor, and smells as he desires, provided he does not contaminate the atmosphere to such an extent as to substantially interfere with the comfort or enjoyment of others, or injure the use of their property. But air is movable, and constantly flowing from the premises of one to those of another, and hence, when it becomes thickly impregnated with putrid substances, it necessarily flows on to the adjacent premises in one direction or another. This being so, it follows that any business which necessarily and constantly impregnates large volumes of the atmosphere with disagreeable, unwholesome, or offensive matter, may become a nuisance to those occupying adjacent property, in case it is so near, and the atmosphere is contaminated to such an extent, as to substantially impair the comfort or enjoyment of such adjacent occupants. When such comfort and enjoyment are so impaired, and compensation is demanded, it is no defense to show that such business was conducted in a reasonable and proper manner, and with more than ordinary cleanliness, and that the odors so sent over and upon such adjacent premises were only such as were incident to the business when properly conducted. It is the interruption of such enjoyment and the destruction of such comfort that furnishes the ground of action, and it is no satisfaction to the injured party to be informed that it might have been done with more aggravation. * * * A business necessarily contaminating the atmosphere to the extent indicated should be located where it will not necessarily deprive others of the enjoyment of their property, or lessen their comfort while enjoying the same."

The opinion in the Brimmer Case also cites other authorities to this effect: "A person may not use his own property, even in and about a business in itself lawful, if it be used in such a manner as to seriously interfere with another in the enjoyment of his right in the use of his property. * * * A reasonable use can never be construed to include those uses which produce destructive vapors and noxious smells, and that result in material injury to the property and to the comfort of the existence of those who dwell in the neighborhood."

In the Brimmer Case it was contended there, as contended here, that the injunction was too broad, and that it was indefinite, as it did not sufficiently advise the appellant what he was restrained from doing. The court said: "We see no force in this objection. The decree seems to be as clear and certain as the circumstances will permit"—citing a number of cases. And then continues: "Where the injury complained of results from a business which is not per se a nuisance, it being caused only by reason of the manner in which the business is conducted or by the surrounding circumstances, it is always proper for the court so to frame its decree that defendant's business will not be absolutely prohibited, if this can be done and still give to plaintiff the relief to which he is entitled." The decree in that case "enjoins appellants from so maintaining their chickens and the premises on which they are kept as to produce dust in such quantities that any of it will be carried by the winds across the highway to respondent's land," stating that this decree is as specific as was the decree in the case of Collins v. Wayne Iron Works, 227 Pa. 326, 76 A. 24, 19 Ann. Cas. 991.

In the case of Judson v. Los Angeles Suburban Gas Co., 157 Cal. 168, 106 P. 581, 582, 26 L. R. A. (N. S.) 183, 21 Ann. Cas. 1247, a nuisance case, it was held that the plaintiff was entitled to recovery for personal discomfort or annoyance to which he was subjected, without proving any damages to his property. In that case it was held that the factory was not a nuisance per se, but only a nuisance by reason of its operation. The court said, among other things: "In order that a judgment of this character may be upheld, it is not necessary that the health of plaintiff or of members of his household should have been impaired. It is sufficient if the odors, sounds, and smoke were offensive to the senses." (Citing a number of cases.)

In the case of Royalty et al. v. Strange (Tex. Civ. App.) 204 S. W. 870, a case relied upon by the appellant, we find the following, quoting from the syllabus: "If the land owner keeps such a number of hogs in such small pens or in such a way or feeds them with garbage in such a way as to produce disagreeable and noxious odors interfering with the comfort, use, and enjoyment of another owner, such owner is entitled to injunction abating the nuisance." The injunction in that case was held too indefinite and too broad, in that it might prevent the defendant from maintaining his hogpens on any part of his 50-acre tract. That opinion further approves the following language: "A lawful business may be conducted in such manner as to become a nuisance, and in such case the parties so conducting it might at the suit of one injured thereby be restrained from continuing to conduct it in such manner, but they could not be denied the right to carry on the business in a proper manner."

[4] There is nothing in the case at bar which prevents the defendant from conducting his dairy, hog-raising, and cattle-breeding operations in a proper manner, and we may also add, in a proper place. There appears to be sufficient room upon the appellant's premises where every act complained of in this action might be so conducted as not to be offensive to the plaintiff or any other person.

Again, in the case of Singer v. James, 130 Md. 382, 100 A. 642, another case relied upon by the appellant in support of his contention that the injunction in this action is too broad, we find the following: "Where defendant maintained hog, cow, and horse pens, dog kennels, and chicken coops in close proximity to plaintiff's residence with consequent loud noises, noisome odors, and other obnoxious effects, plaintiff was entitled to injunctive relief against the nuisance." (We have quoted from the syllabus.) It appears that in that case the injunctive order contained the following words: "Any foul odors," and the court held that language in the injunction too broad, and modified the decree to the extent that in form and substance would read practically as it does in the case at bar.

In the case of Williams v. Bluebird Laundry Co., 85 Cal. App. 388, 259 P. 484, 486, where it was held that an injunction order restraining the defendant from so conducting its laundry as to produce loud noises, noxious odors, etc., was not too broad. We quote from the opinion in that case the following: "It is strenuously contended that because the judgment merely restrains the defendant from so conducting its plants as to cause loud noises, offensive odors, black smoke and soot, it is so indefinite as to render it ineffective, and that it must be reversed; that it is impossible to determine what degree of noise, or degree of odor, etc., would constitute a violation of the injunction; and that the defendant may be subjected to citations for contempt at any time that any one of the plaintiffs may deem any noise, odor or smoke objectionable to himself. However, the judgment plainly states that the laundry or laundries shall be so operated as to avoid causing loud noises, offensive odors, black smoke, or soot, or in any other such manner as to be deleterious to the health of the plaintiffs. We think the entire judgment when read together is sufficiently definite in this regard."

In Thompson v. Kraft Cheese Co., 210 Cal. 171, 291 P. 204, 208, an action involving the pollution of water and the scope of the injunction, we find that the injunctive order was framed so as to prohibit the defendant from conducting his business "in such a manner as to cause a material pollution of the waters or contamination of the bed or banks of the said branch of Nicasio creek, or to give rise to noxious odors preventing the use or enjoyment of said lands of plaintiffs in the usual or customary manner."

The defendant in the case at bar is restrained and enjoined from conducting, operating, or maintaining the business of dairying in such a manner, and at such location upon the defendant's said lands, as to produce loud and distracting noises so that said loud and distracting noises created and emitted from the said dairy business will be carried, transmitted to, penetrate, or enter into the said dwelling house of the plaintiff situate upon his said lands. And restraining the defendant from maintaining his dairy, hogpens, barns, etc., in such a manner as to produce offensive and disagreeable odors so that said offensive and disagreeable odors will be carried by the winds across that certain county road to the lands and premises belonging to the plaintiff. The same is true with reference to conducting the offensive breeding practices to which we have referred. No lawful act on the part of the appellant is restrained; he is simply restrained from so conducting his business as to cause the same to become and constitute a nuisance.

As we have heretofore stated, the record shows that the appellant owns 80 acres of land; that he has so located his own dwelling house that the practices and acts to which we have referred do not constitute a nuisance with reference thereto. He has only to so locate or conduct his dairy business, hograising, etc., so as not to cause the same to become a nuisance to the respondent.

The authorities which we have cited show that such an injunction order is properly maintainable.

The judgment is affirmed.

We concur: PRESTON, P. J.; R. L. THOMPSON, J.

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121 Cal.App. 437

HAWEIS v. BADDOUR.

Civ. 4475.

District Court of Appeal, Third District, California.

March 5, 1932.

Rehearing Denied April 4, 1932. Hearing Denied by Supreme Court May 2, 1932.

1. Usury ⟹117.

Evidence sustained finding that deeds to borrower's separate property and his half interest in deceased's wife's estate and assignments constituted mortgage to secure usurious loan, and not outright sale.

Facts disclosed borrower was bequeathed half interest in deceased's wife's estate worth $408,000, and that on wife's death lender loaned borrower $7,000 and received deed to borrower's separate property, and later lender loaned $20,000 more to borrower in return for agreement promising $30,000 bonus on loan and deed to one-half of borrower's interest in wife's estate, and that later an additional agreement was executed whereby lender took remaining interest of borrower in wife's estate as security for loans to borrower aggregating $27,000 and for $30,000 promised as bonus.

2. Usury ⟹117.

Evidence *held* to show that transaction whereby lender returned to borrower $2,000 note constituted gift precluding such indebtedness from being consideration for borrower's deed to lender to secure usurious loan.

Facts disclosed lender used his securities in obtaining bond for benefit of borrower, and that borrower gave $2,000 note for use of such securities, and that thereafter, on borrower's promise to pay $30,000 bonus on certain loans made to him by lender, lender returned $2,000 note to borrower.

3. Appeal and error ⟹1008(1).

Whether borrower's deeds to lender were intended as absolute sales or mortgages to secure loans is primarily for determination of trial court.

4. Usury ⟹117.

Evidence sustained finding that bonus of $30,000 was bonus for loans aggregating $27,000, making loan usurious.

5. Appeal and error ⟹959(1).
Pleading ⟹236(1).

Whether amended complaint should be filed is discretionary with trial court whose discretion will not be disturbed unless abused.

Appeal from Superior Court, Los Angeles County; Louis P. Russill, Judge.

Action by Emil J. Haweis against S. Baddour. From a judgment for plaintiff, defendant appeals.

Affirmed.

Charles J. Kelly, A. G. Alm, and Hill, Morgan & Bledsoe, all of Los Angeles, for appellant.

Leonard Wright, of San Diego, and Perry F. Backus, of Los Angeles, for respondent.

Mr. Justice pro tem MILLER delivered the opinion of the court.

This is an appeal from a judgment in favor of respondent for $63,000. Plaintiff's claim is predicated on a charge of usury. The facts, as appear from the complaint and from the transcript of the evidence in the case, are as follows:

Respondent and appellant were, and for a number of years had been, friends. Respondent lost his wife in December, 1925, and was in financial straits. This was known to appellant. Respondent's deceased wife had left an estate worth $408,000, which was her separate property at the time of her marriage to respondent. Subsequent to their marriage, and on January 12, 1925, respondent and his wife entered into an agreement by the terms of which she agreed to bequeath to him one-half of her property, he agreeing "to be faithful to his wife and to perform his marital duties in providing for and caring for his wife." The record fails to show any evidence indicating that respondent in any respect failed to perform his part of such agreement. Mrs. Haweis left a last will by which she devised one-half of her said property in the following words: "While, by antenuptial agreement between myself and my husband, Emil Haweis, it was among other things provided, that on the death of either the survivor should have only one thousand dollars ($1000) from the estate of the deceased, and should not because of said marriage inherit or in anywise receive any of the property of the other, and while all my property is my own separate property, nevertheless, having made an agreement dated January 12, 1925, with my husband, that in case of my death prior to his I would bequeath to him a half interest in certain property in said agreement described, upon certain conditions, therefore in compliance with and in satisfaction of said agreement, providing he survives me, and providing that he is faithful to me and performs his marital duties in caring for and abiding with me, I give, devise, and bequeath to my said husband, Emil Haweis, the undivided one-half of the following described real estate, to-wit:" (Then follows a description of certain real property that was appraised in her estate at $408,000.)

After the death of his wife, respondent remained in possession of the home and the furniture therein. In the latter part of March, 1926, the sheriff of the county of Los Angeles, presumably by virtue of some process, the nature of which the record fails to show, took possession of the household goods and furniture and placed a keeper in respondent's home. The sheriff required a bond in the sum of $1,000 before he would release said household goods and furniture. Appellant was asked by respondent to furnish the bond upon the assurance of respondent's attorney, who was a brother of appellant, that the bond would only be required for two or three weeks, and thereupon appellant, in order to secure the bond, deposited with a surety company securities aggregating $20,000. It later developed that the bond was required for a much longer time than was contemplated, it being nearly a year before appellant was able to withdraw his securities as a whole, although he was permitted by the surety company to withdraw some of the bonds so he could "play the market" with them, upon his substituting other securities with the surety company. After these securities had been on deposit with the surety company for three or four weeks, appellant made repeated objections to leaving them up as security, and, apparently, made it so disagreeable for respondent that he promised appellant he would pay him $2,000 for the use of his securities during the time the bond was required. Shortly thereafter respondent sought a loan of $7,000 from the appellant, and together they visited an attorney to arrange for security. From the conversation that took place between appellant and the attorney, the avariciousness and greed of appellant, and his persistent purpose to disregard or to circumvent the Usury Law (St. 1919, p. lxxxiii), are demonstrated. The testimony in that regard is, in part, as follows: "My name is C. T. Van Etten. * * * I am an attorney-at-law. I am acquainted with Emil J. Haweis, the plaintiff in this action. I have met Mr. S. Baddour, the defendant, several times. I recall having had a conversation with these two parties about the month of June, 1926, with respect to a loan agreement between the parties. The discussion was had at my office. * * * My client, Dr. Haweis, and Mr. S. Baddour were present, and possibly a Mr. Shipley. * * * Dr. Haweis said that he was considering borrowing some money from Mr. S. Baddour, and that they would like to have me prepare the papers for them. * * * S. Baddour said that he contemplated loaning Dr. Haweis an indefinite sum of money, possibly up to $25,000 or $30,000, ultimately, upon his interest in the estate of Dr. Haweis' deceased wife. * * * He also asked whether I thought Dr. Haweis' interest in the estate was such that it would be considered good security. I think he asked whether it would be considered good by a bank or a mortgage company or other organization in the money loaning business. I replied that it would not be considered good security by such an institution; that Dr. Haweis' interest under the terms of the will was contingent upon his distribution of the estate, and also contingent upon some other matters. That there was already some litigation pending and that more was threatened in an attempt to prevent Dr. Haweis from collecting his share of the estate, or at least in delaying him in collecting it, and that we might as well recognize the fact that we were confronted with litigation. And that the probabilities were that there would be a long delay before this probate matter could be settled. I also told him that Dr. Haweis' interest was unquestionably a very valuable one; that it was worth a lot of money but nobody could say just how much; that I considered that we had a very good chance to win any litigation that was pending or threatened * * * that the probabilities were that there would be an appeal or appeals which would take a long time, probably several years before the estate would be finally distributed, and that if Dr. Haweis should not survive the period of litigation and distribution his rights under that will at least would terminate. I also told him, however, that Dr. Haweis held an antenuptial contract or agreement made between him and his wife before they were married, and that there was a subsequent or post-nuptial agreement by the terms of which he was given some pretty definite rights, and I thought we could sustain them even if he did not survive. * * * Mr. Baddour said to me, 'I have decided to make Dr. Haweis a loan. I realize that the nature of his interest is not certain, but I am willing to take a chance. I am in the business of playing the stock market anyway, I take chances with my money and my money has to earn big money for me. I am willing to make him a loan, but I must have a big profit if I make that loan.' I said, 'How much?' He said, 'Well, not less than a hundred per cent.' I said, 'Well Mr. Baddour, you may as well understand right now that any such transaction as that is out of the question. We have a usury law in this state which prohibits people from taking more than twelve per cent. interest on loans, and such a proposition as you mention would not only be improper but would be absolutely unlawful, and you may as well forget it.' He said, 'It is a very peculiar law, Mr. Van Etten, that will not permit two friends to enter into an agreement to do what they both want to do. Dr. Haweis is my friend and I am his friend. Neither of us would ever take any advantage of such a law as that.' I replied that that made no difference whatever, that the law was enacted for the purpose of preventing people who were in more or less needy circumstances from entering into such agreements; if such an agreement was made it would be unenforceable, at least as to interest or bonus, and that it would be improper and that I would not permit my client to enter into such a transaction. * * * They left the office but in a very few minutes Mr. S. Baddour, I think, returned alone. Mr. Shipley may have come back with him, but I am not certain. He said, 'I am ready to take your advice on that, Mr. Van Etten. I won't make it in the form of a loan; I will take a deed instead of a mortgage.' I said, 'Mr. Baddour, that won't make any difference. Such a deed would be only a mortgage, and the transaction would still be usurious. You cannot take a profit of more than 12 per cent. from anyone.' He said, 'There must be some way to get around that law.' I said, 'There is not.' He said that he thought it was being done right along, and I replied that it might be done but it was not legal or enforceable. He asked if there was not any way that he could make a profit on such an investment. I said, 'There is no way unless you want to absolutely buy out, purchase, Dr. Haweis' interest in his estate. I do not understand it is for sale, but if you could agree upon a sale and make an absolute purchase from him, step into his shoes, become the defendant in the existing litigation, be ready to file the will contest in his place if it becomes necessary to file it, let him out, after you step in, if you are ultimately successful and if your assignment is good, you would probably be entitled to receive whatever he would otherwise get. * * *' Mr. Baddour said, 'If I should do that and be unsuccessful in this litigation what would I have to show for my loan?' I said, 'I am trying to make you see that that would not be a loan. You would have nothing to show for it; you would have lost your money.' He said, 'Well, I could not do that, I must have notes to show for the money I loan. I could not have anything to do with that kind of a proposition; but I can take a deed.' I said, 'I told you that such a deed would be only a mortgage and I do not want to have any more talk about this transaction. If you insist on such a profit I cannot help you, and I cannot talk to you any further in the absence of my client. * * *' He went away and I never had any further conversation with Mr. S. Baddour about a loan until the day of the probate sale. * * * I told Mr. S. Baddour that I had been advised by the title company that there was a deed on record from Dr. Haweis to S. Baddour and that we now had an opportunity to make a probate sale of a portion of the property in this estate for a sufficient amount of money to enable us to close the probate and to definitely fix and determine the rights of Dr. Haweis and everybody else; that I deemed it highly important that this sale go through without delay for the protection of Dr. Haweis' interests and also for the protection of Mr. S. Baddour's interest, if he held a deed from Dr. Haweis. He said that he did have such a deed. * * * He said, 'That Dr. Haweis and I have an agreement under which I am to receive $30,000. I won't sign any quitclaim, or anything else unless I can get my money.' I said, 'There is not any way to get you that much money in cash at this time, but if Dr. Haweis is willing he can make an assignment to you of the sum of $30,000 of his share of the proceeds of this probate sale to be distributed direct to you when the probate is closed. That is the only way I see for you to get your money.' * * * He said no he would not sign anything unless he got the entire $30,000 which his contract called for. * * * Mr. S. Baddour said to me, 'Now, I want it understood that this $30,000 is my bonus and that Dr. Haweis still owes me $27,000 on his note.'"

Samuel A. Shipley testified, in substance, as follows: "I am acquainted with the plaintiff and defendant in this action, I recall having a conversation with Mr. S. Baddour with respect to making a loan to Dr. Haweis. * * * There were present just Mr. Baddour and myself. Mr. Baddour came to me with a proposition and spoke to me, 'Shipley, there is a big chance for us to make some good money.' I said, 'What is it? Some new dope on the market?' He said, 'No, it is far better than that, it is much surer than a tip on the market.' I said, 'What is it?' He said, 'Dr. Haweis is in very bad straits and needs money very badly. If you and I combine and give him a loan we will make good returns.' I said, 'What do you mean?' He said, 'Well, we can charge any amount we want on that loan.' I said, 'Do you mean to tell me that you are going to charge Dr. Haweis, your best friend, an exorbitant price?' He said, 'Well, you know Dr. Haweis has no family; you have got a family and I have a family.' I said, 'Well, I am awfully sorry, Shickery—that is his first name—* * * I am awful sorry that I can't do it. First of all, I am very fond of the doctor and I would not care, if I had the money to loan him, to charge him an exorbitant amount. * * *' I said, 'My advice to you is not to do anything of the kind.' * * * He told me he would have to loan him as much as $30,000 possibly. * * * He said that he expected to make at least two or three hundred per cent. on the investment. * * * There was never any conversation between me and Mr. Baddour as to buying the Doctor's half interest. * * * That deal is substantially as I have testified to before, with respect to making a loan up to twenty thousand or thirty thousand dollars, and at least two or three hundred per cent. on the loan."

It is significant that the substance of appellant's denials concerning the damaging testimony of C. T. Van Etten, hereinbefore set out, was practically confined to a denial that he was to get $30,000 as a bonus—he claiming that Mr. Van Etten made a mistake in calling it a "bonus"; that what he said was that the word he used was "profit," not "bonus." He likewise denies that he told the witness Shipley that he contemplated making a bonus of from 200 to 300 per cent. with the money he proposed to loan respondent. He did not, however, deny that he told Mr. Van Etten that he must have 100 per cent. profit.

It appears from the testimony of respondent that while the litigation was pending he sought to borrow $7,000, whereupon appellant demanded and received a deed to some property belonging to respondent Cardiff, in San Diego county, Cal. A few weeks later appellant loaned respondent $10,000 more and demanded and received an agreement for the payment of a bonus of $20,000. Later appellant made a further loan of $10,000 to respondent, which, with the previous loans, aggregated $27,000, whereupon the agreement providing for a bonus of $20,000 was torn up and another, providing for $30,000, was made. By the terms of the foregoing agreement, which included a deed, appellant received as security for his loan the Cardiff property that was outside of the estate of Mrs. Haweis, and also an undivided one-half of respondent's interest in the estate of Mrs. Haweis.

Subsequently a settlement of the litigation was effected and there still remaining outside of appellant's control an undivided one-half interest in what respondent had by the terms of the settlement definitely recovered, a further contract was entered into between respondent and appellant on January 28, 1927, by the terms of which all of the remaining interest of respondent in the estate of his deceased wife was taken over as security for the payment of said indebtedness of $27,000.

The evidence does not expressly disclose, but it is a fair presumption that the latter contract was made at the behest of appellant inasmuch as it added greatly to his security, and, further, incumbered respondent's interest in the estate of Mrs. Haweis.

The bonus of $30,000 was paid to appellant by respondent on or about August 13, 1927, out of the estate of Mrs. Haweis and in accordance with an assignment of that amount to be paid out of the proceeds of the probate sale.

Appellant claims that he purchased outright the one-half interest of respondent in the estate of Mrs. Haweis for $2,000, although a consideration of $10 is named in that deed, and that the instruments executed to him by respondent were not intended as security for a loan, while respondent insists that, regardless of the terms of the agreements, deed, and assignment, they were each executed and delivered for the sole purpose of securing to appellant the repayment of $27,000 which he had loaned to respondent, and to also secure the payment of the bonus of $30,000 which the appellant was to receive net.

[1] The evidence does not sustain appellant's contention that he purchased respondent's interest in the estate of Mrs. Haweis, but the evidence does sustain the finding of the trial court to the effect that the instruments in question constituted a mortgage; hence it is unnecessary to notice in detail the cases appellant cites as supporting his contention in the event there was a bona fide sale; they are not applicable here, where every contract, deed, or assignment disclosed by the record appears, from the circumstances shown by the evidence, to have been executed and delivered for the sole purpose of securing to appellant the payment of the loan of $27,000 and the bonus of $30,000.

In Todd v. Todd, 164 Cal. 255, 128 P. 413, 414, the court said: "The appellant's principal contention is that the evidence is insufficient to justify the finding that the instrument executed by plaintiff and defendant was a mortgage. That a deed absolute in form may, by parol testimony, be shown to have been intended to be a mortgage, is not questioned as, of course, it could not be, in view of the many authorities so holding. A few citations will suffice. Civ. Code, § 2924; Montgomery v. Spect, 55 Cal. 352; Malone v. Roy, 94 Cal. 341, 29 P. 712; Woods v. Jensen, 130 Cal. 200, 62 P. 473; Holmes v. Warren, 145 Cal. 457, 78 P. 954; Couts v. Winston, 153 Cal. 688, 96 P. 357. If the deed was intended merely as security for the payment of a debt, it is a mortgage, 'no matter how strong the language of the deed or any instrument accompanying it might be.' Woods v. Jensen, 130 Cal. 200, 62 P. 473. Although it has often been said that the character of an absolute deed cannot be changed to that of a mortgage except 'upon clear and convincing evidence,' the rule is well settled that, where there is a substantial conflict, it is primarily for the trial court to determine whether the evidence in favor of the claim of mortgage is clear and convincing.' Couts v. Winston, 153 Cal. 688, 96 P. 357, and cases cited."

The trial court had the right to accept the testimony of plaintiff as true, and that it evidently did.

In the case of Couts v. Winston, supra, the court also said: "The circumstances of the whole case, if we accept the testimony acted on by the trial court, are entirely consistent with the view that the parties, while in fact agreeing on a loan to be secured by mortgage, were desirous, for reasons of their own, of giving the transaction a different appearance." Hodgkins v. Wright, 127 Cal. 688, 60 P. 431; Rosemead Co. v. Shipley Co., 207 Cal. 414, 278 P. 1038.

In the case before us, it is not difficult to divine the motives that prompted appellant to attempt to cause the transaction to have an appearance of a purchase and sale. The testimony shows that he declared it was a peculiar law that would not allow friends to do as they wished; that there must be some way to get around such a law; that he could not think of purchasing outright the interest of respondent, and take the chance of losing all he put into the proposition in the event the litigation should be unsuccessful—that he must have notes to show for what he loaned.

As is stated in California Jurisprudence, volume 17, page 789: "A man is not presumed to sell his property for very much less than it would be valued in the market; and if the consideration is grossly inadequate a court will not readily believe that the grantor intended to sell."

[2] We cannot agree with appellant's contention that the deed here involved was executed and delivered partly in consideration of the satisfaction of a former indebtedness of $2,000. The deed was merely a mortgage, and hence the authorities cited in support of that contention by appellant are not in point. The $2,000 indebtedness referred to was the amount which respondent agreed to pay appellant for the use of his securities in obtaining a bond to release his furniture. Appellant contends that this $2,000 was a part of the consideration for the execution of the deed, but the testimony of respondent is clear and unequivocal to the effect that he had definitely agreed with appellant to pay him a $30,000 bonus for the loans due him, and that appellant, at the suggestion of his own brother (who was a lawyer associated with Mr. Van Etten as representing respondent in the estate matter), to the effect that the $30,000 bonus, which it had been agreed appellant should receive, was sufficient for appellant to get out of the transaction, and that he ought to give back to respondent the note he held for the $2,000, thereupon gave said note back to respondent. It seems clear that this transaction constituted a gift, as strange as it may seem, of the amount of $2,000 that was then due from respondent to appellant. However, it may well have occurred to appellant at the time that it was good policy to forgive to his dear friend $2,000 in the hope that by so doing he would save any question being raised as to his right to receive the bonus of $30,000, for respondent had, just previous to the surrender of said $2,000 note, made the remark to appellant that he thought appellant was going to "skin him like a Shylock." The bonus that had been agreed upon was neither increased nor decreased as a result of the magnanimous gift of the $2,000, and the effect of the transaction was nothing more nor less than to entirely remove the $2,000 indebtedness from consideration. In all other respects the transaction remained exactly as it was before.

The court, in Chapman v. Hicks, 41 Cal. App. 158, 182 P. 336, 338, said: "'The presumption arising from the execution and delivery of a deed absolute in form is, undoubtedly, that it is made in pursuance of an agreement to sell, and vests an absolute title in the grantee. * * * At the same time the court has been watchful against all schemes of money-lenders to deprive unfortunate debtors of their lands at less than their value, under the claim that the transaction was a purchase, and not a loan.' Locke v. Moulton, 96 Cal. 22, 29, 30 P. 957, 959."

[3] While it is primarily a question for the trial court to determine what the intention of the parties was, there is clear and convincing evidence in the record before us that appellant never at any time considered that he was not loaning money to respondent, or that he did not demand and take the various deeds and assignments as security for the sums he claimed were due him, although it is apparent that he sought to conceal the fact, but it is most improbable that respondent would sell one-half of what he expected to receive from the estate of Mrs. Haweis for $2,000, and such sums, if any, that he was obligated to pay as a result of the contemplated litigation.

Appellant argues that there seems no good reason why he should undertake to expend the money in the litigation to determine respondent's rights, when his sole return in the event of success was to be the repayment of the amount of money expended with interest, and receive nothing for the "hazard" he incurred. This argument is based upon a false premise and begs the question under consideration. We think the most that can be claimed for the so-called "hazard" appellant claims he took in the agreement dated June 22, 1926, was that he agreed, in effect, to advance the costs of the litigation, if that should become necessary—which it never did—such costs consisting of "court costs, stenographic or phonographic reporter's fees, typewriting and printing, process-serving," etc., none of which appellant ever paid.

The main hazard emphasized by appellant is the payment of the attorney's fee respondent had agreed to pay. That fee was expressly made a contingent fee—a percentage of the recovery, dependent upon a recovery. Yet appellant reiterates throughout 145 pages of his briefs, the great "hazard" appellant accepted. This "hazard" he claims became a reality in this, that he, being the owner of one-half of the property, recovered, one-half of the attorney's fee came out of his share of the estate, and, hence, that he was saddled with the one-half of such attorney's fee. But, as we have said, he was not the owner of what he claims, nor was he the owner of any part thereof, and never paid any part of the contingent attorney's fee. Besides appellant never was under any obligation to pay or to advance any sum whatever on account of attorney's fees. Whatever trifling sum he might have been obligated to advance as costs, he never paid in whole nor in part—the same being paid by respondent and, hence, that portion of the great "hazard" incurred by appellant as costs, like the contingent attorney's fee, has no substantial basis upon which to rest. The sum loaned never was put in hazard, nor was any part thereof put in hazard. Appellant always held respondent's unconditional promise to pay, and at all times had ample security for the repayment thereof, as well as the repayment of all sums that he was, by any stretch of the imagination, obligated to pay, and there was no uncertainty concerning the transaction. He held a mortgage, in the form of a deed, on appellant's Cardiff property into which the moneys he loaned appellant went, and which was worth many times the amount of the loans plus any possible advances, plus the $30,000 bonus, for the Cardiff property had on it a $100,000 building; to say nothing about the lien he held against respondent's interest in the Haweis estate.

[4] The finding of the trial court is to the effect that the bonus of $30,000 was a bonus for the loans aggregating $27,000, and the evidence is ample to support the finding.

[5] Complaint is made by appellant of the order of the trial court permitting the filing of an amended complaint at the conclusion of plaintiff's case. The question as to whether or not an amended complaint should be filed is a matter very largely in the discretion of the trial court, and, so long as there is no abuse of discretion, the ruling of the court below should not be disturbed. We cannot see wherein appellant has been in any manner prejudiced by the fact that the amended complaint was filed. The trial court did not, therefore, err in making the order complained of, neither did the court err in denying appellant's motion for a new trial.

In view of what we have above said, it is not necessary to mention in detail the four main points upon which appellant relies for a reversal. Each point has been definitely decided against appellant's contention.

The judgment is affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

121 Cal.App. 455

TEXAS CO. v. BERRY GARAGE et al.*

Civ. 4490.

District Court of Appeal, Third District, California.

March 7, 1932.

1. Evidence ⚿441(9).

Evidence of oral agreement *held* admissible under pleadings to establish invalidity of written gasoline sales contract executed as mere artifice.

Defendant buyer alleged that written contract, providing for 4 cents per gallon discount, was not executed as a binding contract, but that it was distinctly understood that all gasoline ordered would be sold at a discount of 6 cents per gallon pursuant to an oral agreement, and it was contended that written agreement was executed merely to deceive seller's competitors.

2. Sales ⚿52(5).

Evidence supported judgment to effect that written gasoline sales contract was not intended to control price.

3. Evidence ⚿441(9).

Under proper pleading, oral evidence is competent to prove that purported written contract was not to become binding.

4. Appeal and error ⚿1071(6).

Court's omission to specifically find that written contract sued on was void *held* not reversible error, where, in view of finding adopted, such finding would have necessarily been adverse to appellant.

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

Action by the Texas Company against the Berry Garage and others. From the judgment, plaintiff appeals.

Affirmed.

Huston, Huston & Huston, of Woodland, for appellant.

Martin I. Welsh, and Anson H. Morgan, both of Sacramento, and Herbert Choynski, of San Francisco, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from a money judgment for the contract price of gasoline. The plaintiff claims the gasoline was purchased pursuant to the terms of a written agreement which was executed by the respective parties February 24, 1928. On the contrary, the defendants contend the gasoline was purchased under the terms of a previous oral agreement which entitled them to a discount of six cents a gallon from the local prevailing retail price thereof, while the written contract provides for only four cents discount per gallon. It is asserted the written agreement was executed with the express understanding that it was not to become binding upon the parties with respect to the price of gasoline, but that it was executed for the sole purpose of enabling the plaintiff to use the document to deceive other competing companies by making it appear therefrom that plaintiff was not allowing retail customers a rebate on the current price of gasoline in excess of four cents per gallon.

[1] Over the objection of the plaintiff, the defendants were permitted to introduce evidence of this oral agreement to purchase gasoline at a 6 cent discount per gallon from the current retail price thereof. It is contended this ruling of the court is erroneous, since it varies the terms of the written contract upon which the plaintiff's cause of action is founded.

We are of the opinion this evidence is competent under the pleadings in this case for the purpose of establishing the invalidity of the written contract, which became a direct issue in the case. The amended answer denies that the gasoline in question was purchased pursuant to the terms of the written contract which are set out in the complaint. On the contrary, it is therein alleged: "That all gasoline sold and delivered to defendants * * * was sold and delivered pursuant to the terms of an oral agreement made and entered into on said (1st) day of March, 1927, * * * upon the basis of six cents per gallon, less than the current retail price of gasoline, or what is commonly known as six cents differential." Respecting the invalidity of the written contract, the amended answer affirmatively recites: "That the alleged written agreement referred to in plaintiff's complaint was not signed, or executed or delivered by defendants as a binding contract between said parties, that it was distinctly understood and agreed by and between defendants and said * * * (plaintiff) that the provisions of said contract * * * would not be binding upon defendants, but that * * * all gasoline ordered or purchased by defendants, would be pursuant to the terms and conditions of the hereinabove mentioned oral agreement * * * on a six cent differential basis."

The trial court adopted findings favorable to the defendants upon the foregoing issue as to whether the gasoline was purchased pursuant to the oral contract or the alleged written agreement. It was found that the written agreement referred to in the com-

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⚿For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Dismissed per stipulation.

plaint was executed by the parties, and that it provided for four cents discount per gallon "from the tank wagon price" thereof, and that 119,295 gallons of gasoline were delivered to the defendants for which the purchase price had not been paid. The court, however, further found that "plaintiff did, up to March, 1928, allow defendants a five cent differential off of tank wagon price on the purchase and sale of gasoline." And further found: "That * * * the plaintiff and defendants did verbally agree that plaintiff would meet competition in price differentials and that the competition during the month of March or thereafter was six cents off tank wagon prices." And also found: "That defendants are entitled to receive a credit on said demand under plaintiff's first cause of action, of one cent per gallon."

There is substantial evidence to support the foregoing findings. Both Mr. Harris, who is one of the defendants, and J. E. Brenton, a former agent of the plaintiff, so testified. The following colloquy occurred during the examination of the last-mentioned witness:

"Q. Did * * * Mr. Harris * * * tell you that the Union Oil Company * * * had offered a six cent differential? A. Yes sir. * * *

"Q. * * * After he told you the Union Oil Company had offered the six cent differential, and you told him you would meet competition, you meant your company would give him a six cent differential, didn't you? A. That is just what I meant."

It satisfactorily appears that Mr. Brenton had the authority to make this agreement with the defendants. He testified: "Q. * * * Under whose authority did you make this statement to Mr. Harris? A. Mr. C. N. Herndon, who was the representative of this district at that time. And I was also told by other representatives we would meet competition." It also clearly appears there was an error in the date when this oral agreement to meet competition by allowing a six-cent differential was actually made. This agreement occurred in March, 1927, and not in 1928. The following testimony was given in that regard:

"Q. Mr. Brenton, since you testified yesterday in regard to the time when you had your arrangement with * * * Mr. Harris of the Berry Garage, to sell him gas at a six cent differential, have you refreshed your mind as to what year it really was? A. Yes sir.

"Q. What year was it? A. I told you yesterday sir, that the transaction took place in 1928, and it is my belief now I was in error; that transaction took place in 1927."

The intention of the parties to the effect that the written agreement was not to become binding, but, upon the contrary, was executed to mislead other competing gasoline companies regarding the net price received by the plaintiff for its gasoline, was testified to by Mr. Harris as follows:

"Q. This contract is dated in the month of February, 1928; who brought the contract to you to sign? A. I think it was Mr. Brenton. * * *

"Q. Did you take any notice of the amount of differential allowed you by that contract at the time you signed it? * * * Now, what was said by you, if anything? A. I said 'how is this, it only has four cents'; he says: 'well, that is all right, we don't want the other companies, such as the major companies to know what we are paying.'

"Q. What they were paying you? A. What differential I am getting, yes; he says, '* * * they (the written contracts) are really just to show in case they are needed with the other major companies, we can always show that you are only getting four cents, and other moneys such as the extra rebate, will be given to you by check.'

"Q. Did you receive rebates by check after this time? A. Yes sir."

[2] This furnishes substantial evidence in support of the judgment to the effect that the written contract was not intended by the parties to be controlling with regard to the price of the gasoline which was to be paid, but, upon the contrary, that it was executed to deceive other competing gasoline companies regarding the price which the plaintiff was receiving for gasoline. This theory is corroborated by the fact that one cent per gallon, in addition to the discount which is provided for by the terms of the written agreement, was actually paid to the defendants by the plaintiff.

[3] Under proper pleadings, oral evidence is competent to prove that a purported written contract was executed as a mere artifice to affect the relationship or conduct of third parties, and that it was mutually understood between the contracting parties that it was not intended to become binding upon them. Under such circumstances, the reception of oral evidence does not have the effect of varying the terms of the written instrument, but rather tends to prove the invalidity of the challenged document. For this purpose it is competent. Smith Co. v. Muller, 201 Cal. 219, 256 P. 411.

In the case last cited the court says: "Evidence that parties never intended a writing to constitute a contract, but that in lieu thereof another contract was entered into between them, is not objectionable under the parol evidence rule. Such evidence does not change a written contract by parol, but serves to establish that such contract had no force, efficacy, or effect."

[4] The court failed to adopt a specific finding to the effect that the written contract

was intended by the parties to be inoperative and void. But the court did find that the defendants were entitled to the discount of six cents per gallon as provided by the oral agreement, and rendered judgment accordingly. In support of the findings which the court did adopt and the judgment which was rendered, it must necessarily be inferred the written contract was deemed to be invalid. The oral agreement and the written contract are in irreconcilable conflict. In view of the findings which were adopted by the court, a specific determination of the validity of the written contract would have necessarily been adverse to the appellant. Under such circumstances, the omission to specifically find that the written contract is invalid is not reversible error. Phillips v. Stark, 65 Cal. App. 136, 223 P. 443; Hulen v. Stuart, 191 Cal. 562, 572, 217 P. 750; 24 Cal. Jur. 944, § 188.

The judgment is affirmed.

We concur: PRESTON, P. J.; PLUMMER, J.

121 Cal.App. 202

In re SILL'S ESTATE.

Civ. 8339.

District Court of Appeal, First District, Division 2, California.
Feb. 24, 1932.

Rehearing Denied March 25, 1932. Hearing Denied by Supreme Court April 21, 1932.

1. Husband and wife ⚷249.

Separate property of either spouse may be transmuted into community property without written agreement, providing understanding to that effect is fully consummated (Civ. Code, § 164).

2. Husband and wife ⚷264.

Evidence sustained finding property purchased with separate funds of both spouses and used as their home was community property entitling widow to probate homestead therein.

Facts disclosed both spouses contributed $500 of their separate funds to property purchased as their home, and that balance of purchase price was secured by mortgage on husband's separate property, and that both spouses contributed to upkeep and improvement of property involved.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

In the matter of the estate of J. Frank Sill, also known as J. F. Sill, Frank Sill, and Joseph Frank Sill, deceased. Petition for setting apart probate homestead by Emma F. Sill opposed by Olive Kenney. From an order setting apart probate homestead, Olive Kenney, objector, appeals.

Affirmed.

J. E. Hood, of Oakland, for appellant.

Snook, Snook & Chase, of Oakland, for respondent.

SPENCE, J.

Respondent, the surviving widow of the deceased, petitioned for an order setting apart a probate homestead claiming that the property was community property. Appellant, a daughter of the deceased by a former marriage, filed her written objections denying that the property was community property. Upon the hearing the trial court found that the property was community property and ordered that it be set apart as a homestead for the use of respondent, and that said property should belong to said respondent. Appellant appeals from said order.

The sole contention made on this appeal is that the evidence was insufficient to support the finding that the property was community property. In our opinion this contention is without merit.

Respondent and the deceased were married in 1909. Each had been married previously and each had children by such former marriage. It appears that both respondent and the deceased had some property at the time of their marriage, and that each thereafter kept a separate bank account. The deceased was a police officer and continued as such until 1913 when he was retired. His only income thereafter was from the rentals from his separate property in Oakland and from his police pension. The Santa Clara county property here involved was purchased in 1919 for the sum of $2,800. The deposit on the purchase price was made by the deceased, but the evidence does not clearly show whether this sum advanced as such deposit was community property or the separate property of the deceased. Nevertheless it was stipulated by counsel at the opening of the hearing that the $500 in cash contributed by the deceased on the purchase price was from his separate funds. Respondent agreed to and did contribute $500 in cash from her separate funds, and the balance of $1,800 was raised by placing a mortgage upon the separate property of the deceased in Oakland. Apparently nothing was said regarding the manner of taking title to the property in the preliminary conversations between the deceased and respondent. After the deposit had been made the real estate agent asked the deceased, "Shall I put this in your wife's name?" Deceased made no answer, but respondent spoke up and said, "It doesn't make any difference." As the parties left the real estate office deceased said to respondent, "Don't feel bad about it, you know it is just as much yours as it will be mine; this is our home." The property was conveyed to the deceased and was thereafter used as the home of the parties. Deceased paid the taxes and also paid for certain improvements while other improvements were paid for out of the separate funds of respondent. It does not appear that the $500 originally paid by respondent on the purchase price or the sums thereafter paid by respondent for improvements were ever repaid to her or that there was any agreement or understanding between the parties that said sums should ever be repaid.

[1] Conceding that the entire purchase price of the property was made up from the separate property of both deceased and respondent, we are nevertheless of the opinion that there was ample evidence to justify the finding and conclusion that the property in question became the community property of the spouses. Without regard to the presumption found in section 164 of the Civil Code, it is well settled that the separate property of either or both spouses may be transmuted into community property and this may be done without the necessity of any written agreement providing the agreement or understanding to that effect is fully consummated. Estate of Kelpsch, 203 Cal. 613, 265 P. 214; Title Insurance & Trust Company v. Ingersoll, 153 Cal. 1, 94 P. 94; Estate of Wahlefeld, 105 Cal. App. 770, 288 P. 870; Vieux v. Vieux, 80 Cal. App. 222, 251 P. 640; Martin v. Pritchard, 52 Cal. App. 720, 199 P. 846. It clearly appears from the foregoing authorities that the agreement or understanding between the parties is not required to be in any particular words and need not be attended with any particular formality as long as it may be fairly inferred from all of the circumstances in evidence that a community interest was intended by the parties. In Estate of Wahlefeld, supra, the court said at page 776 of 105 Cal. App., 288 P. 870, 873: "In the present case there was a meeting of minds and any form of express words, either spoken or written, that the property was to be considered community property was sufficient." In Martin v. Pritchard, supra, the court said at page 724 of 52 Cal. App., 199 P. 846, 848: "That the wife had an interest in the property is very clear. What the character of that interest was is not so certain. The court came to the conclusion, on a balancing of probabilities, that a community interest was intended by the parties. It cannot be said that the court's finding has no support in the evidence."

[2] In the present case respondent contributed her separate property along with the separate property of the deceased to acquire and improve a place to be used as their home. It does not appear that they had previously given any thought to whether the property should be conveyed to the deceased or to respondent or to both of them. When confronted with making this decision deceased said nothing, and respondent said it made no difference. Immediately thereafter deceased assured respondent that "It is just as much yours as it is mine; this is our home." While the parties did not formally agree in precise words that the property should be community property, it is a fair inference from all the circumstances that such was their intention and understanding.

The order is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

121 Cal.App. 368

In re SMITH'S ESTATE.

EMME v. EMME.

Civ. 8156.

District Court of Appeal, Second District, Division 2, California.

March 2, 1932.

Rehearing Denied April 1, 1932.

1. Appeal and error ⚷761.

Opening paragraph of discussion under each point in appellant's brief *held* not sufficient compliance with court rule requiring appropriate heading showing nature of question presented (Rules of Supreme Court and District Courts of Appeal, Rule 8).

2. Guardian and ward ⚷13(4).

Evidence *held* to support court's finding that wife was not fit guardian of minor child living with her and husband.

> The evidence disclosed that wife was found in very compromising situation on husband's unexpected return from hunting trip; that she was out very late on many evenings, leaving husband to care for child; and that she was given to profanity, interrupted witnesses on several occasions during trial to say they were lying or laugh at them, and seriously objected to child's religious upbringing, which she and husband promised child's natural parents; and that husband was able to and would give child both elementary and collegiate training.

3. Guardian and ward ⚷13(1).

Primary consideration in appointing guardian of minor child is latter's best interest respecting its temporal and moral welfare.

Appeal from Superior Court, Los Angeles County; Ernest Weyand, Judge.

Petition by Onie Bernice Emme for appointment as guardian of the estate and person of Bernice Louise Smith, a minor, contested by Frank Emme. From a judgment for contestant, petitioner appeals.

Affirmed.

John M. Gault and Don R. Lehman, both of Los Angeles, for appellant.

Bayard R. Rountree, of Los Angeles, for respondent.

IRA F. THOMPSON, J.

The petitioner and contestant were husband and wife and Bernice Louise Smith, the minor, who was eight years of age at the time of the trial, had lived with them since she was about two weeks old. However, she had not been legally adopted. At or about the same time that a complaint for divorce was filed, Mrs. Emme filed her petition to be appointed guardian of the estate and person of the minor, to which the husband responded by asking that he be appointed, and alleging that his wife was not a fit and proper person to be intrusted by the court with the responsibilities involved. By stipulation of the parties the cause was heard at the same time as the divorce action. This is an appeal from a judgment in favor of the husband.

[1] The appellant sets up two reasons for a reversal of the judgment. She says, first, that the evidence is overwhelmingly against the finding that she is not a fit and proper person to have the custody of the child; and, second, that the evidence does not support the finding that it is for the best interests of the child to place her in the custody of the respondent. It is patent that the entire argument is that the testimony is insufficient to support the decision. Before we pass to a recital of the essential evidence we must observe that counsel have, we think inadvertently, violated Rule VIII of the Rules of the Supreme Court and District Courts of Appeal, in that they have failed to present an appropriate heading, showing the nature of the question to be presented. In view of the fact that the opening paragraph of the discussion under each point would have constituted such a heading had it been printed in appropriate type and set apart as such, we have concluded not to dismiss this appeal, but we must call the attention of the profession to the fact that such is not a sufficient compliance with the rule and in effect give warning that we must insist upon a full and complete conformance with its requirements.

[2, 3] It is not necessary that we here review all of the testimony adduced at the hearing. Sufficient it is, for our purpose, to say that the evidence supporting the decision discloses that appellant was found by respondent upon his unexpected return from a hunting trip in a very compromising and unmotherly situation; that on many evenings she was out until very late while respondent was required to care for the child; that she was given to profanity; that during the trial of the action she interrupted the witnesses on several occasions to say they were lying, or to laugh at them; that she seriously objected to the religious upbringing of the child which she and her husband had promised the child's natural parents; and that respondent was able to and would give the girl not only elementary but collegiate training. The court was well within its rights in concluding as it did, and in view of the law that "the primary consideration for the guidance of the court is 'the best interest of the child with respect to its temporal and moral welfare' " (In re Matter of Allen, 162 Cal. 625, 124 P. 237, 239), it is difficult to understand how a different result could have been reached.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; FRICKE, Justice pro tem.

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121 Cal.App. 211

SEARS v. ILLINOIS INDEMNITY CO.

Civ. 506.

District Court of Appeal, Fourth District, California.

Feb. 24, 1932.

1. **Insurance** 🔑435.

Provision in indemnity insurance policy that insurer shall not be liable while automobile is driven by person under 16 *held* binding between parties.

> An "insurance policy" is a contract between two persons whereby one, the insured, agrees to pay to the other, the insurance company, certain sums, and the latter, the company, agrees, under certain conditions, to indemnify the former, the insured, against liability or against loss from liability.
>
> [Ed. Note.—For other definitions of "Policy of Insurance," see Words and Phrases.]

2. **Insurance** 🔑435.

Statute permitting injured persons after judgment to sue indemnity insurers imposes no liability for accidents not covered by policy (St. 1919, p. 776).

3. **Insurance** 🔑435.

Where insurer is not liable to insured because automobile was driven by person under

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

sixteen, person injured has no claim against insurer (St. 1919, p. 776).

4. **Insurance** ⚷388(5).

Where indemnity insurer defended action against insured under nonwaiver agreement, insurer waived none of its rights under the policy.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by Helen Sears, a minor, by E. P. Guthrie, her guardian ad litem, against the Illinois Indemnity Company. From judgment for plaintiff, defendant appeals.

Reversed and remanded, with directions.

Kidd, Schell & Delamer, of Los Angeles, for appellant.

L. M. Cox, of San Bernardino, for respondent.

LAMBERT, Justice pro tem.

The facts leading up to this case are briefly that on the 8th day of May, 1927, Gilbert Angrimson owned a Buick automobile. This automobile was being driven by one Wilson Parker, who was then a boy of the age of 15 years, 4 months, and 29 days. While he was driving the car an accident occurred in which the plaintiff and respondent herein, Helen Sears, sustained injuries. The respondent then sued Gilbert Angrimson, his wife, Gilbert Kent Angrimson, the son of Gilbert Angrimson, and his wife, and Wilson Parker, for damages for these injuries. At the time of the happening of the accident Gilbert Angrimson was insured in the Illinois Indemnity Company, the appellant herein, under a policy of indemnity insurance. In the first action the Illinois Indemnity Company, appellant herein, employed counsel and defended the action on behalf of all the Angrimsons. Wilson Parker was represented by other counsel. Before defending the suit the appellant herein entered into a nonwaiver agreement with Gilbert Angrimson and his wife wherein it was agreed that by defending the suit it did not waive any of the terms or conditions of the policy or admit any liability under it. It was quite elaborate, but the purpose of it was to preserve whatever defense the appellant might have to a suit against it in case plaintiff recovered judgment in the then pending action. The first action was tried by a jury and resulted in a judgment in favor of respondent against Gilbert Angrimson and Gilbert Kent Angrimson, his son, but no judgment was rendered against Wilson Parker. The appellant herein refused to pay the judgment on the ground that inasmuch as the car was being driven at the time by a person under 16 years of age it was not liable under its policy. The respondent then, in pursuance of the Statutes of 1919 (St. 1919, p. 776), brought an action against appellant on the judgment heretofore mentioned, which action resulted in a judgment against appellant in the sum of $5,000, the amount of the policy. This appeal is prosecuted from the judgment so rendered.

The appeal presents two questions: First, whether appellant was liable under its policy in view of the fact that the automobile at the time of the accident was being driven by a person under 16 years of age; second, whether appellant waived this defense by employing counsel and defending the Angrimsons in the first suit.

Taking up the first proposition, we find this policy contains the following clause with reference to this matter: "Exclusions: 2. This company shall not be liable for: (a) * * * (d) while driven or manipulated by any person under the influence of intoxicating liquor or under the age fixed by law, or under the age of sixteen years in any event. * * *"

The trial court found in this action (finding 10) that at the time respondent was injured the Buick automobile was being driven by Wilson Parker, a minor, of the age of 15 years, 4 months, and 29 days. The court also in the same finding found that "Gilbert Kent Angrimson, one of the defendants in said case, was present in said Buick automobile at the time the said accident occurred and the said automobile was at said time in the control of, under the management of and being operated by the said Gilbert Kent Angrimson." From the foregoing finding it will be seen, and it is admitted, that the car was being driven by a minor under 16 years of age at the time of the accident, and comes squarely within the excepted class in the policy.

Turning now to the decisions for some light on the subject, we find that able and industrious counsel in the case have been unable to find the problem exactly solved by any decision in this state, and our own efforts have met with no more success. However, we do find in California, cases similar in principle. In Maryland Casualty Co. v. I. A. C., 178 Cal. 491, 173 P. 993, which was a case in which the company had issued a workmen's compensation policy covering the liability of the employer because of the injury to any employee "engaged in general farm work, excluding the operation of farm machinery," an employee, while standing in the field and using a light to guide the engineer, who was operating the machine, was injured by a bar attached to a disk harrow which was being pulled by the machine. The court held that the company was liable because the employee so injured was not operating the machine. Holding that the policy did not cover injuries to those actually engaged upon the machine, the court says, with reference to the exclusion provision of the policy, page 494 of 178 Cal., 173 P. 993, 994: "We think, therefore, that the meaning of the phrase should be restricted so that it would include those who were actually engaged upon the machine, and not those who were assisting in general operations for which the machine furnished only the motive power."

In Coolidge v. Standard Accident Insurance Co. (Cal. App.) 300 P. 885, June 11, 1931, which was a case wherein the accident occurred in 1926, at the time of the accident the automobile was being operated with a trailer attached. The fact that the trailer was so attached had nothing to do with the accident. The policy excluded operation of the automobile while a trailer was attached thereto. Notice of the accident was not given the insurance company until May 12th. The insurance company undertook the defense of the action between the injured party and the insured under a written reservation of rights. It was claimed that the fact that a trailer was attached to the automobile did not negative liability upon the part of the insurance company, and it was further contended that, even if it did, the undertaking of the defense of the suit against the insured constituted a waiver of the right of the insurance company to rely either upon the fact of the trailer being attached to the automobile or on the fact of the delayed notice. The court held that the operation of the automobile with a trailer attached resulted in there being no liability upon the company under the policy for an accident occurring under such circumstances. In this connection the court says, page 888 of 300 P.: "There is, however, no evidence in the present case that the trailer did actually cause the accident or that it materially contributed to the mishap. The answer did allege that the trailer was attached to the automobile at the time of the accident, and the claim was made that this fact exempted the company from liability. It is true the answer failed to allege that the attached trailer actually caused the accident or that it contributed to the affair. It was not necessary to make these allegations. The defendant's exemption from liability does not depend upon the attached trailer becoming the cause of the accident or even contributing to the casualty. The very fact that the trailer was being towed at the time of the accident relieved the defendant from liability according to the specific terms of the insurance policy. The company was entitled to protect itself against this added hazard. The unambiguous terms of the policy did exempt the company from liability while the automobile was towing a trailer."

In other jurisdictions we find some cases cited by appellant touching the principle under consideration as follows: In Morrison v. Royal Indemnity Company, 180 App. Div. 709, 167 N. Y. S. 732, 733, the policy of automobile insurance provided that the company would not be liable for injuries caused in whole or in part by an automobile while being driven or manipulated by any person in violation of law as to age, or, if there were no legal age limit, under the age of sixteen years. At the time the accident occurred the driver of the automobile was seventeen years of age. Consequently the provision of the policy which became important was that exempting the company where the automobile was being driven by a person in violation of law as to age. The accident occurred in New York. The New York statute (Highway Law [Consol. Laws c. 25] § 282, subd. 2, as added by Laws 1910, c. 374) provided: "Age of Operator. No person shall operate or drive a motor vehicle who is under eighteen years of age, unless such person is accompanied by a duly licensed chauffeur or the owner of the motor vehicle being operated." It appeared that the driver of the automobile at the time of the happening of the accident was not accompanied by a duly licensed chauffeur or by the owner of the automobile. The court held that he was driving the automobile in violation of the provisions of the New York statute as to age limit. The court therefore held that there was no liability under the policy upon the part of the defendant insurance company, and a judgment of nonsuit against the plaintiff was affirmed.

In Wagoner v. Fidelity & Casualty Company, 215 App. Div. 170, 213 N. Y. S. 188, the policy again provided against liability caused by any automobile while operated by or while in charge of any person who was either under the age fixed by law for the driver of automobiles or who in any event was under the age of sixteen years. Again it happened that the driver of the automobile was seventeen years of age. The accident happened in New York, and the same statute applied as in the previous case. Again since the driver was not accompanied by a licensed chauffeur or the owner of the automobile the court held that there was no liability upon the insurance company under its policy, and a judgment in favor of the plaintiff was reversed and the complaint ordered dismissed.

The case of Oxford v. Fidelity & Casualty Company, 248 Pa. 312, 93 A. 1072, involved an employer's liability insurance policy which, however, provided that it did not cover injuries suffered or caused by a minor hired contrary to law or by a minor while performing work contrary to law. The statute prohibited the employment of minors under the age of eighteen in certain work. The plaintiff employed such a minor on such work, and the minor sustained an injury. It was held that the defendant insurance company was entitled to defend the case on the ground that the accident was not covered by its policy.

Fidelity & Casualty Company v. Palmer, 179 Ky. 518, 200 S. W. 923, L. R. A. 1918C, 808, involved an elevator liability insurance policy.

Again the policy contained a condition whereby it would not cover injuries or death suffered or caused by the elevator while being operated by a boy under the age fixed by law for elevator attendants. The elevator was in fact being operated by a boy under the age fixed by law and a passenger therein was injured. It was held that the insurance company was not liable under the terms of its policy and that it was immaterial what cause produced or brought about the injury to the passengers. It was further held that it was also immaterial whether that injury was caused by some act or omission on the part of the boy running the elevator, or was caused by some defect in the elevator. The court held that the policy simply did not cover the accident and that there could, therefore, be no liability upon the insurance company. The court says, page 522 of 179 Ky., 200 S. W. 923, 924: "A further argument is made by counsel for the hotel company that as the accident and resulting injury suffered by the passenger who recovered damages from the hotel company was due to a structural defect in the elevator and not to any fault or negligence on the part of the operator, the insurance company should not be allowed to escape liability under the contract. But if we should attempt to adopt this construction, we would be at once confronted by the words of the contract exempting the insurance company from liability for 'injuries to any person in or about the elevator while operated by or in charge of any person under the age fixed by law for elevator attendants.' So that giving to these exempting words their ordinary meaning and such meaning as they would have in common, everyday usage, it makes no difference what cause brought about the accident or injury, or how it happened. The exemption clause is sweeping in its terms, and the only fact necessary for the insurance company to establish to make the exemption from liability effective is to show that the elevator at the time the injury complained of happened was operated by or in charge of a person under the age fixed by law for elevator attendants. The exemption of the company from liability does not depend on the fact that the injury was caused or brought about by some act of omission or commission on the part of the elevator attendant, but on the fact that a prohibited elevator attendant was operating or in charge of the elevator. When the elevator is being operated by a prohibited attendant it is wholly immaterial what cause produced or brought about the accident or injury or death to the passenger."

Kilby Car, etc., Co. v. Georgia Casualty Company, 209 Ala. 356, 96 So. 319, 320, involved an employer's liability policy whereby the company agreed to indemnify the employer for claims for damages from bodily injuries, excluding, however, injuries "suffered by or caused by any child employed by the assured contrary to law as to age." A child was so employed contrary to law as to age. The insurance carrier paid out certain moneys on account of the claim made by the employer and then on discovering the facts brought this action to recover said moneys so paid. Judgment went in favor of the employer, and the insurance company's motion for a new trial was granted. The employer appealed from this order. The order was affirmed, the Supreme Court holding that under the policy there was no liability upon the part of the insurer whether or not the unlawful employment was the cause of the injury. Again the court holds that the accident simply was not covered by the policy, and in this connection it says, page 358 of 209 Ala., 96 So. 319, 320: "The foregoing is in line with the recognized rule that policies of insurance must be construed more strongly against the insurer; still the words of the policy must be given the meaning which they ordinarily bear, and, where it is manifest, as it is in the instant contract, that the intention of the insurer and the insured was that liability should attach only in given circumstances, the law will uphold the contract according to its true intent and import. It is a common expression of insurance law that the policy is the measure of the rights of everybody under it. N. W. Ins. Co. v. McCue, 223 U. S. 252, 32 S. Ct. 220, 56 L. Ed. 426, 38 L. R. A. (N. S.) 57; Morgan v. Prudential Life Ins. Co., supra [209 Ala. 110, 95 So. 355]."

From the above authorities, which appear logical and sound, it would seem that the age of the driver of the car would be a good defense as between Angrimson and the insurance carrier. The Supreme Court in Hynding v. Home Accident Ins. Co., reported in 7 P.(2d) 999, 1000 (Jan. 30, 1932), discusses the question of certain provisions of policies similar in their general provisions to the one under consideration. In that case the plaintiff, after obtaining a judgment against the negligent driver, the insured, brought an action against the insurance carrier to recover on the judgment pursuant to the statute of 1919. Stats. 1919, p. 776. This act, so far as it is material here, provides as follows: "No policy of insurance against loss or damage resulting from accident to, or injury suffered by another person and for which the person insured is liable * * * or, against loss or damage to property caused by * * * any vehicle, and for which loss or damage the person insured is liable, shall be issued or delivered to any person in this state * * * unless there shall be contained within such policy a provision that the insolvency or bankruptcy of the person insured shall not release the insurance carrier from the payment of damages for injury sustained or loss occasioned during the life of such policy and stating that in case judgment shall be secured against the insured in an action brought by the injured person or his heirs or personal representatives, in case death resulted from the accident, then an action may be brought against the company, on the policy and subject to its terms and limitations, by such injured person, his heirs or personal representatives, as the case may be, to recover on said judgment."

The insurance carrier set up the defense that the policy contained what is commonly called a co-operating clause, whereby the insured agreed to assist the insurance company in the defense of any suit that might thereafter be brought on the policy, and that the insured involved in the accident had refused to co-operate in the defense, and the Supreme Court held that this was a good defense, and in the course of the opinion it is said, at page 1002 of 7 P.(2d): "We see no escape from the conclusion that the violation of the co-operation clause by the assured was a valid defense against the injured party's action. We say this with the knowledge that in some cases it may work a hardship on such party, who is ordinarily in no position to force the assured to co-operate. Further, there is the possibility of collusion between the assured and the insurance company, to defeat the rights of the injured party. This possibility is balanced, of course, by an equal possibility of collusion between the assured and the injured party to defeat the rights of the insurance company. Coleman v. New Amsterdam Casualty Co., supra [247 N. Y. 271, 160 N. E. 367, 72 A. L. R. 1443]. Neither of these possibilities, however, is properly subject to consideration here in view of the terms of our statute. It is not a compulsory insurance law, requiring every automobile owner or those in a particular class to secure insurance for the protection of the public generally. This latter type of statute, frequently found in the regulation of taxicabs and other carriers for hire, has usually been given a construction consonant with its purpose, as a result of which the injured party is permitted to recover against the insurance company regardless of the acts of the assured. See Kruger v. California Highway Indemnity Exchange, 201 Cal. 672, 258 P. 602; Boyle v. Manufacturers' Ins. Co., 96 N. J. Law, 380, 115 A. 383; Devlin v. New York Mutual Casualty Taxicab Ins. Co., 123 Misc. Rep. 784, 206 N. Y. S. 365; Cohen v. Metropolitan Casualty Ins. Co., 233 App. Div. 340, 252 N. Y. S. 841; Marx, Compulsory Compensation Insurance, 25 Columb. L. Rev. 164. Our statute regulates to a certain defined extent private policies of indemnity insurance. It deprives the insurance carrier of the defense of insolvency or bankruptcy of the assured, and it permits an action to be brought by the injured party on the policy after judgment against the assured, but the action is 'subject to its terms and limitations.' The object of the statute, similar to that of most of the other acts, was to reach a particular evil and not to make this private voluntary contract serve the purpose of compulsory insurance. See Coleman v. New Amsterdam Casualty Co., supra; Merchants' Mutual Automobile Liability Ins. Co. v. Smart, 267 U. S. 126, 45 S. Ct. 320, 69 L. Ed. 538; Guerin v. Indemnity Ins. Co., 107 Conn. 649, 142 A. 268; Vance on Insurance, § 178, p. 682 et seq.; note, 25 Columb. L. Rev. 661. The proviso that the action is subject to the terms and limitations of the policy, if it means anything, means that the right of action is not absolute, but that there are some defenses available to the company. Of course, no defense can be set up which defeats the statutory object, and of this type is a stipulation involving the financial responsibility of the assured, or a requirement of proof of insolvency or bankruptcy, or return of execution unsatisfied. Malmgren v. Southwestern Insurance Co., supra [201 Cal. 29, 255 P. 512]. We are also of the opinion, and we think most of the authorities are agreed, that the provision must be one reasonably necessary for the protection of the insurance company, and one which can readily be complied with by the assured; and that the violation of the condition by the assured cannot be a valid defense against the injured party unless in the particular case it appears that the insurance company was substantially prejudiced thereby. See George v. Employers' Liability Assur. Corp., 219 Ala. 307, 122 So. 175, 72 A. L. R. 1438; Indemnity Ins. Co. v. Davis' Adm'r, 150 Va. 778, 143 S. E. 328; Huddy, Encyclopedia of Automobile Law (9th Ed.) vol. 13-14, § 298, p. 378."

[1] As to the last paragraph above quoted, we have considered what application, if any, it might have in the instant case, but in view of the matter under discussion in the case and the fact that the cases cited in support thereof all had to do with requirements after the accident occurred, and having in mind the familiar rule that expressions used in judicial opinions are always to be construed and limited by reference to the matters under consideration (City of Pasadena v. Stimson, 91 Cal. 238, at page 250, 27 P. 604), we are of the opinion that we are not required to determine the reasonableness, the ability of the insured to comply with it, or whether the insurance carrier was prejudiced by this condition under consideration—this condition as to the age of the driver being one going to the very essence of the policy and one for which the noncompliance with it would be a good defense. A policy of insurance is nothing more or less than a contract between two persons whereby the one, the insured, agrees to pay to the other, the insurance company, certain sums, and the latter, the company, agrees, under certain conditions, to indemnify the former, the insured, against liability or against loss from liability.

In Boole v. Union Marine Ins. Co., 52 Cal. App. 207, it is said, at page 209, 198 P. 416, 417: "Contracts of insurance are not different from other contracts. In the absence of statutory provisions to the contrary, insurance companies have the same right as an individual to limit their liability, and to impose whatever conditions they please upon their obligations, not inconsistent with public policy."

Again, in Bassi v. Springfield Fire Ins. Co., 57 Cal. App. 707, it is said, at page 712, 208 P. 154, 156: "Policies of insurance are written contracts between the parties and are governed by the same rules which are applicable to contracts generally."

[2] From the foregoing we decide that if the insured had paid the judgment and brought an action to compel the insurance carrier to indemnify it, this breach of condition would have been a good defense. The next inquiry is, Does the injured person stand in a different position and therefore may maintain the suit successfully, although the insured could not have done so? There is nothing in the statute of 1919 above quoted enlarging the liability of insurance companies or purporting to give injured persons any additional rights, except it does permit the injured person, after judgment against the negligent insured, to bring suit to force collection, and excludes the insolvency or bankruptcy of the insured as a defense.

In Bryson v. International Indemnity Co., 88 Cal. App. 100, 262 P. 790, which was a case in which the claimant recovered a judgment against the insured and then brought suit against the insurer, the court said, at page 103 of 88 Cal. App., 262 P. 790, 792: "Since the policy provides for an action on such a judgment by the injured person against the company, under the circumstances stated, the evident intent is that such person shall have the rights which the insolvent insured would have had if he had paid the judgment."

And in the case of Royal Indemnity Co. v. Morris, 37 F.(2d) 90, which was a case decided by the Circuit Court of Appeals for the Ninth District, which includes California, and which was a case that arose under a policy of insurance issued in California and was decided under California law, the question involved was whether the refusal of the insured to allow the insurer to defend the suit brought against him by an injured party was a defense to the insurance company when the injured party, after recovering a judgment against the insured, brought suit against the insurance company. At page 92 of 37 F.(2d) the court said: "Upon the assumption that Gomez, as we hold, was an 'insured,' it must be conceded, under the facts stipulated, that he violated a material condition of the policy in declining to permit any defense to be made to the action brought against him by the appellee; and, as we understand, it is not controverted that as a result of the default he forfeited his right to claim indemnity under the policy. That being true, the question remains whether the appellee is in any better position. This question we expressly reserved in the Colthurst Case, supra [(C. C. A.) 36 F.(2d) 559], but it now becomes necessary to decide it. Upon consideration we feel constrained to answer it in the negative. Such is the weight of authority as appears from the citations in the Colthurst Case. And see, also, Coleman v. New Amsterdam Casualty Co., 247 N. Y. 271, 160 N. E. 367, 369 [72 A. L. R. 1443]. Speaking of a statute of New York to which the provision of this policy in favor of the injured person conforms, the Court of Appeals of New York in the Coleman Case said: 'The statute was prompted by a definite mischief. * * * Before its enactment, the insolvency of the assured was equivalent in effect to a release of the surety. The policy was one of indemnity against loss suffered by the principal, and loss to him there was none if he was unable to pay. *The effect of the statute is to give to the injured claimant a cause of action against an insurer for the same relief that would be due to a solvent principal seeking indemnity and reimbursement after the judgment had been satisfied. The cause of action is no less but also it is no greater.* Assured and claimant must abide by the conditions of the contract.' We see no escape from the reasoning of this and the other cases referred to in which a similar conclusion is reached, and it is equally applicable to the California statute. If the protection afforded by the statute is inadequate, that is a consideration for the legislature and not for the courts." (Italics ours.)

Metropolitan v. Colthurst, 36 F.(2d) 559, is another case decided by the Circuit Court of Appeals for the Ninth District and arose in Solano county, Cal. In that case the plaintiff sued in Solano county for personal injuries. The insured turned over the papers to the insurance company. Shortly thereafter the attorney for the plaintiff notified the insurance company that he was dismissing the Solano county suit but starting a new one in Napa county. The insured was served with the papers in the Napa county case but never turned these over to the insurance company. In the Napa county case the insured allowed his default to be taken with the result that a judgment therein became final. Plaintiff then sued the insurance company under the precise statute involved in the case at bar and also alleged that the insured was at all times insolvent. The Circuit Court of Appeals for the Ninth District (that is the one including California) held that the insurance company was not liable to the plaintiff because of the failure of the insured to comply with the terms of the policy and tender to the insurance company the papers in the Napa county case. The decision, however, was partly based upon the proposition that, knowing of the interest of the insurance company in the case, it became plaintiff's duty to have furnished the company with the complaint and summons in the Napa county case. On *rehearing*, however, the court reversed itself on this latter proposition, thereby exempting the insurance company from liability and placing its decision squarely on the ground that the insured had not lived up to the provisions of the policy.

The respondent cites Finkelberg v. Continental Casualty Company, 126 Wash. 543, 219 P. 12; and Hynding v. Home Accident Insurance Company, as decided by the District Court of Appeal, 2 P.(2d) 423, hearing granted (Cal. Sup.) 7 P.(2d) 999. The Supreme Court refused to adopt the reasoning in these cases as a whole. It did, however, approve the cases of Royal Indemnity Co. v. Morris, and Metropolitan v. Colthurst, supra, and other cases of similar import. In fairness to the respondent it must be said that the decision of the Supreme Court in Hynding v. Home Accident Insurance Co., supra, very materially altered the holding in the cases relied on most strongly by appellant.

[3] We having reached the conclusion in this case that the provision in the policy which was violated by the insured was one which would constitute a good defense in any suit which the insured might have brought to compel the insurance carrier to indemnify him, we also decide that the injured person has the same right against the insurance carrier as the insured would have, and that a defense good against the insured is good against the injured claimant. In other words to put it in plain language, if the so-called insured is not in fact insured by the policy as in this case, at the very time the accident occurred the injured person cannot recover against the insurance carrier.

[4] Respondent also seeks to uphold this judgment on the theory that because the insurance company defended the first cause of action, therefore it assumed all liability for any judgment which might be recovered therein and is now liable to the plaintiff, regardless of any defense it might have under the terms of the policy. This contention cannot be upheld. There are some authorities holding that a defense of a suit against an insured by an insurance company is deemed a waiver of certain rights by the insurance company, where the company so defends without any reservation of rights. There are cases to the contrary, but it is not necessary for us to attempt to distinguish the cases or decide whether this case falls in one class or the other, for it was stipulated in this case, and so found by the court, that before the beginning of the former trial, the insured and the appellant entered into a written nonwaiver agreement heretofore mentioned in this opinion. The authorities seem to be almost unanimous that an indemnity company under such circumstances waives none of its rights by reason of having defended the original suit.

In Bryson v. International Indemnity Co., supra, at page 103 of 88 Cal. App., 262 P. 790, 792, in discussing the statute under which the action was brought (Stats. 1919, p. 776), it is said: "The statute cited requires a provision in such a policy, that, in the event of the insolvency of the insured and the recovery of judgment for damages against him by an injured person, 'an action may be brought against the company, on the policy and subject to its terms and limitations, by such injured person, * * * to recover on said judgment.' Had the insured paid the amount of the judgment, it would have been conclusive in his favor against the company on every issue properly tried in the action against him, he having notified the company of the action and requested it to defend the same. Civ. Code, § 2778, subd. 5. Since the policy provides for an action on such a judgment by the injured person against the company, under the circumstances stated, the evident intent is that such person shall have the rights which the insolvent insured would have had if he had paid the judgment. Such a judgment is conclusive only in respect to the matters adjudged. No one would contend that it precludes the company from defending on the ground that it did not issue the alleged policy or that the policy issued by it does not cover the motor vehicle which caused the injury. It seems equally clear that the company may show in defense that its policy does not indemnify against liability for damage to persons of the class to which the injured person belongs. In other words, before the company can be held liable as an indemnitor, it must be proved that it is an indemnitor. 'While one who is required to protect another from liability is bound by the result of litigation to which such other is a party, provided the former had notice of such litigation, and an opportunity to control its proceedings, a judgment against a party indemnified is conclusive in a suit against his indemnitor only as to the facts thereby established. The estoppel created by the first judgment cannot be extended beyond the issues necessarily determined by it.'"

In Sargent Manufacturing Co. v. Travelers' Insurance Co., a Michigan case reported in 165 Mich. 87, 130 N. W. 211, 34 L. R. A. (N. S.) at page 491, the author's note in connection with that case says: "It may be laid down as a general rule of law, gathered from the above decision and the authorities reviewed herein that an indemnity insurer will not be estopped to set up the defense that the insured's loss was not covered by the contract of indemnity, by the fact that the insurer participated in the action against the insured, if, at the same time, it gives notice to the insured that it does not waive the benefit of such defense."

And in Coolidge v. Standard Accident Insurance Co., supra, on the point of waiver at page 888 of 300 P. it is said: "Finally, it is asserted that the insurance company waived the failure of the assured to notify it of the occurrence of the accident within a reasonable time, and waived the exemption from liability on account of the presence of the trailer which was attached to the automobile at the time of the accident, by its effort to procure an adjustment of the claim for damages, and by its assistance in the defense of the original action for damages. This contention that a waiver resulted from the conduct of the insurance company as above related is without merit. A waiver is a voluntary relinquishment of a known right. First National Bank of Los Angeles v. Maxwell, 123 Cal. 360, 55 P. 980, 69 Am. St. Rep. 64; Jones v. Maria, 48 Cal. App. 171, 191 P. 943; Aronson v. Frankfort, etc., Co., 9 Cal. App. 473, 99 P. 537; 8 Words and Phrases, First Series, page 7375; 5 Cooley's Briefs on Insurance, 3939. It is true that a waiver may be either express or implied. Conduct on the part of the insurance company which will warrant the inference that it intended to waive a provision of the policy, and which deceived the insured so as to prevent his fulfillment of the terms of the contract may amount to a waiver. Francis v. Iowa National Fire Ins. Co. (Cal. App.) 297 P. 122. In the present case, however, the conduct of the insurance company may not be construed to constitute a waiver. The intention of the company to reserve its exemption from liability on account of the trailer which was attached to the automobile at the time of the accident, and to its right to notice of the accident as provided by the terms of the policy, may not be doubted. The plaintiff's signature to a written reservation of these rights was demanded by the insurance company as a prerequisite to its consent to aid in behalf of the plaintiff in an effort to adjust the claimed damages and as a condition upon which the company agreed to assist in the defense of the original action. The letter accompanying this requested reservation of rights also informed the plaintiff that the insurance company insisted upon its exemption from liability because of the plaintiff's failure to furnish notice of the accident and on account of the attached trailer. The conduct of the insurance company renders it indisputable that it did not intend to waive these exemptions." See, also, Emerson v. Western Automobile Indemnity Association, 105 Kan. 242, 182 P. 647; Eckert v. Joice, 152 Minn. 440, 189 N. W. 125; Hartigan v. Casualty Co., 97 Misc. Rep. 464, 161 N. Y. S. 145; Neil v. Hartford Fire (C. C. A.) 1 F.(2d) 904.

In view of the conduct of the appellant in this case in obtaining the waiver agreement, surely under the authorities cited it cannot be held that there was any waiver in the case. The cases cited by respondent on this branch of the case have been considered by us and have been found not to be in point. In fact the case of Coolidge v. Standard Accident Insurance Co., supra, would seem to be conclusive of the matter.

It is our conclusion that on the findings made judgment should have been entered for the defendant. If we are right in this conclusion it follows from the undisputed facts in this case and the law applicable thereto that respondent cannot recover in this action.

It is therefore ordered that the judgment be reversed, and the court is directed to enter a judgment for the appellant.

We concur: BARNARD, P. J.; MARKS, J.

McCARTNEY v. CAMPBELL et al. (KUNCE, Intervener). *

Civ. 522.

District Court of Appeal, Fourth District, California.

March 3, 1932.

Rehearing Denied April 1, 1932. Hearing Granted by Supreme Court May 2, 1932.

1. Brokers ⚷106.

Finding land sale contract executed by broker was owner's contract *held* unsupported.

Finding was unsupported, since the contract for sale of land executed by broker merely stated that broker was duly authorized agent of owner, and there was no other evidence that the contracts were contracts of owner.

2. Brokers ⚷94.

Agency contract *held* not to authorize broker to execute sale contract for owner.

Agency contract did not authorize broker to execute contract for sale of land in behalf of owner, since provision that owner would on demand deed property in trust and enter into trust agreement, authorizing broker to sell lots, and that trustee thus appointed should have power to execute contracts and deeds, clearly negatived existence of any intention on part of owner to grant to the broker the power which was thus expressly conferred on trustee.

⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 16 P.2d 729.

3. Frauds, statute of ⚷116(10).

Parol evidence *held* insufficient to establish owner ratified broker's contract for sale of land, since ratification must be in writing (Civ. Code, § 2310).

4. Brokers ⚷103.

In absence of evidence that owner was advised of names of purchasers or terms of contract, no basis existed for contention that owner had ratified broker's contracts for sale of land.

5. Principal and agent ⚷166(1).

That ratification of agent's acts may be implied from principal's conduct, principal must have full and actual knowledge of all material facts.

6. Brokers ⚷106.

That payments were collected under land contracts by broker's assignee and paid over to owner *held* not to establish owner's ratification of contracts, in absence of evidence establishing change of possession of land.

Appeal from Superior Court, Los Angeles County; Harry A. Hollzer, Judge.

Action by Alice G. McCartney and another against A. P. Campbell and others, in which Peter Kunce intervened. From an adverse judgment, plaintiffs appeal.

Reversed.

See, also, 208 Cal. 647, 284 P. 220.

Harry L. Cohn, of Long Beach, and William J. Clark, John L. Richardson, T. E. Parke, and Howell W. Richardson, all of Los Angeles, for appellant.

C. E. McDowell, of Los Angeles, in pro. per.

Tanner, Odell & Taft, of Los Angeles, for respondent Timm.

H. O. Harrawood, of Redlands, and Ernest B. Coil, C. E. McDowell, Louis F. Laberere, John A. Cronin, W. C. Shelton, George W. Burch, Jr., and McNeil & Cotter, all of Los Angeles, for other respondents.

F. Walton Brown and Leet W. Bissell, both of Los Angeles, for intervener and respondent.

JENNINGS, J.

Plaintiff instituted this action to quiet her title to certain real property located in the county of Los Angeles. The record discloses that on April 17, 1918, plaintiff was the owner of the real property whose title is the subject of controversy herein, and that on said date she entered into a contract with the defendant A. P. Campbell by which she granted to said defendant an exclusive agency for the sale of said property for a period of six months and an option to continue the agency for a further period of one year succeeding the six-month period upon payment by said Campbell of certain interest charges and a definite sum for the discharge of certain street assessments against the property. The contract was assigned with plaintiff's consent to defendant Campbell-Bentley Company on April 18, 1918. During the six-month period covered by the above-mentioned contract, the Campbell-Bentley Company entered into various agreements with individuals for the sale by said company to said individuals of certain lots comprised in the real property for whose sale A. P. Campbell held an exclusive agency by virtue of the terms of the aforesaid contract. These purchasers of lots under contract with the Campbell-Bentley Company were named as defendants in this action and filed answers claiming rights in the real property arising out of their contracts with the Campbell-Bentley Company. Some of them also filed cross-complaints by which they sought from plaintiff specific performance of the contracts entered into between them and the Campbell-Bentley Company.

After the terms for which the exclusive sales agency contract had expired, and on February 1, 1919, plaintiff entered into a contract with A. P. Campbell and E. E. McCalla by which plaintiff purported to give to Campbell and McCalla for a term of two years an exclusive option to purchase the real property which was the subject of the agency contract of April 17, 1918, for a certain sum of money. The record discloses that Campbell and McCalla did not within the two-year period exercise their option to purchase the property, although during this period they made certain payments on the purchase price, and that on August 10, 1921, plaintiff gave written notice to Campbell and McCalla that she rescinded the contract of February 1, 1919, for failure and neglect of Campbell and McCalla to comply with and to perform the terms and conditions of the contract. The court found that there was due, owing, and unpaid to plaintiff from E. E. McCalla, who appears to have succeeded to all rights of A. P. Campbell under the contract of February 1, 1919, the sum of $7,796.60, and that, upon payment to plaintiff by McCalla of this amount, McCalla was entitled to receive a deed from plaintiff to all of the property except certain parcels as to which McCalla had theretofore quitclaimed all his right, title, and interest to plaintiff, and except such lots as had been sold to certain defendants by the Campbell-Bentley Company, and that said defendants, purchasers of lots from the Campbell-Bentley Company, were entitled to receive deeds from plaintiff to the property which they had purchased upon payment by them of whatever amounts remained due on their contracts, and upon the further condition of payment by McCalla to plaintiff of the sum of $7,796.60 found to be due from him under his contract of February 1, 1919. As to certain lot purchasers it was found that all payments required to be made by them under their contracts had been made, but the court specified that such purchasers should nevertheless not be entitled to receive deeds until the amount found due from McCalla should have been paid. From the judgment rendered in conformity with the court's findings and conclusions of law, plaintiff appealed to the Supreme Court. During the time the appeal was there pending, certain stipulations were entered into between plaintiff and certain defendants among whom McCalla was one, providing that the judgment should be reversed, and in pursuance therewith the Supreme Court on January 10, 1930, made its order reversing the judgment in so far as it affected plaintiff and the various defendants who had entered into stipulations for reversal of the judgment. Of the defendants who had appeared in the action, the following, whose rights are affected by the court's judgment and as to whom no reversal of the judgment has been ordered, remain: Mrs. Charles J. Timm (Emma Timm), Helen B. Backman and Fern D. Backman, Harry B. Jilson and Elida S. Jilson, his wife. Of the defendants thus remaining only one, Mrs. Charles J. Timm, has filed a brief in opposition to the appeal. It may be observed that the contracts under which these remaining defendants claim to have acquired rights and interests in the real property whose title is sought to be quieted by this action were contracts identical in language, executed in each instance by the Campbell-Bentley Company, assignee of A. P. Campbell, during the six-month period when, under the provisions of the contract of April 17, 1918, A. P. Campbell was granted an exclusive selling agency of the real property whose title is here in controversy. Furthermore, it appears that all payments required to be made by Mrs. Charles J. Timm under the agreement between her deceased husband and the Campbell-Bentley Company had been made prior to the institution of the action. No rights superior to those of respondent Mrs. Charles J. Timm have been acquired by the other respondents herein, and a consideration of her rights may therefore properly first be had.

The evidence produced during the trial of the action shows that two contracts were executed by Charles J. Timm and the Campbell-Bentley Company. The first of these contracts was executed on May 15, 1918, and the second on June 20, 1918. Each of the contracts thus executed recites that it is an agreement made between "Campbell-Bentley Company, *duly authorized agents of Alice G. McCartney*" (italics ours), designated as the seller and Charles J. Timm designated as the buyer, and provides that the seller agrees, for an expressed consideration, to sell and convey to the buyer a certain described parcel of land, and that the seller, on receiving the full payments at the times and in the manner mentioned, will deliver a certificate of title, and will execute and deliver to the buyer a good and sufficient deed. Each contract is signed by the buyer and by the Campbell-Bentley Company, by H. L. Bentley. These contracts obviously form the basis upon which the claim to title of a portion of the land by respondent, Mrs. Charles J. Timm, rests. The primary question to be determined, therefore, is whether the language of these agreements supports respondent's contention that she thereby acquired against appellant, the admitted owner of the land, a legally recognizable claim of title. It is to be observed that each agreement is signed by the Campbell-Bentley Company, and that no descriptive or qualifying term, e. g., agent, appears thereto appended. The only place in either agreement wherein the name of appellant occurs is in the language "duly authorized agents of Alice G. McCartney, Owner." The rule applicable to the situation thus presented is stated in S. P. Co. v. Von Schmidt Dredge Co., 118 Cal. 368, 371, 50 P. 650, 651, in the following language:

"Thus the rule is well settled that, where a reading of a simple contract, however inartificially it may be drawn, discloses that it is executed for or on behalf of a principal, or discloses an intent to bind such principal, or even leaves the matter one of doubt, parol evidence may be employed to determine whose contract it is; and this even in cases where the instrument is sufficiently clear in its terms to bind the agent. This is not contradicting by parol the terms of a written instrument, for, as has been said: 'It is no contradiction of a contract, which is silent as to the fact to prove that a party is acting therein not on his own behalf, but for another. "This does not deny," said Parke, B., "that it is binding on those whom, on the face of it, it purports to bind; but shows that it also binds another, by reason that the act of the agent, in signing the agreement in pursuance of his authority, is, in law, the act of the principal."' Bish. Cont. § 1084."

The rule thus enunciated has received consistent approval in decisions of the courts of California, and may be regarded as definitely established. Pertinent to the problem under consideration is the following language in Benedict v. Wilson, 10 Cal. App. 719, 723, 103 P. 350, 351: "Where a person executes a writing in his individual capacity, and recites in the body of the instrument that he acts as the representative of a third person, it cannot be said, as a matter of law, that by so doing he binds the third person, and with much less reason can it be said that he does not bind himself. At most, it becomes a question of fact, which may be determined by parol evidence (Southern Pacific Co. v. Von Schmidt, 118 Cal. 368, 50 P. 650). * * *"

[1] The question whether appellant was bound under the contracts hereinabove described was therefore at most a question of fact to be determined by parol evidence. Careful search of the record fails to disclose the production of evidence that justifies the court's finding that the contracts entered into by the Campbell-Bentley Company with respondent Timm were in fact the contracts of appellant. No testimony whose effect was more capable of such showing with respect to any of the contracts with respondents than that of respondent Helen B. Backman appears in the record. Yet this respondent clearly testified that the Campbell-Bentley Company told her that they were the authorized agents of appellant; that she never saw appellant, and made no investigation for the purpose of discovering whether the company which contracted with her was in fact authorized to make the contract. It is obvious that the effect of this evidence is simply that the witness was informed that the Campbell-Bentley Company was the duly authorized agent of appellant, which is exactly what the contract made by this company says on its face. Nothing whatever is added by this evidence, and no assistance is thereby furnished in solving the problem whether, by the recital in the body of the agreement that the company is the duly authorized agent of appellant, the agent intended to bind the principal or that the respondent understood that she was in fact dealing with the principal. Since the parol evidence is of no assistance in determining that the contracts relied upon by respondents were in fact the contracts of appellant, and since each of these contracts was executed by the agent without the addition of any qualifying phrase, and the language of the agreement clearly indicates that it was an agreement of the agent, we are constrained to hold that the language "duly authorized agents of the owner, Alice G. McCartney" was merely descriptive phraseology not sufficient in and of itself to indicate that the contracts were in fact contracts of appellant.

[2] The solution of the primary problem hereinabove suggested renders unnecessary a determination of whether the agent was in fact authorized to execute the contracts relied upon by respondents. Nevertheless, it may not be entirely superfluous to give this feature of the case some consideration. The authorization of the Campbell-Bentley Company to act as agents for appellant is to be found in the exclusive agency contract of April 17, 1918, which was assigned to the Campbell-Bentley Company on the day following its execution. This contract appointed A. P. Campbell to be appellant's exclusive agent for the sale of her property for a period of six months, and conferred upon the agent wide power in the disposal of the property. Under its terms, the agent was empowered to subdivide the property, if necessary, and to fix the selling price to be charged for lots in the tract, provided such price should be greater than the proportionate amount which the selling price of each lot bore to $10,000, the net amount specified to be realized by appellant for the sale of the entire tract. The agent was to be entitled to retain as his commission all moneys received by him in excess of the selling price, plus interest at the rate of 7 per cent. per annum. The above-described provisions would indicate that appellant contemplated that her agent would enter into contracts for the sale of lots in the tract, and might well be held to be indicative of an authorization to the agent so to do. However, certain other provisions of the contract evidence a contrary intent. It is provided that appellant will on demand deed the property in trust to any reputable bank or trust company in Los Angeles county designated by A. P. Campbell or his assigns, and enter into a trust agreement authorizing Campbell or his assigns to sell lots in the tract at any price he may elect above the aggregate price of $10,000 and interest, and that the trustee thus appointed shall be empowered to execute contracts and deeds. It is further provided that, if Campbell or his assigns "shall not elect to create a trust to begin selling operations on or before the expiration of six months from date hereof that this agency may be cancelled at my option," etc. It is not disputed that the trust contemplated was never created. It does not, however, appear that appellant exercised her option to cancel the agency because of the agent's failure to create a trust. With respect to the power of agents to execute contracts for the sale of real property, the rule is stated in Church v. Collins, 18 Cal. App. 745, 748, 124 P. 552, 553: "The rule deduced from the authorities with regard to the power or right of agents to execute contracts of sale of real property for the owners thereof is and ought to be that, if such authority is intended to be conferred, the language used in conferring it should be so clear, distinct, and certain in its meaning to that end as to leave no room for doubting that such is its purpose."

This statement of the rule received the express approval of the Supreme Court in Salter v. Ives, 171 Cal. 790, 792, 155 P. 84. When the rule is applied to the agency contract of April 17, 1918, it cannot be successfully maintained that the contract embodied a grant of power to the agent to execute contracts for the sale of the property. The principal, appellant herein, specifically provided for the creation of a trust for selling operations and that the trustee should be "empowered to execute contracts." The use of this language clearly negatives the existence of an intention on the part of appellant to grant to her agent the power which is thus expressly conferred upon the trustee who is to be designated by the agent.

It is, however, urged that appellant ratified the contracts for the sale of lots in the tract executed by the assignee of her agent by her contract with A. P. Campbell and E. E. McCalla executed on February 1, 1919. The particular language contained in this latter contract which, it is said, constitutes ratification, is as follows: "It is also the intent of this contract that the interests of purchasers of any lot or lots of this property, purchased while this contract is in force, shall be recognized by both owner and mortgagee and that the owner will convey any such lots to the order of said A. P. Campbell and E. E. McCalla, free and clear of all encumbrances," etc.

[3-6] But the contracts which are relied upon by respondents as vesting in them an interest in the property were not contracts that were executed during the time the contract of February 1, 1919, was in force. They were contracts executed prior to February 1, 1919, and are not therefore covered by the plain meaning of the language employed. Nevertheless, it is said, and the court found, that appellant was advised of the execution of these prior contracts, acquiesced in them and in the collection by Campbell and McCalla of payments made by respondents under the prior contracts, and thereby, as the court found, ratified the execution of contracts made prior to February 1, 1919. Certain difficulties arise when this finding is measured by the evidence appearing in the record. In the first place, so far as it declares ratification by knowledge and consent, the finding rests upon evidence indicating that appellant was informed of the existence of prior contracts at the time she executed the contract of February 1, 1919, and agreed that these prior contracts should stand on the same footing as contracts which should be executed during the two-year period covered by the contract of February 1, 1919. The evidence as to her consent in this regard is parol evidence, and the manifest effect of the finding is that it proposes to establish, by parol, ratification of an agency to execute contracts for the sale of real property. It cannot be disputed that such an agency must, in the first instance, be created by a written instrument. If, however, the agency was not thus created, and the agent executes contracts for the sale of land, the principal may ratify the unauthorized contracts of the agent. But the ratification, to be effective, must be a written ratification. Civ. Code, § 2310; Lambert v. Gerner, 142 Cal. 399, 403, 76 P. 53. Furthermore, so far as knowledge of and acquiescence in contracts executed with respondents by appellant's agents is concerned, it is to be observed that no witness other than McCalla testified regarding this feature, and this witness stated that he told appellant that contracts for the sale of six lots had been made by her agents during the six-month period and that she made no objection thereto. There is no evidence that appellant was advised of the names of the individuals with whom contracts had been made or the terms of the contracts. The evidence does show that the contracts were recorded during the month of October, 1918. But the rule that ratification of unauthorized acts may be implied from the acts and conduct of a principal requires full and actual knowledge of all material facts by the principal. Puget Sound Lumber Co. v. Krug, 89 Cal. 237, 26 P. 902; Brown v. Rouse, 104 Cal. 672, 38 P. 507; Hall v. Wells & Son, 24 Cal App. 238, 141 P. 53; Hutchinson v. Scott, Magner & Miller, 35 Cal. App. 171, 169 P. 415; Allen v. S. F. W. D. Produce Exch., 59 Cal. App. 93, 210 P. 41. Nor is the fact that payments were collected under the contracts by McCalla and that McCalla paid over the moneys thus obtained by him to appellant sufficient to raise an implication that appellant thereby ratified the contracts with respondents. It is a settled rule in California that receipt of payment, even to the full amount of the purchase price, does not constitute ratification. Forrester v. Flores, 64 Cal. 24, 28 P. 107; Salfield v. Sutter County L. I. & R. Co., 94 Cal. 546, 29 P. 1105; Woerner v. Woerner, 171 Cal. 298, 152 P. 919; Hines v. Copeland, 23 Cal. App. 36, 136 P. 728. The evidence presented by the record herein fails to show the necessary element of change of possession of the land covered by the contracts with respondents which must accompany proof of payment in order to furnish any sufficient showing of ratification on the ground of receipt of payment. Woerner v. Woerner, supra. It is therefore our conclusion that the court's finding that appellant by her acts and conduct ratified the contracts upon which respondents rely for the creation of interests in the land whose title is herein sought to be quieted is not warranted by the evidence appearing in the record.

The judgment is reversed.

We concur: BARNARD, P. J.; MARKS, J.

120 Cal.App. 450

MANN v. BRISON, City Clerk.

Civ. 7973.

District Court of Appeal, Second District, Division 2, California.

March 5, 1932.

Hearing Denied by Supreme Court April 4, 1932.

Appeal and error 🔑832(4).

Rehearing will not be granted for purpose of considering suggestions made for first time in petition for rehearing.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

On petition for rehearing.

Rehearing denied.

For former opinion, see 7 P.(2d) 1110.

John J. Beck, of Los Angeles, for appellant.

Nowland M. Reid, City Atty., of Long Beach, for respondent.

PER CURIAM.

In denying a rehearing in this case it is proper to note the fact that the point and argument supporting it to the effect that the charter provision involved is unconstitutional is made for the first time in the petition for rehearing. It has been repeatedly stated that a rehearing will not be granted for the purpose of considering suggestions made under such circumstances. In re Novotny's Estate, 94 Cal. App. 782–790, 271 P. 923, 273 P. 58; Pasadena Ice Co. v. Reeder, 206 Cal. 697–705, 275 P. 944, 276 P. 995; and People v. New York Indemnity Co. (Cal. App.) 298 P. 849.

Rehearing denied.

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121 Cal.App. 395

DOGGETT v. LACEY.

Civ. 7032.

District Court of Appeal, Second District, Division 2, California.

March 4, 1932.

1. Automobiles 🔑242(2).

Under doctrine of res ipsa loquitur, presumption of negligence on part of driver arose where automobile, traveling on good dirt road, suddenly left road and struck ditch and overturned.

2. Automobiles 🔑201(10).

Automobile accident, caused when steering apparatus stuck so it could not possibly be turned, *held* unavoidable, precluding recovery.

3. Appeal and error 🔑1064(1).

Instruction that guest assumed risk attendant on riding with one-arm driver *held* not prejudicial error, where degree of care driver had to exercise was pointed out.

4. Automobiles 🔑224(1).

Guest, knowing automobile driver had only one arm, assumed risk of any contingency.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by Pearl Doggett against Loren Lacey. From a judgment for defendant, plaintiff appeals.

Affirmed.

Russell & Heid, of Tulare, for appellant.

Ray W. Hays, of Fresno, for respondent.

IRA F. THOMPSON, J.

The plaintiff prosecutes this appeal from a judgment rendered against her in an action for personal injuries resulting from an automobile accident. The material facts adduced by respondent, and which in opposition to the claim of appellant he now asserts support the verdict of the jury, are as follows: The appellant was accompanying respondent and a Mrs. Shoemaker on a week-end trip to California Hot Springs. Respondent was seated behind the steering wheel on the left of his Chrysler coupé, Mrs. Shoemaker was in the middle, and appellant on the right-hand side of the seat. Respondent had only one arm. They had driven over the floor of the valley from Hanford into the rolling land below the mountains, and were traveling on a very good dirt road—almost as smooth as pavement—at the time the accident occurred. They topped a hill at a speed of a little less than 40 miles per hour, and then gradually slowed down to make a gentle curve about 50 feet beyond the brow of the hill. They rounded the curve, and about 25 feet after having turned it the car took a sudden turn to the left, and respondent was unable to turn it back into its course. They struck a ditch and overturned. The testimony of respondent is to the effect also that he was unable to turn the steering wheel after the accident. We have stated that respondent's testimony was in substance that he was driving at less than 40 miles an hour when he came to the top of the hill. It should perhaps be said that just before they came to its crest the speedometer reading was 45 miles, but the testimony also shows that this instrument was fast—that is to say—that when it indicated 47 the car was actually traveling 40. And it should be added that respondent's testimony is to the effect that the overturning was not due to his speed.

[1, 2] Does this testimony support the verdict of the jury? We may assume that under the doctrine of res ipsa loquitur a presumption of negligence on the part of respondent arose. But the testimony is sufficient to warrant the jury in concluding one of two things—either that the steering apparatus of the automobile stuck so that it could not possibly be turned, or that it stuck sufficiently that respondent, crippled as he was by the loss of one arm, could not turn it. In fact, this condition of affairs is indicated by the testimony of Mrs. Shoemaker who testified for appellant. She swore that she felt respondent's elbow against her as he attempted to pull the car back, and "thought about trying to pull the steering wheel" herself, and then thought she "had better not touch it." If the jury concluded in line with the first of the alternatives, the accident was one properly classified as unavoidable and for which the respondent was not answerable. 19 Cal. Jur. 15.

[3, 4] If, however, they adopted the other theory, we have a situation involving an instruction given by the court and which appellant asserts was an incorrect statement of the law. It reads: "If you believe from the evidence that the accident was caused by the fact that Loren Lacey had only one arm, then I instruct you that the plaintiff in this case assumed any risk that was attendant upon riding with a one-arm driver and she cannot recover." It is contended by appellant that this instruction told the jury that respondent was absolved from that reasonable degree of care exacted from other persons. The instruction cannot, however, when read in connection with others given, receive such construction. The degree of care which respondent was called upon to exercise was carefully pointed out to them. The instruction complained of was without doubt pointed as the very possibility which we have suggested, to wit, that the jury might conclude that the steering gear stuck to the degree that respondent could not, with his physical handicap, turn the wheel. As so understood, there was no prejudicial error committed. Appellant was a guest in the automobile. From her own testimony, she knew of the incapacity of the respondent. It is said in respondent's brief: "No one, however, would doubt that a plaintiff knowingly riding in an automobile driven by a blind man would be guilty of contributory negligence as a matter of law." The analogy is fairly drawn. The instruction did not absolve respondent from the duty of exercising reasonable care, but it did say that, if in an emergency, and yet while exercising that degree of care for which he was responsible, the respondent was unable, by reason of having only one arm, to overcome the obstacle, the plaintiff could not recover. By her acceptance of him as a driver she accepted the risk of such a contingency. Such is the effect of the decision in Jones v. Pacific Gas & Electric Co., 104 Cal. App. 47, 285 P. 709, wherein it was held that plaintiff was guilty of contributory negligence in riding with one who was intoxicated, where the state of insobriety occasioned an accident.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; FRICKE, Justice pro tem.

RIP VAN WINKLE WALL BED CO. v. HOLMES et al. *

Civ. 720.

District Court of Appeal, Fourth District, California.

March 4, 1932.

Rehearing Denied April 1, 1932. Hearing Granted by Supreme Court May 2, 1932.

Patents ⚷209(1).

Where contract provided one purchase price, for purchase of two patents and license agreement, payable in installments, seller could recover installments after one patent was declared invalid as against defense of total failure of consideration.

Appeal from Superior Court, Los Angeles County; H. S. Gans, Judge.

Action by the Rip Van Winkle Wall Bed Company against Verne Holmes and others, individually and as copartners, doing business under the firm name and style of the Holmes Bed Manufacturing Company, in which defendants filed a cross-complaint. From the judgment, defendants appeal.

Affirmed.

Francis D. Adams, of Hollywood, and Earl Curtis Peck, of Los Angeles, for appellants.

Loeb, Walker & Loeb, of Los Angeles, for respondent.

BARNARD, P. J.

On April 15, 1921, plaintiffs' assignors entered into a contract with the defendants whereby they agreed to sell them a certain patent covering a wall bed, another patent covering a gas stove on swinging doors, a certain license agreement with another party permitting that party to operate under the first patent, upon the payment of $1 for every wall bed sold, together with any patents that might be issued in any foreign countries upon these same devices. The defendants agreed to pay for these things the sum of $20,000 payable in varying installments on the 1st day of January of each year up to and including the year 1930, it being also agreed

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 14 P.2d 754.

that the sellers should place the necessary assignments in escrow in a bank, to be delivered when the final payment was made. Such assignments were placed in escrow as agreed and the payments were made up to and including the one due January 1, 1926. On November 22, 1926, by a decision of the United States Circuit Court of Appeals, the patent on the wall bed first above mentioned was declared invalid, as lacking in novelty. The defendants failed to pay an installment of $2,000, which by the terms of the contract became due on January 1, 1927, and this action was brought for the purpose of compelling payment of the same. Two defenses to this suit were interposed. By answer and cross-complaint it was sought to reform the agreement by inserting one word therein in order to comply with the alleged intention of the parties and, as so reformed, it was claimed that the contract gave to the defendants an option to cease making further payments, and that such option was exercised by their failure to make one of the payments provided for. As a second defense it was alleged that there was a total failure of consideration, in that the first patent referred to had been declared invalid. After trial, the court refused to reform the contract and gave judgment for the plaintiff, from which judgment this appeal has been taken.

The first point raised is that the evidence is not sufficient to support certain findings to the effect that the contract, as written, expressed the true intention of the parties thereto and that it was not the intention of the parties to give to the appellants an option to terminate the agreement by failing to make payments thereunder. The contract contained the following paragraph:

"It is further provided that in the event of a default by the said parties of the second part in the payment of any of the payments hereinabove provided for, then and in that event the said parties of the first part, within thirty (30) days after said default shall have occurred, cancel and terminate this contract, and shall declare any and all moneys theretofore paid hereunder forfeited and shall retain the same as and for liquidated damages, and in full of any and all claims arising or to arise hereunder."

The appellants sought to reform this portion of the instrument by inserting the word "shall" between the word "occurred" and the word "cancel" in this paragraph. It may first be observed that the reformation asked for, if granted, would not have had the effect claimed by the appellants. Wilcoxson v. Stitt, 65 Cal. 596, 4 P. 629, 52 Am. Rep. 310; Burg Bros. v. Bercut, 73 Cal. App. 114, 238 P. 166. However, the court found that the contract as written did not fail to express the true intention of the parties and that the parties did not intend said written agreement to give to the appellants an option to terminate the same by failing to make the payments provided for. The respective parties set forth in their briefs some sixty pages of evidence relating to this subject. It would serve no useful purpose to summarize this evidence here, but it fully appears that while the evidence is conflicting, it is amply sufficient to support the findings attacked. Incidentally, these appellants brought a former action to reform this same contract and to insert another word therein (Holmes v. Anderson, 90 Cal. App. 276, 265 P. 1010), and a question naturally arises as to why a mistake of the importance of the one here claimed was overlooked at that time.

The only other point raised is that the respondents cannot recover in this action for the reason that there was a total failure of consideration because the first patent mentioned was declared invalid. The court found that the consideration had not failed either wholly or in part; that the invalidity of the one patent did not constitute a total or partial failure of consideration; and that such invalidity did not constitute a defense to this action. While we think the finding that there was not a partial failure of consideration is erroneous, this is not material, as the only issue raised by the pleadings and disclosed by the theory upon which the case was tried, is that there was a total failure of consideration. The appellants rely on a number of cases from federal courts which are claimed to establish the rule that the invalidity of a patent sold on deferred payments is such a total failure of consideration as will relieve the purchaser from a further performance of the contract. Conceding, but not deciding, that this is the correct rule, it is not determinative of the case before us, since the contract here in question provides one purchase price, payable in installments, for the purchase of a number of things. In Imperial Livestock, etc., Co. v. Tracy, 208 Cal. 205, 281 P. 50, 54, the court said: "While it is true that the answer pleaded that no consideration passed for execution of the note, yet defendant offered no proof to show that the stock was valueless. On the contrary, the clear inference from the evidence is that it is of considerable value. Under well-settled rules of law, defendant could not keep the stock and resist payment of the note in toto without offering evidence to show that the stock was entirely without value."

While the facts and issues in that case were somewhat different from the one at bar, the principle set forth has an application here. A total failure of consideration was here pleaded and is now relied on. There is here more than an inference that the appellants received something of value. Not only di they have the use for about six years of th patent which was later declared invalid, bu it appears that for some time, the extent o which is not shown, they received the roya ties on the license agreement with another party which they were to receive under the contract and an assignment of which was placed in escrow in a bank. They further received all of the benefit of the other patent referred to which was never declared invalid. Appellants argue that this second patent had expired by lapse of time before the first patent was declared invalid and, therefore, that they had nothing of value at the time the payment came due on January 1, 1927. This contention is without merit. The contract provided for one purchase price payable in installments, for several things, and even if one of them had been valueless from the beginning, this would not have shown a total failure of consideration. It can neither be told what portion of the purchase price covered either patent nor what portion thereof covered the respective years during which it was contemplated either patent would be in force. Not only was a partial failure of consideration not pleaded, but upon the objection of the appellants the court refused to admit any evidence as to the respective values of what had been received and what had not been received. The appellants may have profited greatly or slightly by the things they actually received under the contract, but, under the pleadings and the evidence, the court could not find as to the respective values nor as to what portion of the consideration had failed. The appellants rely on the following quotation from Gibbs v. Hersman, 73 Cal. App. 732, 239 P. 350, 352: "It is a fundamental rule of contracts that where, from the nature of the contract, it is evident that the parties contracted on the basis of the continued existence of the thing to which it relates, the subsequent perishing or destruction of the thing will excuse the performance. * * *" See, also, La Cumbre G. & C. Club v. Hotel Company, 205 Cal. 422, 271 P. 476.

It neither appears here that all of the things concerning which these parties contracted were subsequently destroyed, nor does it appear from the nature of the contract that the installment payments, which varied in different years, were so differentiated between the things sold or so related to the values to be received during the respective years, as to excuse, in the absence of any other evidence, the payment of any further installment, in the event of the destruction of the utility of one of the things sold.

It may well be that the appellants have suffered a partial failure of consideration, although this was neither pleaded nor presented during the trial of this action. It does not appear, however, that any injustice will result from the judgment appealed from, since three additional installments of the purchase price, amounting to $7,500, have matured since this action was filed. If other suits are filed to recover those installments, by proper pleading and proper presentation of the matter any rights of the appellants can be protected and full justice done.

The judgment appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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121 Cal.App. 415

NIELSEN v. EMERSON.

Civ. 8178.

District Court of Appeal, First District, Division 1, California.

March 5, 1932.

1. Executors and administrators 🔑315(6).

Surviving husband claiming property in possession of wife's executor is not concluded on question of ownership by decree of distribution.

2. Judgment 🔑724.

In action upon different claim or demand, judgment is only conclusive on issues essential to or involved in judgment.

3. Judgment 🔑725(3).

Judgment in beneficiary's action to enforce testamentary trust, necessarily involving validity of trust, *held* conclusive in subsequent action by beneficiary to quiet title to trust realty.

Will devised and bequeathed described property in trust and named testatrix' husband as beneficiary of trust during his lifetime. Husband brought an action to enforce the trust, and in due course a judgment was entered directing payment to husband of a stipulated sum per month from the trust fund. Subsequently, husband brought an action to quiet title to certain realty embraced within the trust, and the trustee, after denying husband's ownership, contended that the husband was estopped from maintaining the action by reason of the previous judgment rendered in the action to enforce the trust.

4. Insane persons 🔑94(1).

Though plaintiff was declared incompetent, and there was no substitution of guardian before judgment, judgment *held* not void, but at most irregular.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Mads Nielsen, an incompetent person, by his guardian, W. E. Most, against

M. L. Emerson, as trustee under the last will and testament of B. Agnes Nielsen, also known as Bridget Agnes Nielsen, deceased. Judgment in favor of the defendant, and the plaintiff appeals.

Affirmed.

See, also, 6 P.(2d) 281.

W. E. Most, of Oakland, for appellant.

Breed, Burpee & Robinson, of Oakland, for respondent.

PER CURIAM.

An action to quiet plaintiff's alleged title to certain real property described in the complaint as lot 24 in block 131 according to that certain map entitled Resubdivision of Block 131, as per Keller Berger's Map of Oakland, Alameda County, Cal., filed February 27, 1890, in the office of the county recorder of Alameda county.

The action was against M. L. Emerson as trustee under the last will and testament of B. Agnes Nielsen, deceased. Defendant trustee, after denying plaintiff's ownership, averred that plaintiff was estopped from maintaining the action by reason of a previous judgment in action No. 90545 entitled "Mads Nielsen, plaintiff, versus M. L. Emerson and M. L. Emerson as trustee under the will of B. Agnes Nielsen. deceased, defendants," filed in the superior court of Alameda county, and which judgment was entered on October 8, 1928.

The court found in accordance with the allegations of the answer and rendered judgment against plaintiff, who has appealed therefrom.

The facts are as follows: On April 30, 1925, said B. Agnes Nielsen, who was plaintiff's wife, died, leaving a will, by which she bequeathed her estate, including the real property above described, to defendant M. L. Emerson, as trustee upon certain trusts set forth in the will, of which Emerson was also named as executor. Administration was had, and on July 20, 1926, the residue of the estate, including said real property with certain money in bank and other personal property, was distributed to defendant upon the trust so created. Both the will and the decree of distribution provided that the income from the trust estate be paid to plaintiff during his lifetime, and that upon his death the trust should end and the property vest in equal shares in defendant Emerson and a brother of the deceased. The will also provided that if in the opinion of the trustee or the court it should be deemed advisable that plaintiff should have for his support and maintenance more than his personal earnings and the income from the trust estate, then in the discretion of either the trustee or the court such additional sum as might be necessary should be paid to him monthly for his support.

On August 17, 1926, plaintiff commenced said action No. 90545 to enforce the trust above described, alleging that the property of said deceased had, by order of the court in the matter of her estate, been transferred and had come into the possession of the defendant as trustee under said will, that plaintiff was unable to work, and since the death of his wife had received interest on the money in bank but that the same was insufficient for his support; further, that the property of the trust was more than sufficient to pay an allowance of $100 per month, and prayed that said sum be paid monthly to him from the trust fund.

The answer denied that plaintiff was incapacitated or that the sum asked was reasonable; it set forth a description of the property, which it alleged to be the property of the trust, this consisting of the real property above described with the personal property mentioned, and that plaintiff had occupied the real property rent free with the consent of the trustee since the death of Mrs. Nielsen.

The court found that the estate consisted of the real and other property mentioned; that plaintiff ever since the death of his wife had by consent of the trustee occupied the real property rent free as the beneficiary under the trust; further, that plaintiff was able to perform certain kinds of unskilled manual labor; and that $10 per month from the trust fund would be sufficient for his support. Judgment was entered that he recover from defendant trustee that amount per month payable from the trust fund.

[1, 2] A surviving husband who claims property in the possession of the executor of his deceased wife is not concluded by the decree of distribution entered in the matter of her estate as to the ownership of the property. Estate of Rowland, 74 Cal. 523, 16 P. 315, 5 Am. St. Rep. 464; Williams v. Williams, 170 Cal. 625, 151 P. 10. And while as a general rule a former judgment concludes the parties in all subsequent actions not only as to all matters actually decided but as to all matters belonging to the subject of the controversy and properly within the issues which might have been decided (15 Cal. Jur., Judgments, § 189, p. 136; Southern Pacific Co. v. Edmunds, 168 Cal. 415, 143 P. 597), in an action upon a different claim or demand the former judgment is only conclusive as to such issues as were essential to or shown to have been involved in the judgment. 34 Cor. Jur., Judgments, §§ 1156, 1322, pp. 745, 911; Lillis v. Emigrant Ditch Co., 95 Cal. 553, 30 P. 1108; Freeman v. Barnum, 131 Cal. 386, 63 P. 691, 82 Am. St. Rep. 355; Horton v. Goodenough, 184 Cal. 451, 194 P. 34.

[3] While the action here was not upon the same claim as that asserted in the former suit, nevertheless the question of the validity

of the trust was necessarily involved and passed upon. Moreover, the title to the different items claimed by the estate was placed in issue and found upon by the court; and it appears that the plaintiff had with the trustee's permission been an occupant of the real property free of rent and as the beneficiary under the trust since his wife's death. The present case is not distinguishable in its essentials from Silverston v. Mercantile Trust Co., 18 Cal. App. 180, 122 P. 976, which case is decisive here and sustains the conclusion of the trial court.

The further contention that plaintiff is not concluded by the former judgment because he was suing as a beneficiary under the trust, and here as an individual, cannot be sustained, as both actions were to enforce an alleged individual right, and in neither was plaintiff suing in a representative capacity.

[4] Nor is there merit in the claim that plaintiff having been declared incompetent before judgment was rendered in the former action, and there having been no substitution of his guardian, the judgment was void. As held in the following cases, such a judgment is at most irregular and is not void. Dunn v. Dunn, 114 Cal. 210, 46 P. 5; Hogan v. Superior Court, 74 Cal. App. 704, 241 P. 584.

Other points are raised in plaintiff's brief, none of which have merit or require discussion.

The judgment is affirmed.

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121 Cal.App. 433

RIO LINDA POULTRY FARMS, Inc., v. FREDERICKSEN et ux.

Civ. 4414.

District Court of Appeal, Third District, California.

March 5, 1932.

Rehearing Denied April 4, 1932.

Account stated 🔑1.

Agreement that statement showing amount due under note and trust deed would be prepared, and that debt would be reduced to $1,600 and balance paid in installments, *held* not "account stated."

[Ed. Note.—For other definitions of "Account Stated," see Words and Phrases.]

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by the Rio Linda Poultry Farms, Incorporated, against H. L. Fredericksen and Emma Fredericksen, his wife. From judgment for defendants, plaintiff appeals.

Affirmed.

Butler, Van Dyke, Desmond & Harris, of Sacramento, and Arthur C. Huston, of Woodland, for appellant.

Ralph H. Lewis and George McCutchen, both of Sacramento, for respondents.

Mr. Presiding Justice PRESTON delivered the opinion of the court.

The action was brought upon an account stated.

Defendant denied specifically the allegations of the complaint and in addition to his denials set up other grounds of defense, not necessary to detail.

The court below found that the allegations of the complaint to the effect that defendants were indebted upon an account stated were untrue and expressly declined to make any further findings of fact.

It was apparently the view of the trial court that the instrument relied upon by plaintiff was not a stated account and gave judgment accordingly.

The plaintiff sues as the assignee of Sacramento Suburban Fruit Lands Company, and no issue is raised as to the question of the assignment, its execution or validity. Appellant relies upon a certain writing in the form of a letter addressed to defendants, and upon the written acceptance by the latter of the terms of the letter. This letter is dated February 3, 1927, and addressed to defendant and is, substantially, as follows:

This letter is written to confirm a verbal understanding of even date in reference to obligations of defendants under a certain deed of trust and a contract for deed. Then follows a résumé of prior dealings and a recital of defendants' default, and a certain compromise theretofore effected. It then recites that there is remaining only a second deed of trust in an original amount of $1,200 upon which payments have not been kept up and also refers to an advancement of some $196 upon which $100 has been paid. Then it is stated that to harmonize all past-due items the former compromise has been effected and that by such agreement it was agreed that there should be added to the deed of trust all interest accruing to November 1, 1926, and also the balance of cash which was owing; also any taxes paid on behalf of defendants. The letter then contained this clause: "A statement will be rendered to you within the next thirty days showing the total amount of your indebtedness, figuring everything to November 1, 1926." The letter further recites that the agreement between the parties is that $250 will be advanced to defendants and will be charged to second deed of trust and bear interest from the date the money is actually paid out. Further, it is stated that in return for the extension granted on the present indebtedness and for the advance of the $250, the defendants have agreed to repay prior to May 1, 1927, an amount sufficient to reduce the total indebtedness to exactly $1,600 and have also agreed to pay eighty dollars quarterly and, in addition, interest which will liquidate the balance within five years. Then the concluding clause: "This letter is written in duplicate and a space is provided below for your signature, indicating that the above is in line with your understanding of what was agreed upon today."

The defendants and each of them signed the following, which was also a part of the document: "The above is in line with our understanding of what was agreed upon today and we hereby acknowledge receipt of the $250.00 cash mentioned therein."

This writing, on its face, concedes the fact that there is already a deed of trust securing the original amount of $1,200, which said deed of trust is before us. This deed of trust secures the payment of five promissory notes, totaling $1,200, and also is security for such additional sums as may be hereafter borrowed by the Fredericksens, respondents. An "account stated" has been defined as an agreed balance of accounts; an account which has been examined and accepted by both parties. 1 Cal. Jur. 189.

It is not every debt which can form the basis of an account stated or an action thereon. It cannot become a substitute for an action of debt upon a specialty, such as a promissory note. In such a case no subsequent statement of the amount due thereon, although agreed to by the payer, can supersede the special promise so as to form the basis of an action as upon an account stated to recover the original debt. The written promise being higher evidence of the debt and the debtor being already bound thereby, there could be no necessity for a resort to a subsequent statement and promise to pay. Moreover, the debtor being already completely bound for a specified sum, there is no element of uncertainty to be settled, and no difficulty in ascertaining the balance upon conflicting claims, which could constitute a consideration for a new promise to pay, and therefore such promise would be a nudum pactum. Bennett v. Potter, 180 Cal. 736–745, 183 P. 156.

So here, the instrument pleaded as an account stated is by its terms an agreement as to what shall be included within the terms of the second deed of trust. And, indeed, the entire instrument, construe it as we will, is simply an adjustment of claims and application thereof to the deed of trust. Likewise, the instrument itself creates an indebtedness for a sum not yet advanced though receipt is acknowledged by defendants.

In Jasper Trust Co. v. Lampkin, 162 Ala. 388, 50 So. 337, 338, 24 L. R. A. (N. S.) 1237, 136 Am. St. Rep. 33, the court quotes approvingly from an earlier case [Middleditch v. Ellis, 2 Exchequer Reports, 623, 628] as follows: "The defendant is charged with nothing but the money secured by the deed. There is no consideration for the suggested new liability, except the ascertaining how much remains due on the deed. It is a perversion of language to speak of this as an account stated. It is merely a process adopted for the purpose of ascertaining how much of the original debt has been discharged, and all which is really done is to make out to what extent the defendant remains liable upon the deed."

Scanning the letter closely and indulging in every inference, we cannot determine therefrom the state of the account between the parties. And it is obvious that the instrument was not intended to convey that information. The limit of permissible construction leaves nothing more to be gleaned from the letter than the fact that at some future time a statement will be prepared showing what remains due under the note and deed of trust and that in consideration of an extension of time, a sum sufficient to reduce the debt to $1,600 will be paid and the balance in instalments. This will not measure up to the requirements of an account stated. 1 Cal. Jur. 189–196, and cases therein cited.

For the reasons given, it is manifest that the judgment must be affirmed.

The transactions out of which the claimed indebtedness arose involved the sale to defendants by the assignors of plaintiff of a tract of land. Subsequent to the letter the defendants brought suit against the vendor alleging fraud and misrepresentation. Judgment was given against the vendors in the sum of $6,000, which judgment has become final.

Ordinarily, an approximate justice might countenance a relaxation of the rule confining one to his original contract and permitting no recovery under a claimed account stated. But, in the instant case, it can readily be seen that rights and duties exist under the deed of trust that would be ignored if the rule were not given effect.

The judgment is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

121 Cal.App. 374

CAMPBELL v. TITLE GUARANTEE & TRUST CO.

Civ. 8218.

District Court of Appeal, First District, Division 2, California.

March 3, 1932.

1. Vendor and purchaser 🔑341(1).

Nine months' unexcused delay after discovery of fraud by purchaser attempting to rescind contract *held* laches, barring rescission and recovery of purchase price (Civ. Code, § 1691).

2. Vendor and purchaser 🔑118.

Purchaser under contract cannot maintain action for rescission while in default.

3. Vendor and purchaser 🔑335.

Purchaser cannot recover sums paid under contract, where time was of essence of agreement, and her unexcused default terminated her rights and vendor's obligations thereunder.

4. Evidence 🔑434(11).

Purchaser cannot recover damages for alleged fraud, where contract recited that purchaser agreed vendor had made no representations not contained within written agreement.

Appeal from Superior Court, Los Angeles County; William Hazlett, Judge.

Action by Laura E. Campbell against Title Guarantee and Trust Company. From a judgment for plaintiff, defendant appeals.

Reversed, with directions.

Girard F. Baker and Willebrandt & Horowitz, all of Los Angeles, for appellant.

George L. Hampton, of Los Angeles, for respondent.

SPENCE, J.

Plaintiff brought this action seeking rescission of a contract to purchase real estate and the return of money paid thereunder. The cause was tried by the court sitting without a jury, and, from a judgment in favor of plaintiff, defendant appeals.

The property was located in the city of Burbank and was known as lot 14 in tract No. 9748, as shown on the official map of said tract recorded in the office of the county recorder of the county of Los Angeles on January 7, 1927. The legal title thereto was vested in defendant, and the Realty Service Corporation was its selling agent. The written agreement for the purchase of this lot designated it by lot number with reference to the recorded map. Said agreement was signed by plaintiff and defendant on January 31, 1927. It contained the following provisions, which we will number to facilitate reference thereto:

(1) "It is expressly understood and agreed that time is of the essence of this agreement, and in the event of the failure of the Buyer to comply with all or any of the terms or conditions hereof in the manner and within the time herein specified, the same shall become null and void as fully as if it had never been made, and the Seller shall be released from all obligation in law or equity to convey said premises, and the Buyer shall forfeit all right thereto and to all moneys theretofore paid under this agreement. * * *"

(2) "It is understood that this instrument contains the entire agreement between the parties, and the Buyer agrees that the Seller has not, and that no agent of the Seller has made any representation or promise with respect to, or affecting said property or this contract not expressly contained herein."

Plaintiff made the payments due under said contract up to October 30, 1927, and then defaulted. On May 16, 1928, plaintiff served a purported notice of rescission and thereafter brought this action. Plaintiff claimed the right to rescind solely by reason of alleged fraud consisting of an alleged misrepresentation by the salesman of the selling agent respecting the size of the lot. She alleged in her amended complaint that the lot had been represented to be a 54-foot lot, while in truth and in fact it was only a 40-foot lot; that she did not discover the falsity of the representation until August 17, 1927; and that she served notice of rescission on May 16, 1928. It will be noted that the notice of rescission was served when plaintiff was in default and not until nine months after the discovery of the alleged fraud. There was neither allegation nor proof of any excuse for the delay.

Counsel for appellant has submitted a lengthy brief urging several grounds for the reversal of the judgment. On the other hand, counsel for respondent has filed no brief and has entered into a stipulation to submit the cause on behalf of respondent "on the record of the case." If counsel for respondent felt that the judgment of the trial court could be sustained upon any ground, it was his duty to his client and to this court to present a brief. His failure to do so cannot be treated otherwise than as a tacit admission that in his opinion the judgment must be reversed. A careful review of the entire record leads us to the conclusion that no other result can be reached.

[1, 2] We deem it unnecessary to discuss all of the contentions made by appellant. Much is said with respect to the insufficiency of the

evidence to sustain the findings, but a discussion of this question would serve only to unduly prolong this opinion, for we are satisfied that respondent's amended complaint failed to state a cause of action for rescission of the contract. The right to rescind is governed by section 1691 of the Civil Code. Under the terms of that section the party entitled thereto must rescind promptly upon discovering the fraud. As was said in Schneider v. Henley, 61 Cal. App. 758, at page 763, 215 P. 1036, 1038: "Subdivision 1 of section 1691 of the Civil Code requires prompt action in case of rescission. * * * In Marten v. Burns Wine Co., 99 Cal. 355, 33 P. 1107, it was held that a delay of 3 months was too long. In the case of Bailey v. Fox, 78 Cal. 389, 20 P. 868, a delay of 4 months was held to be fatal, and in Gamble v. Tripp, 99 Cal. 223, 227, 33 P. 851, the Supreme Court said that a delay of 4½ months, in the absence of some excuse shown therefor, was certainly not the prompt action required by the Code. From an examination of authorities, it would appear that 30 days is about the utmost length of time which the courts are disposed to allow to the purchaser for rescission, unless there are unusual circumstances in the case excusing longer delay. 2 Black on Rescission and Cancellation, § 542, p. 1279. * * * Plaintiffs neither alleged nor proved any excuse in justification of their long delay in rescinding, and under the law they were guilty of laches." Here respondent alleged that she had knowledge of the alleged fraud in August, 1927. Her testimony showed that she had such knowledge in May or June, 1927, but, confining ourselves to the allegations of the amended complaint, it appears that nine months elapsed before she served her notice of rescission. In the absence of allegations showing unusual circumstances excusing such delay, her complaint was insufficient. for it affirmatively appeared that she failed to act promptly and was therefore not entitled to rescind.

[3, 4] In reversing the judgment we deem this a proper case in which to direct the trial court to enter judgment in favor of appellant. Not only was the amended complaint insufficient to state a cause of action for rescission, but from the nature of the controversy, as disclosed by the uncontradicted evidence, it is apparent that respondent cannot prevail under any theory upon a retrial of the cause. She would not be entitled, in any event, to rescission for the added reason that she was admittedly in default at the time she attempted to rescind. Bryan v. Baymiller, 95 Cal. App. 481, 272 P. 1106; Russell v. Penniston, 55 Cal. App. 492, 203 P. 813. She could not recover the sums paid as under the first above-quoted provision of the agreement, time was made of the essence, and her unexcused default terminated her rights under the agreement and terminated all obligations of the seller. Schwerin Estate Realty Co. v. Slye, 173 Cal. 170, 159 P. 420; Glock v. Howard, 123 Cal. 1, 55 P. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; Fresno Irr. Farms Co. v. Canupis, 39 Cal. App. 184, 178 P. 300. Furthermore, she could not succeed by amending and attempting to plead and prove a cause of action for damages for alleged fraud, for under the second above-quoted provision of the agreement she was not entitled to rely upon any alleged oral representations made by the salesman. Gridley v. Tilson, 202 Cal. 748, 262 P. 3; Munn v. Earle C. Anthony, Inc., 36 Cal. App. 312, 171 P. 1082; Tockstein v. Pacific Kissel Kar Branch, 33 Cal. App. 262, 164 P. 906; Pease v. Fitzgerald, 31 Cal. App. 727, 161 P. 506.

The judgment is reversed, with directions to the trial court to enter judgment in favor of the defendant.

We concur: NOURSE, P. J.; STURTEVANT, J.

121 Cal.App. 763

TITLE GUARANTEE & TRUST COMPANY, a Corporation, Plaintiff and Appellant, v Laura E. CAMPBELL, Defendant and Respondent.

Civ. 8219.

District Court of Appeal, First District, Division 2, California.

March 3, 1932.

Appeal from Superior Court, Los Angeles County; William Hazlett, Judge.

Girard F. Baker and Willebrandt & Horowitz, all of Los Angeles, and George F. Baker, for appellant.

George L. Hampton, of Los Angeles, for respondent.

SPENCE, J.

This is a companion case to Campbell v. Title Guarantee & Trust Co., 9 P.(2d) 264, the opinion in which has been this day filed.

This action was instituted by plaintiff to quiet title. By way of defense defendant alleged in her amended answer the same facts which she set forth in her amended complaint for rescission in the other action. By stipulation the two actions were tried together. The trial court adjudged plaintiff to be the owner of the real property subject, however, to a lien in favor of defendant for the sums paid to plaintiff upon the contract to purchase. Plaintiff appeals from the portion of the judgment providing for a lien upon the premises in favor of defendant.

The opinion in Campbell v. Title Guarantee & Trust Company (Cal. App.) 9 P.(2d) 264, is determinative of all questions raised upon this appeal. Plaintiff herein was entitled to judgment as prayed, and the defendant was not entitled to recover the sums paid nor to a lien therefor. The portion of the judgment appealed from is reversed, and the trial court is directed to enter judgment in favor of plaintiff quieting title against defendant, Laura E. Campbell.

We concur: NOURSE, P. J.; STURTEVANT, J.

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121 Cal.App. 453

INGALLS v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 8202.

District Court of Appeal, Second District, Division 1, California.

March 7, 1932.

Rehearing Denied April 5, 1932. Hearing Denied by Supreme Court May 5, 1932.

1. Mandamus ⚷31.

Mandamus is proper to compel court to proceed with case erroneously dismissed for lack of jurisdiction.

2. Courts ⚷472(6).

Action for fraud demanding rescission and for money received *held* not at law triable in municipal court, but of equitable nature within exclusive jurisdiction of superior court.

The action was for fraud, alleging, in the first count, payment of $1,900 to defendants and service of notice of rescission of the contract, and, in the second count, money had and received. The judgment demanded cancellation of the contract and return of the consideration.

Application for writ of mandate by Iola B. Ingalls against the Superior Court of the State of California in and for the County of Los Angeles and Henry M. Willis, Judge, to require the respondent to exercise jurisdiction over, and to hear and determine, an action.

Writ issued.

Robert E. Rosskopf, of Los Angeles, for petitioner.

McAdoo, Neblett & Clagett, of Los Angeles, for respondents.

TAPPAAN, Justice pro tem.

The action involved here was filed by the petitioner, as plaintiff, against Clifford F. Reid, Inc., a corporation, and J. P. Treleven, defendants, in the superior court in and for the county of Los Angeles. The complaint was in two counts, the first count setting up a cause of action based upon fraud alleged to have been practiced upon plaintiff by defendants in the procuring from her of a contract to purchase certain real property. There are allegations of the payment by plaintiff to defendants of the sum of $1,900, and of the service upon defendants of a notice of rescission of the contract. The second count of the complaint is one for money had and received. The prayer for judgment demands the cancellation of the contract and the return of the money paid thereunder. The answer of the defendant is in effect a general denial of the allegations of the complaint.

[1, 2] When the cause came on for trial before the superior court, defendants objected upon the ground that the court was without jurisdiction to hear and determine it, and the trial court sustained the objection so made and dismissed the action. Thereupon petitioner filed her petition in this court for a writ of mandate to compel the superior court to exercise jurisdiction over said cause and proceed to hear and determine said cause upon its merits. The questions of law involved in this proceeding are raised by demurrer to the petition. "It is a definitely settled rule that, where a court has jurisdiction of a cause, it should not be permitted by an arbitrary or erroneous order to divest itself of jurisdiction, but it should be compelled to proceed with the case to judgment. Mandamus is an appropriate remedy. Golden Gate Tile Co. v. Superior Court, 159 Cal. 474, 114 P. 978." Pacific States Corp. v. Superior Court, 72 Cal. App. 241, 244, 236 P. 938, 939. The principal question here presented is as to whether the cause of action as stated in the complaint is of an equitable nature and so within the exclusive jurisdiction of the superior court, or one at law, and properly within the jurisdiction of the municipal court. The trial court in dismissing the action held it was one at law, and therefore should have been instituted in the municipal court. In this the trial court was in error.

Though different phases of this matter have on numerous occasions been before our courts, and the decisions have not always been harmonious, the matter has been definitely settled by the case of Stone v. Superior Court (Cal. Sup.) 4 P.(2d) 777. The authorities cited upon this petition and demurrer are in the main discussed in the opinions in that case and it would be but a work of supererogation to again state them here.

Let the peremptory writ issue.

We concur: CONREY, P. J.; YORK, J.

121 Cal.App. 92

MILLER v. AMBASSADOR PARK SYNDICATE et al.

Civ. 7096.

District Court of Appeal, Second District, Division 1, California.

Feb. 19, 1932.

1. Appeal and error 🔑1071(3).

In action on note, that contrary to evidence finding designated three individuals as trustees of defendant syndicate *held* not to require reversal, where effect of finding was negligible.

2. Bills and notes 🔑517.

In action on note, evidence supported finding that note had been delivered to payee.

Evidence disclosed that, while note had not been actually placed in physical possession of the payee, immediately following its execution in presence of payee by implied consent of both parties note was placed in escrow, and that conditions of escrow were fulfilled, thereby entitling payee to delivery of the note.

3. Appeal and error 🔑1071(6).

In action on note, failure to make specific findings on issue tendered by answer relative to indebtedness of plaintiff's assignor to defendant *held* harmless, where findings, if made, would have been unfavorable to appellant.

4. Bills and notes 🔑516.

In action on note, evidence supported finding that payee was not indebted to defendant syndicate when note was assigned to plaintiff.

5. Judgment 🔑589(1).

Although difference in form of action will not necessarily prevent bar, if causes of action are identical, judgment because of mistake in remedy will not bar plaintiff's second action.

6. Judgment 🔑589(2).

Former judgment dismissing complaint in action involving note based on alleged tort of defendants *held* not res judicata of subsequent action on note based on defendants' failure to pay note when due.

Former judgment in action involving note wherein plaintiff sought damages against several defendants because of their alleged fraudulent acts against plaintiff was not res judicata of subsequent action, since first action disclosed that plaintiff had mistaken legal remedy and that entirely different evidence would be required to sustain a judgment in the first action sounding in tort from that which would support a judgment arising from breach of obligation to pay the promissory note.

7. Attachment 🔑308(4).

Evidence supported finding that attachment never became effective against bank allegedly possessing note so as to defeat plaintiff's action thereon.

Evidence disclosed that bank on which attachment was served was not a trustee for defendant syndicate as alleged in writ of attachment except for a special purpose, not including the handling of the note sought to be attached, that at time attachment was served bank did not have possession of the note, and that, according to oral agreement of the parties to the note, it had not become due at such time.

8. Bills and notes 🔑534.

Attorney's fee cannot be allowed in action on promissory note, where not claimed in complaint or otherwise.

Appeal from Superior Court, Los Angeles County; Ernest Weyand, Judge.

Action by David Miller against the Ambassador Park Syndicate and others. From order denying defendants' motion for new trial and from judgment for plaintiff, the named defendant and Aubrey E. Austin and William B. Tuteur, as its trustees, appeal.

Appeal from order denying motion for new trial dismissed, and judgment modified and affirmed.

Joseph Musgrove and Fred O. McGirr, both of Los Angeles, for appellants.

I. Henry Harris, of Los Angeles, for respondent.

HOUSER, J.

From a judgment rendered against it and others, in favor of plaintiff, the defendant Ambassador Park Syndicate and certain individual defendants appeal to this court.

As far as concerns the complaint in the action, it is based upon a nonnegotiable promissory note which was executed by the defendant syndicate in favor of plaintiff's assignor, but the facts upon which the several defenses to the action are founded are numerous and somewhat complicated. As each of the several specifications of error herein receives consideration by this court, wherever deemed necessary or advisable, the pertinent facts applicable thereto will be briefly set forth.

[1] It is first urged by appellants that because in its findings of fact the trial court declared that each of three designated individuals was a trustee of the defendant syndi-

cate, when, as adduced by the evidence, neither of such named persons was in fact a trustee thereof, the judgment should be reversed. It is a familiar rule applicable particularly to the legal propriety of granting a new trial, or to the reversal of a judgment, that not only must error be shown to have been committed, but as well that in some substantial manner prejudice has resulted to the basic rights of the aggrieved party. Although herein appellants have made no effort in the way of directing attention to the possible ultimate effect which the alleged objectionable finding may have had upon the mind of the judge of the trial court in reaching a conclusion with reference to other important findings in the case, from a consideration of the entire evidence relative to the findings which are claimed to have been influenced by the finding in question, it becomes apparent that the questioned finding was lacking in potency and that its effect, if any, was negligible. It follows that the position assumed by appellants in that regard is not sustainable.

[2] It is next urged that the finding made by the trial court to the effect that the promissory note upon which the action was based was delivered to the payee thereof was not supported by the evidence. No such express finding of fact appears in the record herein. From an examination of the pertinent evidence it appears that the promissory note was never placed in the actual physical possession of the payee thereof. However, the fact, as in substance was found by the trial court, that immediately following its execution, which took place in the presence of the payee, by the implied consent of both parties thereto, the note was placed in escrow in the possession of a third person, considering the passing of the events upon the happening of which the payee of the note became entitled to its possession, constituted an effective legal delivery of the note to its payee. Without herein setting forth the facts upon which are predicated the findings made by the trial court relative to the conditions of said escrow of the promissory note, and upon the fulfilment thereof the ensuing right of its payee to its delivery to him, it may suffice to state that in the opinion of this court the objection presented by appellants relative to the sufficiency of the evidence to sustain such findings is lacking in legal merit, and therefore cannot be sustained. Based upon like conditions appearing in the transcript of the evidence adduced on the trial of the action, must also fail each of the several objections to certain other findings of fact urged by appellants referring specifically to the notice by respondent to appellants of the assignment of the promissory note by its payee to plaintiff; the lawful ownership by plaintiff of the promissory note and the ensuing right by him of its physical possession; and for a certain period, in derogation of plaintiff's rights in the premises, the withholding of possession of the promissory note from plaintiff by the appellant syndicate and its trustees, and thereafter the like withholding from plaintiff of such promissory note by one Joseph Musgrove—all for the purpose of preventing plaintiff from "obtaining the money described in the note."

[3] One of the defenses to the action pleaded by the defendants in substance was that plaintiff's assignor was indebted to the defendant Ambassador Park Syndicate in a much larger sum of money than was owing by it to the payee of the promissory note. In pleading such defense, a wealth of evidentiary, as well as pertinent ultimate, facts, were alleged. By its finding of fact, instead of treating separately each ultimate fact respectively so alleged in the answer of the defendants, the trial court contented itself in that regard with a blanket finding "that no proof was adduced before the court that the defendant DuBain (the payee of the note) was indebted to the Ambassador Park Syndicate, a common law trust, or its trustees, at any time in any amount." With reference thereto it is here contended by appellants that the finding made by the trial court "does not amount to a finding that the facts pleaded by defendant Ambassador Park Syndicate by way of set-off are untrue." However, from a consideration of the questioned finding, as well as of other findings made by the trial court, it at once becomes apparent that, had the court made specific findings on each of the several issues of ultimate fact in that regard tendered by the answer of the defendants, such findings and each of them necessarily would have been against and contrary to the allegations of fact contained in said answer. In this state the rule repeatedly has been announced that, when the record discloses the fact that, although the trial court has failed to find on a material issue, if it also appear that, had a finding been made on such issue it would have been adverse to the contentions advanced by the appellant, the judgment of the lower court should not be disturbed because of such omission. Hutchings v. Castle, 48 Cal. 152, 156; People v. Center, 66 Cal. 551, 564, 5 P. 263, 6 P. 481; McCourtney v. Fortune, 57 Cal. 617, 620; Winslow v. Gohransen, 88 Cal. 450, 452, 26 P. 504; Demartin v. Demartin, 85 Cal. 71, 75, 24 P. 594; So. Pac. R. R. Co. v. Whitaker, 109 Cal. 268, 274, 41 P. 1083; Reed v. Johnson, 127 Cal. 538, 541, 59 P. 986; Craig v. Gray, 1 Cal. App. 598, 601, 82 P. 699; Gerth v. Gerth, 7 Cal. App. 735, 737, 95 P. 904; U. S. Trading Corp. v. Newmark G. Co., 56 Cal. App. 176, 191, 205 P. 29; Lincoln v. Hoggard, 66 Cal. App. 196, 199, 225 P. 770; Rossiter v. Thompson, 66 Cal. App. 491, 498, 226 P. 809; Platt v. Okamoto, 95 Cal. App. 297, 298, 272 P. 613.

[4] But it is clear that such a conclusion does not necessarily prejudice the further point advanced by appellants, to wit, that the

finding to the effect that plaintiff's assignor was not indebted to the Ambassador Park Syndicate is not supported by the evidence. On the trial of the action, in attempting to prove that, prior to the date of the assignment of the promissory note in question to plaintiff, the assignor of plaintiff was indebted to Ambassador Park Syndicate, the defendants introduced in evidence the judgment roll in another action wherein by the judgment therein it was disclosed that Ambassador Park Syndicate had recovered judgment against plaintiff's assignor for an amount of money largely in excess of the amount claimed by plaintiff in the instant action. As appeared by the record and files in the action so introduced in evidence, the cause of action therein was based upon the alleged fraud of plaintiff's assignor acting in a fiduciary capacity in connection with the sale by and through the efforts of plaintiff's assignor of a large tract of land to the Ambassador Park Syndicate, by means of which fraud plaintiff's assignor had realized a secret profit. It was also shown that said judgment was brought about by the consent and the stipulation of the parties to the action. Offsetting the effect of said judgment, plaintiff introduced evidence which tended to establish the fact that said judgment was induced by fraud of the defendants in the instant action and by collusion between or among the parties litigant in the action in which such judgment was rendered—all for the purpose of defeating the recovery of a judgment in the instant action. With reference to such situation, the specific findings of fact made by the trial court are in accordance with the contentions of plaintiff, and an examination of the evidence adduced in relation thereto leads this court to the conclusion that such findings were based on sufficient evidence to support the same. However, controverting the effect of such ruling, and citing the case of Jeffords v. Young, 98 Cal. App. 400, 406, 277 P. 163, appellants contend that "equity will not overturn a judgment unless it appears that a like judgment will not follow." But assuming the correctness of the suggested principle of law, as far as concerns the facts herein, "it proves too much." On the trial of the action, the issue of whether any prior indebtedness existed against plaintiff's assignor and in favor of Ambassador Park Syndicate was squarely drawn—just as it was in the original action between the syndicate and plaintiff's assignor—and in which latter action judgment was rendered against the defendant therein by and with his consent thereto. However, the difficulty of applying the legal principle as suggested by appellants lies in the fact that, after hearing the evidence relative to the issue of such indebtedness, instead of rendering a judgment thereon identical with that rendered in the former action, the trial court made its finding as hereinbefore indicated, to wit, "that no proof was adduced * * * that the defendant DuBain was indebted to Ambassador Park Syndicate, or its trustees, at any time in any amount." From which situation it becomes manifest that the application of the principle of law to which appellants have directed attention is wholly impracticable, unless the findings of fact in question, the conclusion of law thereon, and the ensuing judgment were not supported by the evidence. In that connection, although, after an examination of the evidence adduced on the trial of the action relative to the issues here under consideration, from its viewpoint thereon this court is unprepared to state that such evidence did not largely preponderate in favor of the contention of appellants herein, nevertheless, from the same source of information, it would appear that some substantial evidence was introduced which, if believed to be true by the trial court, furnished sufficient foundation for the conclusion in question. It therefore would seem to follow that the defense interposed by the defendants in the action relative to a former indebtedness of plaintiff's assignor to Ambassador Park Syndicate should not be permitted to prevail.

[5, 6] Another defense presented by the defendants to the instant action was that of "res adjudicata," in that, prior to the institution thereof, in a former action between the same parties, which action involved a subject-matter identical with that involved in the instant action, on the hearing of a demurrer to the complaint therein on the ground that the complaint failed to state a cause of action, said demurrer was sustained without leave to amend the complaint, and thereupon said action was by the court dismissed. In that connection, appellants contend that plaintiff herein is precluded from maintaining the action, for the reason that it appears that a former action for the same cause, between the same parties, identical with the parties litigant in the instant action, was dismissed "on the merits." However, assuming as correct the suggestion that the former action was "between the same parties," and that it was dismissed "on the merits," the respondent urges the point that, since the cause of action in the one action was not identical with that in the other, the rule suggested by appellants has no application to the facts herein. An examination of the complaint in each of the two actions reveals the fact that the former action was based upon alleged tort, and that the plaintiff therein sought damages against the several defendants therein because of their alleged fraudulent acts as against the plaintiff; whereas the cause in the instant action arises from the alleged breach by the defendants of an express contract, to wit, their failure to pay the promissory note when due. Although a mere difference in the form of the action will not necessarily prevent a bar, if the cause of action

is the same and "the same evidence will support both actions" (Taylor v. Castle, 42 Cal. 367, 372), the principle of law is well established that, "if the plaintiff has mistaken his legal remedy or the proper form of action, and the judgment goes against him for that reason, it is no bar to a second action rightly brought." 15 Cal. Jur. 173, and cases there cited. Considering the facts as portrayed by the complaints in the respective actions here under consideration, it is obvious that in the first action filed by the plaintiff he mistook "his legal remedy." It is likewise apparent that entirely different evidence would be required to sustain a judgment in the first action, which sounded in tort, from that which would support a judgment arising from the breach of an obligation to pay a promissory note. The necessary conclusion is that the instant action was not barred by the judgment in the former action, and that the findings of fact with relation thereto were sustained by the evidence.

[7] As hereinbefore stated, preceding the commencement of the action which appellants have herein contended constituted a bar to the instant action, the subscribers to and members of the Ambassador Park Syndicate instituted an action for the purpose of recovering a judgment against plaintiff's assignor and several of his associates on account of the secret profit alleged to have been realized by the defendants in said action in the matter of the sale of the tract of land to this defendant syndicate. In that action, the plaintiffs therein caused a writ of attachment to issue which was served upon the Pacific-Southwest Trust and Savings Bank, as trustee for the syndicate, the purpose of such attachment being to subject the promissory note of the syndicate in favor of plaintiff's assignor to the levy of execution of any judgment which might be recovered in the action.

By its separate answer in the instant action the Ambassador Park Syndicate pleaded as a separate defense thereto the judgment recovered by said syndicate in said last-mentioned action against plaintiff's assignor, the levying of execution on said promissory note under defendants' said attachment, and the execution sale of said promissory note, together with the alleged fact that, after applying the proceeds of said sale to the satisfaction of said judgment, a deficiency judgment still remained in favor of Ambassador Park Syndicate and against plaintiff's assignor.

With reference to such situation, appellants complain of the insufficiency of the evidence to sustain the findings of fact made by the trial court to the effect that the attachment to which reference has been had never became effective, as it purported to affect the promissory note which is the subject-matter of the instant action. However, such objection may not be sustained, for the reason that an examination of the record herein discloses at least the following facts in evidence upon which the conclusion made by the trial court as to the ultimate fact in question properly may have been based, to wit: The bank upon which the attachment was served was not a trustee for said syndicate except for a special purpose, not including the handling of the promissory note in question; nor at the time the attachment was served did said bank have said promissory note in its possession; nor, according to the oral agreement of the parties to said note, had said note become due at said time.

Several other findings made by the trial court in connection with the binding effect of the said attachment and the judgment in the action in which the same was rendered are also the subject of appellants' attack. Without herein setting forth the particularities of such objections, it may suffice to state that they relate either to matters as to which has been indicated a conclusion by this court adverse to the suggestions of appellants with reference thereto, or that appellants' criticisms of such findings are directed toward facts which, in consideration of the views of this court which hereinbefore have been expressed, are not material. But, in any event, after an examination of the evidence which pertains to such findings, this court is of the opinion that in each instance it is sufficient to support the same.

[8] Appellants further object to the allowance in the judgment rendered herein of an attorney's fee of $1,500. Since it appears that the complaint in the action contained no allegation whatsoever regarding attorney's fees, nor that any claim was made on the trial of the action with reference thereto, it follows that no foundation was laid either for the finding of fact to which appellants object nor for that part of the judgment which includes such attorney's fees. Prescott v. Grady, 91 Cal. 518, 522, 27 P. 755; Brooks v. Forington, 117 Cal. 219, 48 P. 1073; De Jarnatt v. Marquez, 127 Cal. 558, 559, 60 P. 45, 78 Am. St. Rep. 90; City Inv. Co. v. Pringle, 49 Cal. App. 353, 355, 193 P. 504. It follows that the judgment of the lower court should be reduced by deducting therefrom the sum of $1,500.

It is ordered that the judgment be and it is modified by deducting from the judgment rendered by the trial court the sum of $1,500 as and for attorney's fees. As thus modified, it is ordered that the judgment be, and it is, affirmed. The appeal from the order denying defendant's motion for new trial is dismissed.

We concur: CONREY, P. J.; YORK, J.

LUDERS v. SECURITY TRUST & SAVINGS BANK et al.

Civ. 721.

District Court of Appeal, Fourth District, California.

March 4, 1932.

Rehearing Denied April 1, 1932. Hearing Denied by Supreme Court May 2, 1932.

1. Frauds, statute of 🔑106(1).

Bequest to person "for her faithful service to me" *held* insufficient memorandum of alleged oral agreement to leave property to satisfy Statute of Frauds (Civ. Code, § 1624).

2. Wills 🔑306.

Evidence *held* to support finding that will relied on had been revoked.

3. Appeal and error 🔑1071(3).

Where judgment is amply supported by other findings, fact that some findings are not supported by evidence is immaterial.

Appeal from Superior Court, Los Angeles County; Louis P. Russill, Judge.

Action by Grace Luders against the Security Trust & Savings Bank, as executor of the estate of Marie Lagier, deceased, and others. From judgment for defendants, plaintiff appeals.

Affirmed.

Frank G. Tyrrell and F. M. Tyrrell, both of Los Angeles, for appellant.

Lawler & Degnan and Massey & Massey, all of Los Angeles, for respondents.

MARKS, J.

Appellant instituted her action in the court below seeking to enforce an alleged trust in all of the property of the estate of Marie Lagier, deceased, of which estate the Security Trust & Savings Bank is executor. The respondents, Sarilda Peebles, Louise Baille, Desire Guillemer, and Emmanuel Guillemer were the legatees under a will of Marie Lagier which was admitted to probate.

Appellant and Marie Lagier, both of whom were widows, met in April, 1922, and their acquaintance ripened into a friendship. Appellant with her partner operated a small restaurant in the city of Los Angeles where deceased was accustomed to take her meals. In July, 1922, she requested appellant to sell her restaurant, live with her, enter her employ, undertaking the duties of managing decedent's apartment house, taking care of it, doing the manual labor of operating it, renting the apartments and collecting the rents, and acting as the personal companion, attendant, nurse, servant, and chauffeur of deceased, in consideration for which, according to the testimony of appellant, deceased promised that: "When I die, what I have is yours for your services. I won't pay anybody." Appellant accepted the terms of the offer and under this oral agreement entered the employ of deceased and continued in such employment up to about the 15th day of May, 1924, when the two women had a violent quarrel which resulted in Mrs. Lagier ordering appellant from her home and dispensing with her services.

In June, 1924, appellant filed an action for damages against Mrs. Lagier alleging a breach of the contract of employment and that the reasonable value of her services was $150 per month. She sought judgment in the sum of $3,300. Mrs. Lagier, besides answering the complaint for damages, filed a separate action against appellant whereby she sought to recover $150, evidenced by a promissory note, and the additional sums of $150 and $75, which she alleged had been loaned to appellant. About July 1, 1924, the two women effected a reconciliation. The suit of appellant for breach of contract was dismissed on July 10, 1924, and the suit of deceased against appellant was dismissed on July 14, 1924. The friendship between the two women was renewed, but they never returned to their former relation wherein appellant was fulfilling the terms of the previous oral contract between them. For about a year Mrs. Lagier employed a manager to operate her apartment house. Thereafter, and until her death, she operated it herself. Appellant did not return thereto except upon visits, and on these occasions she sometimes performed personal services for Mrs. Lagier and also assisted in helping to clean apartments. She drove Mrs. Lagier's automobile and acted as her chauffeur when frequently requested so to do. The conversation between Mrs. Lagier and appellant which resulted in their reconciliation is detailed by appellant as follows: "Yes; I said, 'If I go back with you, it will be the same thing over again, and where do I come in?' She said, 'The will will always stand, I never will revoke that will, it is yours, what I have is yours at my death.'"

In June, 1923, deceased executed a will in which she bequeathed her property to appellant "for her faithful service to me." Appellant seeks to bring this case without the provisions of the Statute of Frauds (Civ. Code, § 1624) by reason of this will and also by her partial performance of the terms of the contract with deceased. She maintains that the will was a sufficient note or memorandum in writing of the contract to take it out of the statute.

These two arguments of appellant have been resolved against her by the decisions of the Supreme and Appellate Courts of this state. These decisions were reviewed by this court in the recent case of Cazaurang v. Carrey, 4 P.(2d) 259, 261, where it was said: "We think no such full performance is here shown, as takes this agreement or these agreements out of the statute. Hughes v. Hughes, 49 Cal. App. 206, 193 P. 144, 145; Zellner v. Wassman, 184 Cal. 80, 193 P. 84, 86; O'Brien v. O'Brien, 197 Cal. 577, 241 P. 861, 864. In the case of Hughes v. Hughes, the court said: 'The subsequent making of defendant's will, in favor of the plaintiff, following the marriage, was not such part performance of the oral agreement to make such will as to take the alleged contract out of the statute of frauds.' In Zellner v. Wassman, the court said: 'Agreements to leave property by will must be reduced to writing or evidenced by some written note or memorandum; for, by virtue of the 1905 amendment to section 1624 of the Civil Code, they are within the purview of the statute of frauds. It is admitted that the agreement of the son to leave $5,000 by will herein sued upon was not reduced to writing, and that no written note or memorandum thereof was made unless the will executed by deceased, a copy of which was attached to the complaint, fulfills the requirements of the statute in that respect. The will in question contained a simple bequest of $5,000 to plaintiff, without reference to any agreement in respect thereto. The pre-eminent qualification of a memorandum under the statute of frauds is "that it must contain the essential terms of the contract, expressed with such a degree of certainty that it may be understood without recourse to parol evidence to show the intention of the parties." 5 Browne on Statute of Frauds, § 371. Accordingly, it has been held in this state that an undelivered deed cannot be regarded as a sufficient memorandum of an oral agreement for the sale of land therein described when the deed is silent as to the terms of the alleged agreement and merely conveys the land from one party to another. Swain v. Burnette, 89 Cal. 564, 570, 26 P. 1093. In other jurisdictions the same reasoning has been applied to a will, for some reason ineffective upon the death of the testator, which makes no mention of the terms of the contract in pursuance of which it is alleged to have been executed. Allen v. Bromberg, 163 Ala. 620, 50 So. 884; McClanahan v. McClanahan, 77 Wash. 138, Ann. Cas. 1915A, 461, 137 P. 479. A potential factor in furtherance of fraud would be engendered were a will containing a simple bequest permitted to operate as evidence of a binding contract to make such a bequest. It must therefore be held that there is no written memorandum of the agreement here in suit. Nor does this case fall within the rule that the statute of frauds cannot be invoked in case of a completed oral contract (Schultz v. Noble, 77 Cal. 79, 19 P. 182; Colon v. Tosetti, 14 Cal. App. 693, 113 P. 365, 366), for the contract now sued upon was not completed. The reason that the contract is now in court is because the decedent did not perform his part of the alleged agreement by causing to be in existence at the time of his death a will bequeathing $5,000 to plaintiff. The mere execution of a will was not a performance of the contract.' In O'Brien v. O'Brien: 'It must be taken as the settled law in this state that by the amendment of 1905, adding subdivision 7 to section 1624 of the Civil Code and by the corresponding provision of subdivision 7 of section 1973 of the Code of Civil Procedure as amended in 1907, "an agreement * * * to devise or bequeath any property, or to make any provision for any person by will" is invalid unless the same or some note or memorandum thereof be in writing and subscribed by the party to be charged or his agent. * * * Prior to 1905 an oral contract to make a will was enforceable in a court of equity. Owens v. McNally, 113 Cal. 444, 33 L. R. A. 369, 45 P. 710; McCabe v. Healy, 138 Cal. 81, 70 P. 1008; Rogers v. Schlotterback, 167 Cal. 35, 138 P. 728; Wolfsen v. Smyer, 178 Cal. 775, 175 P. 10. The reason prompting the amendment of 1905 is aptly stated by the Code commissioner in his note appended to section 1624, as follows: "The change consists in the addition of subdivision 7. The cases in which it (is) sought to establish by parol evidence alleged agreements to provide for a person by will are becoming so numerous as to warrant the assumption that the reasons inducing the original enactment of the statute of frauds apply with especial force to agreements of this class and that they ought to be brought within that statute." Since that amendment, the effect of the new subdivision as applied to numerous and varying states of facts has been before the courts, but nowhere has it been decided, so far as we are advised, that the amendment should not be given the same force and effect as other provisions of the statute of frauds. Especially with reference to the new provision it has been held that neither subsequent marriage nor the execution of a will pursuant to an oral antenuptial agreement to make a will is such part performance as will relieve the contract from the operation of the statute.' In our opinion, the reasoning underlying these cases is especially applicable to such a case as this, where the main part of the oral agreement is the agreement not to revoke a will. In no manner has this agreement been executed, and in fact it could hardly be fully executed prior to the death of the party making the will. This entire agreement was to devise property to the appellant and to make provision for her by will. The reasons for the statutory inhibition against an oral contract for that purpose are most cogent. The agreement here sought to be established seems to be exactly the sort of agreement which this portion of the statute was intended to prevent, and nothing in this action differentiates it from the usual case which the statute was designed to cover. While it may be true that equity may relieve a party from the effects of such a statute in a proper case and upon a sufficient showing, no equitable circumstance, such as fraud or the like, here appears to entitle the appellant to any such equitable relief. As pointed out by the authorities we have cited, the mere failure to carry out the contract is not a sufficient showing of fraud. No more appears than that the appellant relied upon an oral agreement, and under the plain terms of the statute this is not sufficient."

[1] The will which deceased executed in 1923 did not "contain the essential terms of the contract, expressed with such a degree of certainty that it may be understood without recourse to parol evidence to show the intention of the parties," as required in the case of Zellner v. Wassman, supra, and was not a sufficient note or memorandum of the contract to bring this case without the provisions of the statute of frauds.

[2] The trial court found that the will of 1923 had been revoked. Appellant complains of this finding as not supported by the evidence. An examination of the record discloses that the verified pleadings in breach of contract specifically allege that this will had been revoked by the deceased. A witness produced by appellant testified that during the summer of 1926 the deceased showed him a will, some of the terms of which were not contained in the will in favor of appellant, and in his presence destroyed this will by burning it. With this evidence before us we cannot conclude that this finding was not supported by any evidence. It further appears that about a month before her death, deceased had in her possession an holographic will which disposed of her property to the individual respondents now before this court. At about the same time a formal will was prepared by an attorney and duly executed by deceased and the holographic will destroyed. This formal will was the one admitted to probate.

[3] Appellant complains that a number of the findings of the trial court are not supported by the evidence and that others are contrary to it. The findings are unusually and unnecessarily full and complete and as to some of them the position of appellant may be correct. However, there are other findings which amply support the judgment. The findings complained of by appellant therefore become immaterial and do not furnish any ground for a reversal of the judgment. As was said in Trout v. Ogilvie, 41 Cal. App. 167, 182 P. 333, 334: "If the contract alleged in the complaint be one that a court of equity will not enforce, it is immaterial that the finding that no such contract was made is not supported by the evidence. The rule is that it is immaterial that there is an erroneous finding upon an issue, where, if the finding were otherwise, a different conclusion would not be necessitated."

The case has been ably and exhaustively briefed by counsel for both parties. It is not necessary to lengthen this opinion by considering any of the many other grounds for reversal urged by appellant or the other forceful arguments of respondent in support of the judgment. There was not a sufficient note or memorandum in writing signed by deceased to take the case without the provisions of the statute of frauds and no such performance of the parol contract shown as would waive the necessity of the writings required by law in cases of this kind.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

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121 Cal.App. 228

PITT v. SOUTHERN PAC. CO.

Civ. 535.

District Court of Appeal, Fourth District, California.

Feb. 24, 1932.

Rehearing Denied March 24, 1932. Hearing Denied by Supreme Court April 21, 1932.

1. Appeal and error ⚷933(4).

Where order granting new trial is general, appellate court cannot consider whether evidence was sufficient to sustain verdict unless wholly insufficient in law (Code Civ. Proc. § 657).

2. Master and servant ⚷286(33).

In action for death of brakeman when uncoupled cars were permitted to slide together and crush brakeman walking between them, case *held* for jury (Federal Employers' Liability Act [45 USCA §§ 51–59]).

3. Master and servant ⚷265(14).

Brakeman crushed to death on going between uncoupled cars *held* entitled to presumption conduct was not heedless and that he was unaware of approaching danger (Code Civ. Proc. § 1963, subd. 4).

4. Evidence ⚷53, 89.

"Presumption" is evidence, and may in certain cases outweigh positive evidence adduced against it.

[Ed. Note.—For other definitions of "Presumption," see Words and Phrases.]

5. Appeal and error 🔑854(6).

On appeal from order granting new trial, action of trial court will not be disturbed if sustainable upon any hypothesis.

6. Trial 🔑89.

Evidence showing custom of stopping train several years prior to accident, admitted subject to promise to connect same with custom at time of accident, should have been stricken on failure to so connect it.

7. Evidence 🔑546.

Trial court has wide discretion in determining whether witness is qualified as expert.

8. Appeal and error 🔑1064(1).

Instruction that presumption that person will exercise caution for self-preservation can only be controverted by "convincing" contrary evidence and to find according to presumption unless so controverted *held* prejudicial error (Code Civ. Proc. § 1961).

> Such instruction was prejudicial error under circumstances where there was no direct evidence on disputed issue, because word "convincing" was bound to be understood by jurors to mean they must be convinced absolutely, which is unnecessary in civil cases, and because language, "because of instinct of self-preservation" introduces an element of argument into instructions, in that it went beyond Code Civ. Proc. § 1961, providing presumption may be controverted unless conclusive; "convince" meaning to overcome by argument, to prove the fallacy of a thing, to prove, or demonstrate.
>
> [Ed. Note.—For other definitions of "Convince," see Words and Phrases.]

9. Master and servant 🔑265(13).

Where switchman going between uncoupled cars was killed, railroad has burden of showing risk resulting in switchman's death was ordinary risk or extraordinary risk of which deceased knew (Federal Employers' Liability Act [45 USCA §§ 51–59]).

10. Master and servant 🔑284(1).

In action for death of brakeman going between uncoupled cars, whether movement was switching operation or trip run and whether brakeman violated Interstate Commerce Commission order *held* for jury (Federal Employers' Liability Act [45 USCA §§ 51–59]).

11. Trial 🔑228(3).

Word "proper" should not be used in instructions defining care of railroad sued for death of brakeman going between uncoupled cars.

12. Appeal and error 🔑1170(11).

Court of Appeals will not disturb order granting new trial unless convinced trial court did not consider whole record and decide it did commit prejudicial error (Const. art. 6, § 4½).

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Action by Frederick M. Pitt, as administrator of the estate of Leslie M. Shaw, deceased, against the Southern Pacific Company. From an order granting a new trial, plaintiff appeals.

Affirmed.

Rosenthal & Rosenthal and E. B. Drake, all of Los Angeles, for appellant.

W. I. Gilbert, of Los Angeles, for respondent.

LAMBERT, Justice pro tem.

The facts leading up to this controversy are briefly: On July 19, 1926, the respondent was operating a freight train in interstate commerce in Riverside county, Cal., and transporting freight in a westerly direction toward Los Angeles, Cal. Leslie M. Shaw, now deceased, was an employee of respondent on said date and was acting as a "swing brakeman." He had received instructions that when the train reached a station called Garnet, a helper "cut" was to be made; that is, an extra engine was to be added to the train for the purpose of assisting the train up grade. The roadbed at this point was laid upon a grade of 1.7 per cent., and the train was ascending the grade. The deceased, Shaw, pursuant to his instructions, went forward on the top of the train to the tenth car from the caboose, transmitted a stop signal to the engineer, and was shortly thereafter and about the time the train came to a stop or rest, seen upon the ground in the act of uncoupling the cars with his left hand and simultaneously giving the engineer a "go ahead" signal with his right hand. After the cars were "cut," deceased, Shaw, went between the cars; that is, the ten attached to the caboose and the forty-five cars attached to the engine. While thus between the cars, that part of the train consisting of the forty-five cars rolled or slid down grade about six feet and crushed Shaw to death. This action was brought by the administrator of his estate to recover damages in behalf of his heirs consisting of his wife and a minor child aged 1 year and 7 months. It is based on the Federal Employers' Liability Act of 1908 and amendments thereto (45 USCA §§ 51–59). The complaint originally contained seven counts. By an amendment what is designated a ninth cause of action was added. We have been unable to discover an eighth cause of action, so presume it exists only in contemplation. At all events, so far as this discussion is concerned, it will not be missed. While the failure to have the train properly equipped as required by the Safety Appliance Act was alleged, this charge was abandoned at the trial. Accordingly, under the various allegations contained in the several counts of the complaint and the amendment to the complaint (count 9), the question of respondent's liability rested primarily upon the alleged failure of its employees to perform a duty imposed upon them. The respondent by its answer put in issue each and all of the material allegations of negligence set forth in the several causes of action of appellant's complaint by denial thereof, and in addition thereto pleaded the special defense of "assumption of the risk" by the deceased, and alleged "that the injuries and death of the deceased arose directly out of and were caused from risks and dangers incident to decedent's employment, which said risks and dangers he had then and there, under and by virtue of the said Federal Employers' Liability Act and other laws, assumed at the time he entered the employment of defendant company." Upon the issues thus framed the case was tried by a jury.

It was the theory of plaintiff that the deceased went between the cars when they were not in motion, but the rear "cut" was sliding back and away from him and the "cut" of forty-five cars was standing still; that apparently he went there to close the angle cock which was to, and did, automatically set the brakes on the caboose and rear "cut" of cars after they had moved about six feet and stopped them; that the engineer failed to use his automatic air line and hold the forty-five cars attached to the engine, but negligently permitted them to roll back and crush deceased. It was the theory of respondent that it was not guilty of any negligence; that the rolling back of the cars was merely caused by the release of the slack in the string of forty-five cars; that this was an ordinary risk which deceased assumed; and also that any extraordinary risk caused by the negligence of respondent, if any, was also assumed by the deceased. That is, these were the main theories as developed by the evidence of both parties.

The jury returned a verdict in favor of plaintiff in the sum of $35,000. The respondent in due time made a motion for a new trial on all the statutory grounds. The trial court granted a new trial, but did not designate the grounds; the order being general. The plaintiff and appellant prosecutes this appeal, claiming that the trial court abused its discretion.

[1, 2] As the order granting a new trial was general, we are precluded from considering the question whether or not the evidence is sufficient to sustain the verdict, unless it is wholly insufficient in law and without conflict in any material point. Code Civ. Proc. § 657; Read v. Pacific Electric Ry. Co., 185 Cal. 520, 197 P. 791. Respondent claims that the evidence is insufficient as a matter of law to support the verdict. We do not agree with this contention. We conclude that we may not say as a matter of law the evidence is not sufficient to support the verdict within the rule as laid down in Read v. Pacific Electric Ry. Co., supra, and other cases.

[3] Respondent's argument on this branch of the case is that, inasmuch as appellant proved the conduct of the deceased immediately before the accident which resulted in his death, he was not entitled to the presumption that a person takes ordinary care for his own safety. Code Civ. Proc. § 1963, subd. 4. There was no eyewitness to the actual crushing of deceased, and appellant did not prove or establish directly why deceased went between the cars, or what was his purpose at the very time of the accident. He was entitled to the presumption as evidence that he did not heedlessly go between the cars, and that he did not see or know of the danger closing in upon him. It was then a matter for the jury to determine from all the evidence, including the presumption, whether the respondent's employees were negligent, and whether this negligence, if any, was the proximate cause of Shaw's death, or whether he had assumed the risk as incident to his employment; that is, whether the accident was caused by an ordinary risk, or if extraordinary, whether he assumed it.

There is considerable seeming conflict in the decisions as to the force and effect of disputable presumptions as evidence. This is due chiefly to the failure to distinguish between inferences and presumptions. The question of disputable presumptions is thoroughly discussed in the case of Smellie v. Southern Pac. Co., finally decided since the briefs were filed in this case, and reported in (Cal. Sup.) 299 P. 529 (May 1, 1931). From that case we quote the following at page 532:

[4] That a presumption is evidence and may in certain cases outweigh positive evidence adduced against it has long been the settled law of this state. People v. Milner, 122 Cal. 171, 54 P. 833; Sarraille v. Calmon, 142 Cal. 651, 76 P. 497; People v. Siemsen, 153 Cal. 387, 95 P. 863; Pabst v. Shearer, 172 Cal. 239, 156 P. 466; Thompson v. Davis, 172 Cal. 491, 157 P. 595; Gilmour v. North Pasadena Land, etc., Co., 178 Cal. 6, 171 P. 1066; Olsen v. Standard Oil Co., 188 Cal. 20, 204 P. 393; Mar Shee v. Maryland Assurance Corporation, 190 Cal. 1, 210 P. 269; Pacific Portland Cement Co. v. Reinecke, 30 Cal. App. 501, 158 P. 1041; Grantham v. Ordway, 40 Cal. App. 758, 182 P. 73, 76.

"A few quotations from the foregoing authorities will, we think, remove all doubt from this question. In People v. Milner, supra, at page 179, of 122 Cal., 54 P. 833, 837, the court said: 'Against a proved fact, or a fact admitted, a disputable presumption has no weight; but where it is undertaken to prove the fact against the presumption, it still remains with the jury to say whether or not the fact has been proven, and, if they are not satisfied with the proof offered in its support, they are at liberty to accept the evidence of the presumption.' In Sarraille v. Calmon, supra, at page 655 of 142 Cal., 76 P. 497, 498, the court said: 'The presumption of nonpayment arising from possession of uncanceled notes, admittedly executed by defendant, was evidence that they were not paid, and produced a conflict with the evidence of defendant's witnesses.' In People v. Siemsen, supra, at page 390, of 153 Cal., 95 P. 863, 865, we find the following language: 'But the court, in determining whether or not to accept Mr. Greeley's testimony, had a right to consider the presumptions raised by law. One of these is that "official duty has been regularly performed"; another, that "a writing is truly dated." * * * These presumptions, while disputable, are in themselves evidence (citing authorities) and will support a finding made in accordance with them, even though there be evidence to the contrary.' In Pabst v. Shearer, supra, at page 242 of 172 Cal., 156 P. 466, 467, this court stated the rule as follows: 'It must be remembered that a presumption declared by statute, although disputable, is itself evidence, and that it is for the trial court to say whether the evidence offered to overthrow the presumption has sufficient weight to effect that purpose.' In Thompson v. Davis, supra, at page 493 of 172 Cal., 157 P. 595, 596, this court again said: 'Under the express provision of section 164 of the Civil Code, as that section has read since the year 1897, such deed to the wife raised the presumption that the title was thereby vested in her as her separate property. This presumption is, to be sure, not conclusive. "It may be overcome by evidence sufficient to satisfy the court that the property in question, although conveyed to the wife, was in fact community property." (Citing authority.) But the presumption, "although disputable, is itself evidence, and * * * it is for the trial court to say whether the evidence offered to overthrow the presumption has sufficient weight to effect that purpose."' In Olsen v. Standard Oil Company, supra, at page 24 of 188 Cal., 204 P. 393, 395, this court sustained an instruction in the following words: 'The presumption is that every man obeys the law, and the presumption in this case is that the plaintiff was traveling at a lawful rate of speed and on the proper side of the highway at all times. This presumption is in itself a species of evidence and it shall prevail and control your deliberations until and unless it is overcome by satisfactory evidence.' In Pacific Portland Cement Co. v. Reinecke, supra, at page 504 of 30 Cal. App., 158 P. 1041, 1043, we find the following language: 'The presumptive evidence of the time of the making of the indorsement and guaranty and the consideration therefor may be resorted to in aid of the findings, even though it be assumed, as counsel for the defendant contends, that it stands alone and was opposed by direct evidence to the contrary. The general rule that as against a proved fact, or a fact admitted, a disputable presumption has no weight, is subject to the exception that where, as in the present case, an endeavor is made to establish a fact contrary to the presumption, the fact in dispute still remains to be determined upon a consideration of all of the evidence, including the presumption.' In Mar Shee v. Maryland Assurance Corporation, supra, at page 7 of 190 Cal., 210 P. 269, 272, this court has again said: 'There seems to be some confusion in the decisions of this state with respect to the extent to which under various circumstances presumptions of law are to be regarded as evidence of facts. The code expressly declares them to be evidence (Code Civ. Proc. §§ 1957, 1963), and admonishes the trial judge to instruct the jury on all proper occasions "that they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a * * * presumption." Code Civ. Proc. § 2601, subd. 2. Among the decisions of this court recognizing and applying the foregoing rule may be mentioned the following: Sarraille v. Calmon, 142 Cal. 651, 76 P. 497; Adams v. Hopkins, 144 Cal. 19, 77 P. 712; Moore v. Gould, 151 Cal. 723, 91 P. 616; People v. Siemsen, 153 Cal. 387, 390, 95 P. 863; Freese v. Hibernia Sav., etc., Soc., 139 Cal. 392, 73 P. 172; Gilmour v. North Pasadena Land, etc., Co., 178 Cal. 6, 171 P. 1066.'"

And at page 534 of 299 P.: "It is argued by the defendants that, since the statute itself (section 1963, Code Civ. Proc.), before enumerating the disputable presumptions, declares that said presumptions 'are satisfactory, if uncontradicted,' and that they 'may be controverted by other evidence,' it must follow that, if they are contradicted or controverted they fade out and disappear from the case. As has been seen, they do disappear when contradicted or controverted by the evidence of the party relying upon them, with the qualification stated in the Mar Shee Case, but it is not correct to say that, under the Code section and the effect given to it by the court, they vanish from the case as a matter of law when contradicted or controverted by the party against whom they are invoked. In such case their guiding and compelling effect is undermined and diminished or destroyed to the extent that they are controlled by the facts as found to exist."

This case we think disposes of respondent's contention on this point of the case adversely to it.

[5] From what has been said, it follows that the court did not err in refusing to grant a nonsuit, or in its refusal to direct a verdict in favor of respondent. However, as said in Biaggi v. Ramont, 189 Cal. 675, at page 681, 209 P. 892, 895, "on an appeal from an order granting a new trial the action of the trial court will not be disturbed if upon any hypothesis it can be sustained."

[6] It is contended that it was error to admit evidence, over objection of respondent, as to the custom of the method of stopping trains at the place in question several years prior to the accident, and to deny the motion to strike this testimony. It was admitted subject to the promise to connect it up by showing that the same custom was used at about the time this accident took place. This was not done. We think the motion made to strike this testimony should have been granted. Appellant in a supplemental brief cites McComb v. A., T. & S. Fe R. Co. (Cal. App.) 294 P. 81, in regard to proof necessary to prove a custom. This case merely goes to the quantum of proof necessary to prove a custom, and is of no aid to him in the instant case.

[7] It is next contended that it was error to permit the witness W. H. Sheasby to testify as an expert in regard to the principle relating to the equipment of box cars and the application of the principles of equipment to the operation of the train. We have examined the record in this connection and find no prejudicial error. In Union C. Co. v. Madera Irr. Co., 179 Cal. 774, at page 779, 178 P. 957, 960, it is said: "Whether a witness is qualified as an expert is to be determined in the first instance by the trial court, and in so deciding the trial court has a wide range of discretion. Howland v. Oakland C. S. Ry Co., 110 Cal. 513, 521, 42 P. 983, Ann. Cas. 1912D, 817, note." And it seems he testified to some matters on which it was proper to enlighten the jury. Fonts v. S. P. Co., 30 Cal. App. 633, 159 P. 215, and cases therein cited.

[8] It is next claimed by respondent that the court erred prejudicially in giving certain instructions. With this contention we agree. The court gave at the request of appellant instruction No. 19 as follows: "You are hereby further instructed that under the law every person is presumed to take ordinary care of his own concerns, and that because of the instinct of self preservation he will exercise due care and caution for his own safety, and such presumption can only be controverted by convincing evidence to the contrary, but unless so controverted, the jury are bound to find according to the presumption."

While the thought expressed in this instruction was proper, the language used to convey it was erroneous, and in this particular case highly prejudicial. The word "convincing," while used in this instruction in a descriptive sense, was bound to be understood by the jury to mean that their minds must be convinced absolutely. The word "convince," according to Webster's Dictionary, means "to overcome by argument"; "to prove the fallacy of a thing"; "to prove or demonstrate." The word itself is superlative—that is, it means the utmost degree or highest degree. In Murphy v. Waterhouse, 113 Cal. 467, at page 473, 45 P. 866, 867, 54 Am. St. Rep. 365, it is said: "In a civil case it is error to tell the jury that there must be evidence sufficient to convince their minds of any fact necessary to be shown by either party. The weight of evidence, or preponderance of probability, is sufficient to establish a fact in a civil case." See, also, Hutson v. So. Cal. Ry. Co., 150 Cal. 701, at page 705, 89 P. 1093.

This instruction also contains the following erroneous language: "Because of the instinct of self preservation." This introduces an element of argument into the instruction. Section 1961, Code of Civil Procedure, provides: "A presumption (unless declared by law to be conclusive) may be controverted by other evidence, direct or indirect; but unless so controverted the jury are bound to find according to the presumption." Any instruction on this presumption should not go beyond the Code section. The giving of this instruction just discussed was prejudicial error alone sufficient to support the order of the trial court.

[9] However, there were other erroneous instructions given, and in view of the new trial that must be had in this case, we may say that the instructions complained of should not be given in the form in which they were given. We refer first to instruction No. 12, upon the doctrine of the assumption of risk and burden of proof. The only burden that was upon the respondent was to show that the risk and danger which resulted in Shaw's death was one of the ordinary risks and hazards, or an extraordinary risk and hazard of which deceased knew, or which in the exercise of ordinary care he should have known. Gila Valley, G. & N. R. Co. v. Hall, 232 U. S. 94, 34 S. Ct. 229, 58 L. Ed. 521, at page 542.

[10] Second, the instruction No. 7, relating to the violation of the order of the Interstate Commerce Commission—it seems the jury should first determine whether the movement was a switching operation or trip run, although it seems clear to us that it was a trip run, and then whether the order was violated. It would be better to have the instruction cover both elements clearly.

[11] Third, the word "proper" should not be used in defining the care to be exercised by the respondent. There are some other instructions discussed, but we do not deem it necessary to express any opinion upon them. Neither need we discuss the question of excessive damages.

Finally, appellant refers to section 4½, article 6, of the Constitution, which provides: "No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

[12] This provision is a limitation on the power of the trial court, but, when that court has acted and granted a new trial, we must presume that the trial court did consider the whole record, and decided that it had committed prejudicial error, and, unless an inspection of the record convinces us that it is otherwise, we will not disturb the order.

In the case of Montgomery v. Globe Grain & Milling Co., 109 Cal. App. 695, at page 699, 293 P. 856, 858, it is said: "It is a well-settled rule of law in California that an erroneous instruction given by the court to the jury is an error of law that is considered excepted to as a matter of law. Section 647, Code Civ. Proc. While an instruction gives the law of the case to the jury, its applicability, and oftentimes its correctness, depends upon the evidence in the case. An instruction should not be considered as merely an abstract statement of a principle of law, but it must relate to and be measured by the circumstances of the case in which it was given. To determine the question of whether there was any error in giving it frequently requires an examination of the evidence in the case. Hamlin v. Pacific Elec. R. Co., 150 Cal. 776, 89 P. 1109; Shipley v. San Diego Elec. R. Co., 106 Cal. App. 659, 289 P. 662. Sullivan v. Market Street R. Co., 136 Cal. 479, 69 P. 143."

And in Campanella v. Campanella, 204 Cal. 515, at page 522, 269 P. 433, 436, we find the rule applicable here expressed as follows: "We are mindful of the rules here applicable, expressed in Scott v. Times-Mirror Co., 178 Cal. 688, 690, 174 P. 312, 313, as follows: 'It is the well-settled rule of this court that when the order of the trial court in granting a new trial is general in its terms, it will be affirmed if it could properly have been granted upon any of the grounds upon which the motion for it was predicated. Weisser v. Southern Pac. Ry. Co., 148 Cal. 426, 7 Ann. Cas. 636, 83 P. 439; Morgan v. J. W. Robinson Co., 157 Cal. 348, 107 P. 695. It is an equally well-settled and long-established rule of this court that an order granting a new trial will not be disturbed upon appeal, except upon a showing of clear and manifest abuse of discretion on the part of the trial court in respect to granting the same. Harrison v. Sutter St. Ry. Co., 116 Cal. 156, 47 P. 1019; Doolin v. Omnibus Cable Co., 125 Cal. 148, 57 P. 774; Sherwood v. Kyle, 125 Cal. 652, 58 P. 270; Lee v. Southern Pac. R. R. Co., 101 Cal. 118, 35 P. 572; Meinberg v. Jordan, 29 Cal. App. 760, 57 P. 1005, 1007.' "

It follows from what has been said that the order granting the new trial in this case must be and it is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

121 Cal.App. 428

PEOPLE v. NAHHAS.

Cr. 1177.

District Court of Appeal, Third District, California.

March 5, 1932.

Rehearing Denied March 19, 1932. Hearing Denied by Supreme Court April 4, 1932.

1. Criminal law ⟹1116.

Defendant could not complain that amendment to information charged offense not shown by preliminary examination evidence, where such evidence was not in record (Pen. Code, §§ 538, 1008).

> Amendment to information, in prosecution for executing chattel mortgage without informing mortgagee of existence of prior mortgage, stated that the property was of the value of more than $200.

2. Indictment and information ⟹161(5).

Offense in information charging commission of felony by execution of mortgage without informing mortgagee of prior mortgage *held* not changed by amendment charging that value of property was over $200 (Pen. Code, §§ 486, 487, 490a, 538, 1008).

> Amendment charging that property had value of more than $200 did not change character of offense, since the information specifically charged defendant with crime of felony, and, in order to constitute offense of felony under Pen. Code, §§ 486, 487, 490a, 538, the property necessarily must have been of the value that would constitute the action of defendant a felony in the subsequent transfer thereof, and therefore the property must have been

in value over sum of $200; consequently the insertion of the figures "200" did not make it any more a felony.

3. Indictment and information ⚷161(1).

Amendments to information are allowable where substantial rights of defendant are not affected (Pen. Code, § 1008).

4. Indictment and information ⚷196(1).

Questions presentable by motion or demurrer *held* waived, in absence of motion or demurrer.

5. Criminal law ⚷369(1), 1186(4).

In prosecution for executing second mortgage without informing mortgagee of first mortgage, admission of evidence regarding third mortgage *held* error, but not prejudicial error, where evidence conclusively established defendant's guilt (Pen. Code, § 538; Const. art. 6, § 4½).

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Amile Nahhas was convicted of violating statute making it offense to execute subsequent mortgage without informing mortgagee of existence of prior mortgage and without informing prior mortgagee of intention to make further incumbrance, and he appeals.

Affirmed.

George L. Klug, of Merced, and H. W. McGowan, of Willows, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

The defendant was convicted of a felony, to wit, violation of section 538 of the Penal Code, in that, on or about the 30th day of May, 1931, in the county of Merced, the defendant executed and delivered a mortgage upon certain personal property, to wit, caterpillar 30 tractor No. 5940, of the alleged value of more than $200, upon which property there was, at the time of the execution of the said mortgage, a prior incumbrance, and that the defendant, at the time of executing the subsequent mortgage, failed to inform the mortgagee, the person to whom the mortgage was executed, of the existing prior mortgage, and also failed to inform the owner of the prior mortgage thereof. From this conviction the defendant appeals.

When the case was called for trial, upon motion, the district attorney was allowed to amend the information by inserting the words, "of the value of more than $200.00," the claim being made that this amendment was and is not allowable under the provisions of section 1008 of the Penal Code, in that it substantially changed the offense charged in the information so as to charge an offense not shown by the evidence taken at the preliminary examination.

[1] By reason of the fact that the evidence taken at the preliminary examination is not set forth in the record, the contention that the amendment charges an offense not shown by such testimony is without merit.

The record shows that, upon the application of the district attorney for permission to amend the information, the objection urged by the appellant thereto was set forth as follows: "If the court please, at this time I object to this amendment for the reason that the Penal Code of the State of California sets forth in paragraph 538 thereof what constitutes the offense, and there is absolutely no value therein stated, and so it is superfluous."

The objection was further made by the appellant that it was entirely up to the jury to find out if the property had any value. The section of the Code referred to reads that a violation thereof constitutes the crime of larceny. By section 490a of the Penal Code it is provided that whenever, by any law or statute of this state, larceny, embezzlement, or stealing is referred to, said law or statute shall be read and interpreted as if the word "theft" were substituted therefor, theft being divided into grand theft and petty theft, as shown by sections 486 and 487 of the Penal Code. To constitute grand theft the property in this case involved must exceed in value the sum of $200.

[2] Upon this appeal it is contended, further, that the amendment changes the character of the offense set forth in the information. This, however, does not appear to be the case. The information specifically, without relation to the value of the property, charges the defendant with the crime of felony. In order to constitute the offense of felony, the property necessarily must have been of the value that would constitute the action of the defendant a felony in the subsequent transfer thereof. To be a felony it must have been in value over the sum of $200, and therefore the insertion of the figures "200" did not make it any more a felony. The felony was charged by the information just as in the case of People v. Olsen, 64 Cal. App. 126, 220 P. 444, we held that a burglary was charged, and that the defendant was being tried for the crime of burglary, and that an amendment showing the ownership of the house that the defendant entered did not affect the substantial rights of the defendant.

[3] It would serve no useful purpose to cite the long list of cases holding that amendments are allowable where the substantial rights of the defendant are not affected. We may, however, refer to the following: People

v. Carroll, 39 Cal. App. 654, 180 P. 49; People v. Clayberg, 26 Cal. App. 614, 147 P. 994; People v. Anthony, 20 Cal. App. 586, 129 P. 968.

[4] The subsequent mortgaging of the property was the substance of the offense. The value of the property simply went to the extent of the punishment, and, being charged as a felony, the extent of the punishment was indicated, and the addition of the value by amendment to the information simply made it more certain. No demurrer was interposed by the defendant, nor was any motion made to set aside the information on the ground that the defendant had not been legally committed by a magistrate, so that all questions which might have been raised by motion or demurrer must be considered as having been waived.

[5] During the course of the trial there was introduced some testimony relative to a third mortgage executed and delivered by the defendant, which had been released, and the release not filed for record. In the examination of the defendant the district attorney was permitted, over the objection of the appellant, to ask the appellant if the failure to file for record the release of the mortgage was not for the purpose of preventing attachment by creditors. The objection to this testimony should have been sustained, but the record shows beyond any controversy that the defendant in this case executed a subsequent mortgage to C. R. Burnett to secure the payment of the sum of $1,000, without having informed him of such prior mortgage, nor was information given to either the prior mortgagee or to C. R. Burnett, as required by the Code provisions. Section 538 of the Penal Code provides: "At or before the time of making such sale, transfer or encumbrance, such mortgagor informs the person to whom such sale, transfer, or encumbrance is made, of the existence of the prior mortgage, and also informs the prior mortgagee of the intended sale, transfer, or encumbrance, in writing, by giving the name and place of residence of the party to whom the sale, transfer, or encumbrance is made." There is nothing in the record to show that any such notice was given. In fact, we do not find that the appellant claimed that any such notice was given. All the claim there is on the part of the defendant goes to the effect that he told the prior mortgagee that he was going to make the mortgage, and that the prior mortgagee objected thereto. Our attention has not been called to any testimony indicating that C. R. Burnett was given any information either orally or in writing. The oral information, if given to the holder of the prior mortgage, would not comply with the statutes.

Whether the court erred in permitting the introduction of testimony relative to a third mortgage need not be decided, because under the provisions of section 4½ of article 6 of the Constitution we are compelled to hold that the introduction of such testimony did not result in a miscarriage of justice as excluding everything relative to the third mortgage, and also the objectionable question allowed to be propounded by the district attorney; the evidence shows beyond a shadow of a doubt, much less a reasonable doubt, that a subsequent mortgage was executed and delivered to C. R. Burnett on property exceeding in value $200, to secure the payment of the sum of $1,000 without giving notice. This being true, a further discussion of the questions raised upon appeal or citation of authorities appears to be unnecessary.

The judgment is affirmed.

We concur: PRESTON, P. J.; R. L. THOMPSON, J.

215 Cal. 241

LEWITH v. REHMKE.

L. A. 13074.

Supreme Court of California.
March 24, 1932.

1. Appeal and error 🔑**870(6).**

Proceedings on new trial motion are reviewable on appeal from judgment.

2. Appeal and error 🔑**82(3).**

Order refusing to vacate judgment and reopen cause for additional evidence *held* appealable as special order made after final judgment.

3. Appeal and error 🔑**82(1).**

Order denying relief from default in not serving bill of exceptions within time limit *held* appealable as special order made after final judgment (Code Civ. Proc. § 650).

4. Appeal and error 🔑**801(3).**

Whether court erroneously refused relief from default in not serving bill of exceptions within time limit was matter for consideration on hearing of appeal from order refusing relief, not on motion to dismiss appeal (Code Civ. Proc. § 650).

Appeals from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Action by Joseph L. Lewith against Mae Rehmke. Judgment for defendant. From an order denying plaintiff's motion to vacate and set aside the judgment and to reopen the cause for additional evidence, and from an order denying his motion that he be relieved from his default in failing to serve a proposed bill of exceptions within the time limit, plaintiff appeals. Motion to dismiss the appeals.

Motion denied.

C. C. Pease, of San Diego, for appellant.

Gray, Cary, Ames & Driscoll and E. A. Walters, all of San Diego, for respondent.

PER CURIAM.

Motion to dismiss appeals now pending in this court in the above-entitled action. The motion is made upon the ground and for the reason that the said appeals are taken from orders which are not appealable; and upon the further ground that the appeal from the order refusing to vacate the judgment in said cause and to reopen the same for the taking of additional evidence was not perfected within the time allowed therefor by law.

The action is one to cancel a deed to certain real property and to quiet title thereto. After trial of the issues, judgment went in favor of defendant, which judgment was entered on December 22, 1930, and notice of such entry was served on December 27th following. Plaintiff, on the 3d day of January, 1931, served and filed a notice of intention to move for a new trial. Among the grounds therein set forth was newly discovered evidence which plaintiff alleged he could not reasonably have discovered or produced at the trial. Subsequently, on February 20, 1931, plaintiff served and filed a notice of motion to vacate and set aside the judgment and to reopen the case for further evidence. This evidence, as appears from the affidavit in support of the motion, consisted of two letters written by defendant to her daughter shortly before the deed in question was obtained by defendant. The letters in substance stated that defendant was relying upon certain named threats to procure the deed. Discovery of the letters was made by plaintiff subsequent to the trial. This last-named motion was noticed for the 25th day of February, 1931. The motion was denied. It is from the order refusing to vacate and set aside the judgment and to reopen the cause for additional testimony that one of the appeals here involved is taken. Thereafter, and on the 25th day of March, 1931, plaintiff filed a notice of appeal from the judgment and from the order denying the motion to vacate, but did not serve his proposed bill of exceptions until the 25th day of April, being some fifty-nine days after service upon him of the notice of entry of order denying the motion for a new trial. The proposed bill was served and filed within a period of time fixed by the court, which time it is claimed was beyond the statutory limit allowed by statute. Defendant on the 30th day of April, 1931, served and filed her objection to further proceedings for the settlement of the bill of exceptions, for the reason and upon the ground that the proposed bill was served after the time allowed therefor by section 650 of the Code of Civil Procedure, and an order was made setting a time for hearing upon this objection. Thereupon plaintiff noticed for the same day a motion that he be relieved from his default in failing to serve his proposed bill within the time limit. On the day set for the hearings, the court refused to relieve plaintiff from his default. It is from this order that the other appeal here involved has been taken.

The clerk's transcript contains two notices of appeal. The first of these notices states an appeal from the judgment, from the order denying the motion for a new trial, and from an order denying plaintiff's motion to vacate the judgment and reopen the case for further evidence "for the purpose of having reviewed all matters and orders reviewable on appeal from the judgment in the above entitled action and from the whole and all thereof." The second notice states an appeal from an order of the trial court denying relief to plaintiff from default relating to the time of serving and presenting a bill of exceptions, and from the further order of the trial court ordering and sustaining the objection by defendant to the settling of the proposed bill of exceptions.

The transcript filed herein consists of the clerk's transcript on the main appeal and a reporter's transcript on the appeal from the order denying relief from default. The reporter's transcript was settled, signed, and filed by the trial court.

[1-4] It is respondent's main contention, in moving to dismiss the appeals, that they constitute a mere attempt to appeal from an order denying a motion for a new trial, a nonappealable order. There is no merit in this claim. The manifest purpose of appellant is to procure a record to support his appeal from the judgment, and without which his appeal would avail him nothing. Proceedings on motion for a new trial may be reviewed on the appeal from the judgment. The effect of the two orders appealed from precludes the preparation of a record which may avail plaintiff on his appeal from the judgment. They are appealable as special orders made after final judgment and an appeal therefore lies from them. California Delta Farms, Inc., v. Chinese American Farms, Inc., 201 Cal. 201, 255 P. 1097. Whether or not the court committed error in refusing relief to appellant from his default is a matter to be considered on the hearing of the appeal. The motion to dismiss is denied as to both appeals.

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215 Cal. 229

McKINLEY BROS. v. McCAULEY et al.

Sac. 4494.

Supreme Court of California.

March 22, 1932.

Rehearing Denied April 21, 1932.

1. Waters and water courses 🔑21.

Patent under which defendants claimed created no riparian rights as against prior patent and appropriation under which plaintiff claimed, since riparian rights attach only to land in private ownership.

2. Waters and water courses 🔑152(5).

In action to quiet title to water rights, judgment and record in action between parties' predecessors in interest were admissible under plaintiff's allegation of ownership, though not specifically pleaded.

3. Names 🔑18.

Identity of person is presumed from identity of name.

4. Judgment 🔑955.

In action to quiet title to water rights, burden was on defendant to rebut presumption that name "Alfred H. Gunning" appearing as patentee was not same person as A. H. Gunning appearing in an earlier action, judgment in which was claimed to be bar to present action.

5. Judgment 🔑955.

In action to quiet title to water rights, evidence *held* to show that judgment against A. H., was against defendants' predecessor in interest Alfred H., Gunning, and concerned same lands and water rights.

6. Judgment 🔑951(2).

To determine applicability of judgment relied on as bar, judgment roll in its entirety may be inspected.

7. Judgment 🔑681.

In action to quiet title to water rights, judgment against defendants in favor of plaintiff's predecessor in interest *held* res adjudicata.

8. Judgment 🔑743(1).

Discharge of contemner for alleged violation of injunction in action relied on as res adjudicata of water rights *held* immaterial, since title was not involved in contempt proceeding.

In Bank.

Appeal from Superior Court, Lake County; Ross Campbell, Judge.

Action to quiet title to water rights by McKinley Bros. against James B. McCauley and others. From judgment for plaintiff, defendants appeal.

Affirmed.

O'Hara, Hatch & Pope and Russell O'Hara, all of Vallejo, for appellants.

H. G. Crawford and C. M. Crawford, both of Lakeport, for respondent.

SEAWELL, J.

Appeal by defendant James B. McCauley from a judgment in an action which is essentially one to quiet plaintiff's title to the beneficial use of the waters of Putah creek in Lake county. The judgment decreed that the plaintiff, McKinley Bros., a corporation owning and operating a flourmill and electric power plant near the town of Middletown, is the owner of, and entitled to the possession for beneficial uses of, all of the flow in the natural channel of said creek up to 500 miners' inches measured under a 4-inch pressure at its diversion points on Anderson and English creeks, which creeks unite to form Putah creek, subject, however, to a permitted diversion by appellant McCauley for a 36-hour period each week of the waters of Gunning creek, a tributary of Anderson creek. Putah creek has its source in Cobb mountain in Lake county, flows in a general easterly direction, draining an extensive watershed in Lake, Napa, Yolo, and Solano counties, and empties into the Sacramento river below the town of Davis. It is a seasonal stream, flowing a large quantity of water in the rainy season and a comparatively small amount in the dry season. The respondent's asserted right to the undiminished flow of Putah creek in its natural channel is based upon an appropriation of 500 miners' inches sectional area measured under a 4-inch pressure for milling purposes, made and recorded by its predecessor in interest, James M. Davis, in 1862, while the land above the then contemplated diversion was still unoccupied government land. It is stipulated that respondent is the successor in interest of Davis. The diversion under this appropriation was for sawmill purposes and began in 1869, there having been no intervening appropriation, and has continued uninterruptedly ever since. The amount of water actually diverted has varied with the flow of the stream.

[1] The sawmill, for which the original appropriation was made, in time gave way to a gristmill known as the Alhambra mill, owned and operated by Joel Stoddard and J. H. Laughlin, the latter giving way to the flourmill and electric generating plant now owned by the respondent corporation. The land upon which the respective mills stood, consisting of 120 acres patented to Davis in 1875, is riparian to, and lies upon both sides of, Putah creek. It is stipulated that the appellant is the successor in interest of land riparian to Gunning creek, a tributary of Anderson creek, which was patented to Alfred H. or A. H. Gunning in 1882. This latter patent contained the following reservation: "Subject to any vested and accrued rights for mining, agricultural, manufacturing or other purposes, and rights to ditches and reservoirs used in connection with such rights, as may be recognized and acknowledged by the local customs, laws and decisions of courts." The Gunning patent, under which the appellant claims, being subsequent in point of time to the Davis patent and appropriation under which the respondent claims, gave rise to no riparian rights as against it, for it is settled that riparian rights do not attach to lands held by the government until such land has been transmitted to private ownership. Rindge v. Crags Land Co., 56 Cal. App. 247, 252, 205 P. 36; Canal & Irrigation Co. v. Worswick, 187 Cal. 674, 203 P. 999.

As already stated, the present action is, in effect, one in which the respondent seeks to have its title quieted to the undiminished flow in the natural channels of Putah creek up to 500 miners' inches under its appropriation, the water diverted by it being used in the operation of its flourmill and electrical energy generating plant, and upon its lands, which use has continued by respondent and its predecessors for more than forty years. The flow of Putah creek is diverted from Anderson and English creeks by flume, ditch, and pipe through said plant, and then returned to the natural channel of Putah creek and used by respondent for farming and stock-raising purposes upon its lands. Generally, during the dry season the flow of Putah creek is so limited that all of it is required by respondent to operate the machinery of its plant. It is the appellant's diversion of water from Gunning creek across the lands of defendants Simons and Cannon, who do not appeal, that is complained of as an invasion of respondent's rights under its appropriation to all the flow of Putah creek up to 500 miners' inches, that is here sought to be enjoined.

The appellant denies the right of respondent to an undiminished flow of said amount of water; denies its beneficial use by respondent and its predecessors; admits a diversion of water from Gunning creek under a claim of right for beneficial purposes; and denies it is a wrongful diversion or a wrongful interference with respondent's rights.

It appears that in 1886 Joel Stoddard and J. H. Laughlin, predecessors in interest of the respondent, instituted an action in the Superior Court in and for the county of Lake against certain defendants; among them being A. H. Gunning, appellant's predecessor in interest, to have said defendants enjoined from so diverting the waters of Putah creek and its tributaries by ditch, dam, or otherwise, as to interfere with their right to have the water descend to their mill and lands. After a hearing, it was decreed in that action that the plaintiffs were entitled to the uninterrupted flow of the waters of Putah creek to the extent of 500 miners' inches, sectional area, measured under a 4-inch pressure, down to and through their mill, excepting and reserving to defendants a 36-hour flow from 12 o'clock noon on each Saturday until 12 o'clock midnight of the Sunday next following, during which period the plaintiffs' gristmill was not operated. The judgment in said action also perpetually enjoined the defendants, including appellant's predecessor in interest, from obstructing or interfering with the plaintiffs' right to the natural flow of Putah creek to the above extent. The judgment has long since become final.

[2] In alleging its cause of action in the present case, the respondent did not specifically plead this judgment so entered in favor of its predecessor in interest many years before. Respondent did, however, offer said judgment

and the record of said earlier action in evidence. They were admitted over the appellant's objection. This judgment and record were admissible in evidence under respondent's general allegation of ownership (Doyle v. Bradshaw, 41 Cal. App. 247, 252, 183 P. 185; Moakley v. Los Angeles, etc., Co., 99 Cal. App. 74, 277 P. 883), the action being essentially one to quiet title to respondent's right to the use of said water.

The appellant urges (1) that the evidence does not support the conclusion that the judgment in the earlier action between the predecessors of the parties hereto is binding upon him; (2) that it does not show that the predecessors of respondent acquired the right to use the waters of Putah creek to the extent of 500 miners' inches sectional measure under a 4-inch pressure at a time when the lands of both parties were public, unoccupied government lands; and (3) that it does not establish that respondent and its predecessors in interest have continuously beneficially used said 500 miners' inches of water from the time of the inception of their alleged right under appropriation until the filing of the complaint in the present action.

The respondent, on the other hand, urges that the real issue is whether or not it has, through its predecessors, acquired the right to divert the waters of Putah creek. Upon this issue respondent asserts that the prior adjudication of the respective rights of the predecessors in interest of the parties hereto has become final and constitutes a bar to the appellant's claims herein.

The trial court, in line with respondent's contention, found that the appellant was barred and concluded as to the subject-matter of this action by the judgment above referred to, rendered on May 24, 1886, in the action of Stoddard et al. v. Dunham et al. It further found that there has been no change in fact, condition, status, or right since the entry of that judgment, and that respondent has never ceased to make a beneficial use of the 500 miners' inches of water from Putah creek when available, and that respondent has never forfeited or abandoned its right to the use of said water up to 500 miners' inches. As a conclusion of law therefrom the court below declared that respondent was entitled to judgment, which was accordingly entered, establishing its right to the natural flow of Putah creek up to 500 miners' inches measured under a 4-inch pressure, reserving to appellant the above-noted 36-hour diversion of the waters of Gunning creek. It was also concluded and decreed that the appellant has no right, either as an appropriator or as riparian owner, in or to the waters of Putah creek and its tributaries other than as described, and that appellant, his agents and employees, should be perpetually enjoined from claiming, diverting, using, or asserting any right to the water of that creek and its tributaries, other than as described.

[3, 4] Appellant contends that the court below erred when it concluded that the judgment in the earlier action, supra, constituted a bar to his claim in the present action. He admits that he is the owner of the land patented to Alfred H. Gunning in 1882, but contends that there is no evidence that said Gunning is the same person as the A. H. Gunning who appeared as a defendant in the earlier action, supra, or that the A. H. Gunning who was a defendant in the earlier action had been sued in his relation as owner of the lands now occupied by appellant. Identity of person is presumed from identity of name, and the burden was upon the appellant to rebut the presumption, which he failed to do.

[5, 6] An inspection of the answer of A. H. Gunning and the findings of the court in the former case is quite conclusive of the fact that "A. H." Gunning named as a defendant therein and "Alfred H." Gunning, to whom the patent was issued in 1882, was intended to and does identify the same person from whom it is stipulated appellant deraigned title in the lands described in the answer herein. Appellant makes claim through no other source. By the judgment in said case of Joel Stoddard and J. H. Laughlin v. Seth Dunham, A. H. Gunning, Phillip Lampley and Rufus Springston it is provided that defendants "shall at all times henceforth have and enjoy without molestation or hinderance the right to take, divert and use the water of said stream * * * by any proper means from 12 o'clock noon of each Saturday until 12 o'clock midnight of the Sunday next following. * * *" The use of the water mentioned in the judgment was, of course, the use incident to the ownership of lands owned by Gunning to which appellant became his successor. Said lands are specifically described in appellant's answer herein, and, upon an inspection of the judgment roll in its entirety, to which resort may be had to determine the issues litigated in said former action, it is made clear that the lands described by appellant in the instant case and those of which ownership was asserted in said former action are the same lands. Said former judgment, which apportioned the rights of parties to said action, was not appealed from or attacked by any of the parties defendant.

That the flow of water in Putah creek has greatly diminished during the past decade there can be no question. It is equally clear that plaintiff has not enjoyed the quantity of water allocated to it during the dry seasons, but it has used as much thereof as the flow of the stream furnished. The judgment seems sufficiently certain in its original form to sustain the effect placed upon it by the trial court.

[7] We are of the opinion that the judgment in the earlier action is binding upon the appellant herein as the successor in interest of A. H. or Alfred H. Gunning, and that the trial court was correct in finding that the judgment in said earlier action constituted a bar to the appellant's claims herein.

[8] We find no merit in appellant's contention as to the effect of certain contempt proceedings growing out of a violation of the injunction order entered in the earlier action. In this particular, he urges that, inasmuch as the contemner was discharged, it must necessarily follow that the earlier action is not a bar herein. It is elementary that title or right by adverse user, or otherwise, may not be tried in a contempt proceeding. Ex parte Hollis, 59 Cal. 405; Koerber v. Superior Court, 57 Cal. App. 31, 34, 206 P. 496. This principle was recognized in the order of discharge entered in the contempt proceeding relied on by appellant.

The conclusion we have reached renders unnecessary a discussion of other points.

Judgment affirmed.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; PRESTON, J.; SHENK, J.

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215 Cal. 237

VICKERS v. DEPARTMENT OF INDUSTRIAL RELATIONS et al.

S. F. 14400.

Supreme Court of California.
March 23, 1932.

Master and servant ⚷405(2).

Evidence disclosed that cleaning old cesspool and completing new one, not continuous with other jobs, was "casual employment," and hence injury to eye while drilling concrete not compensable (St. 1917, p. 835, § 8(c).

Facts disclosed that worker was employed by person engaged in teaching profession to clean out old cesspool and complete new one with understanding work would not occupy more than three or four days, and that, when he reported for work, employer mentioned various other odd jobs which altogether would take about two weeks, but that no agreement was made in regard to such other odd jobs, and that on second day of work steel splinter flew into worker's eye, causing injuries.

[Ed. Note.—For other definitions of "Casual Employment," see Words and Phrases.]

In Bank.

Proceeding under the Workmen's Compensation Act by Theodore Stenerson, claimant, for injuries, opposed by L. E. Vickers, employer. To review an order of the Industrial Accident Commission awarding compensation, employer brings certiorari

Award annulled.

W. D. Tillotson and John A. Spann, both of Redding, for petitioner.

A. I. Townsend, of San Francisco, for respondent Industrial Accident Commission.

Glenn D. Newton and Jesse W. Carter, both of Redding, for respondent Theodore Stenerson.

SHENK, J.

Petition to review and annul an award of the Industrial Accident Commission.

The award was made in favor of one Theodore Stenerson who suffered the loss of his right eye from an injury occurring while he was engaged in drilling the concrete wall of a cesspool on the property of the petitioner in the town of Anderson, Shasta county. The petitioner is a public school teacher, and was regularly engaged in that profession at the times involved herein. It is conceded that the work done by Stenerson was not in the course of the trade, business, profession, or occupation of the employer. The question to be determined is whether the evidence and the inferences reasonably to be drawn therefrom sufficiently support the finding of the commission that the employment of Stenerson by the petitioner was other than casual.

The term "casual," as defined by section 8 (c) of the Workmen's Compensation Act (St. 1917, p. 835), is applicable only to employment where the work contemplated is to be completed in not exceeding ten working days, without regard to the number of men employed, and where the total labor cost of such work is less than $100. Concededly the total cost of the work involved here was less than $100, and the remaining question is whether the work contemplated was to be completed in more than ten working days.

On February 17, 1930, the petitioner went to a poolroom at Anderson and inquired if any one there wanted work. Stenerson replied that he was looking for work. The petitioner stated that he desired some one to clean out an old cesspool and complete a new one. The petitioner told Stenerson to come the next morning and bring some one to help him bale out the old cesspool. The testimony establishes without conflict that at the time of the conversation in the poolroom nothing was said concerning any other than the cesspool work, which it is admitted would not occupy more than three or four working days. The next morning, and before the petitioner left to attend to his school duties, Stenerson arrived with a helper and started work on the cesspool. On the second day of work, while drilling the concrete wall between the old and new cesspools, a steel splinter flew into Stenerson's eye.

On the hearing before the commission, Stenerson testified that, when he arrived at the petitioner's place, he was shown over the grounds by the petitioner, who mentioned other work that there was to do about the place, including the laying of a pipe across the road to the cesspool, leveling a plot, plowing a half acre, spading a garden, planting corn, and moving a fence. Stenerson testified that he asked petitioner how long the work would last, and that the petitioner replied that there was about two weeks' work on the place. The petitioner admits that he intended that Stenerson might be engaged to do some of the other work, but he testified that he did not then engage Stenerson to do the additional work, and Stenerson at no time asserts or claims that any actual agreement was voiced by the parties as to any further work to be done by Stenerson himself. The cesspool work was completed by some one else after Stenerson's injury, and the other work mentioned by Stenerson was done at different times in March and April following. The record does not satisfactorily establish that the completion of the cesspool, together with the additional work enumerated by Stenerson, when completed, actually occupied more than nine and one-half working days. Stenerson by his testimony attempted to compute the probable time for completing such work at two weeks. His approximations, however, were indefinite, and he was not able to say with any degree of certainty just how long it would take to complete each job. In some cases he testified that he did not know how long it would take.

The respondents rely on Rissman v. Industrial Accident Commission, 190 Cal. 619, 213 P. 991, and Ingram v. Dept. of Ind. Relations, 208 Cal. 633, 284 P. 212. We recognize the correctness of the holding in the latter case that, in a continuous employment of odd jobs which extends beyond ten working days, the employment is not casual within the meaning of the act. We were careful to point out, however, that the fact that it was contemplated that several odd jobs, each of a casual nature by itself, were to constitute one continuous employment for longer than ten days, must be based upon sufficient evidence. In the Ingram case the employee had continuously worked longer than ten days at odd jobs before he was injured, and in other cases relied upon by the respondents the testimony was clear that the employment reasonably contemplated more than ten working days. In the present case, however, the employee has not overcome the petitioner's showing that the employment was for the cesspool work alone; nor has he shown, if any further work was to be done, that it was to be continuous or would occupy more than ten working days. The employee's own testimony does not establish that any agreement for any further work was made, nor when it was to be done, nor that it would reasonably extend over a continuous period of ten days. In such a state of the record, we must conclude that a finding other than that the employment was casual is without support in the evidence. This conclusion renders it unnecessary to determine the further question presented as to whether, in view of the facts that in the type of occupations followed by Stenerson he had lost no earning power and that he was able to and did earn as much as formerly, the disability rating was excessive.

The award is annulled.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; CURTIS, J.; SEAWELL, J.

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215 Cal. 226

EBERHARD et ux. v. PACIFIC SOUTHWEST LOAN & MORTGAGE CORPORATION.

L. A. 12861.

Supreme Court of California.

March 22, 1932.

1. Licenses ⚷18½.

Statutory inhibitions against selling securities without permits are meant to protect public from imposition and deception, not primarily to benefit seller (Deering's Gen. Laws 1923, Supps. 1925–1927, 1929, Act 3814).

2. Licenses ⚷39.

That mortgage executed by corporation allegedly constituted "security" within statute forbidding sales thereof without permit *held* no defense against innocent assignees' foreclosure action (Deering's Gen. Laws 1923, Supps. 1925–1927, 1929, Act 3814; Civ. Code, § 3517).

In Bank.

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Action by Jules Eberhard and wife against the Pacific Southwest Loan & Mortgage Corporation. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Superseding opinion in 1 P.(2d) 420.

Dudley Robinson, of Los Angeles (H. C. Miller, of San Jose, of counsel), for appellant

Pacific Southwest Loan & Mortgage Corporation.

Bayard R. Rountree, of Los Angeles, for respondents.

Henry G. Bodkin, Bodkin & Lucas, Willis I. Morrison, and Laurence W. Beilenson, all of Los Angeles (Archibald M. Johnson, of San Francisco, of counsel), amici curiæ, for respondents.

PRESTON, J.

Plaintiffs, assignees of a $1,000 note and mortgage made by defendant in favor of the National Loan Company of Los Angeles, a corporation, upon which default had been made in the payment of both principal and interest, brought this action to foreclose the mortgage. Defendant mortgagor answered admitting that no part of the principal of said promissory note had been paid, and that upon presentment and demand for payment it had refused to honor a $40 interest coupon attached to said note, which had fallen due some months before. And as the reason and grounds for such refusal, said defendant alleged that said note and mortgage was one of a series issued by it as a first lien upon certain parcels of land pursuant to a resolution of its board of directors, authorized by its articles of incorporation; that it entered into an agreement with the mortgagee whereby it sold, executed, and delivered to said mortgagee, National Loan Company, the said series of mortgage notes and mortgages in consideration of the sum of 50 per cent. of the face value thereof, whereupon said mortgagee thereafter sold, assigned, and delivered the said mortgage notes and mortgages to divers persons; that no permit of the commissioner of corporations of this state for the issuance and sale of mortgage notes and mortgages was ever applied for or issued to it, pursuant to the provisions of the Corporate Securities Act of this state (Deering's Gen. Laws 1923, Supps. 1927, 1929, Act 3814); that the said notes and mortgages composing said series are all securities as defined by the language of said act and, therefore, having been issued and sold without the sanction and permit of the corporation commissioner as aforesaid, they are void. Defendant prayed judgment against plaintiffs, declaring that plaintiffs take nothing, and that said note and mortgage be declared null and void.

Plaintiffs thereupon demurred to the answer upon the ground that it did not state facts sufficient to constitute a defense to the cause of action alleged in their complaint for the reason that it affirmatively appeared from the allegations of said answer that the mortgage notes and mortgages are not securities within the meaning of said Corporate Securities Act, wherefore plaintiffs prayed judgment against defendant. The court below sustained the demurrer, and judgment was duly entered thereon in favor of plaintiffs. Defendant appealed.

As above noted, appellant's sole defense is that the security it issued and sold, which is the subject of this suit, is one that required a permit from the state corporation commissioner, and that no such permit was by it sought or obtained; hence the security is null and void and should be so declared. If, however, for the purposes of this opinion, the necessity for a permit be conceded, there is nothing whatsoever to show that plaintiffs are anything more than the innocent victims of appellant, which now seeks to profit by its own deliberate wrong.

[1, 2] The inhibitions of the Corporate Securities Act (Deering's Gen. Laws, 1923, Supp. 1927, 1929, p. 3287, Act 3814) against sales of securities to the public without permits are meant to protect the public from imposition and deception—not primarily to benefit the seller. The seller and the purchaser are therefore in no sense in pari delicto where this provision is violated. The fact that the transaction may be void at the behest of the purchaser is not to allow a premium for real wrong done by the seller. The fundamental maxim that "no one can take advantage of his own wrong" (section 3517, Civ. Code), and other kindred principles, immediately recur to the mind. The above is but a recast of the doctrine abundantly supported by authority and applied in cases involving this very act done under similar circumstances. See Pollak v. Staunton, 210 Cal. 656, 293 P. 26; Michell v. Grass Valley Gold Mines Co., 206 Cal. 609, 275 P. 418; Tatterson v. Kehrlein, 88 Cal. App. 34, 263 P. 285, and Castle v. Acme Ice Cream Co., 101 Cal. App. 94, 281 P. 396; Hemmeon v. Amalgamated, etc., Co., 95 Cal. App. 400, 273 P. 74.

The question as to whether a note and mortgage, issued for sale under the circumstances set forth here, is a security within the meaning of the Corporate Securities Act, requiring a permit for its sale to the public, is argued by appellant and by certain amici curiæ in their briefs. But under our view of the case the question does not properly arise; it is, however, involved in another cause before us, upon the determination of which it will receive our attention. The only purpose the question serves here is to prevent the assessment of damages for what would otherwise be clearly a frivolous appeal.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

215 Cal. 236

MORRISON et al. v. WHITEFORD et al.

Sac. 4527.

Supreme Court of California.

March 22, 1932.

Rehearing Denied April 21, 1932.

Waters and water courses ⇨152(8).

In action to quiet title to waters in spring, evidence *held* to support judgment for plaintiffs.

In Bank.

Appeal from Superior Court, Lake County; Benjamin C. Jones, Judge.

Action to quiet title by Fred L. Morrison and others against B. B. Whiteford and others. From the judgment in favor of plaintiffs, defendants Stephen J. York, Nancy Eloise Butcher, Frank Cyr, and E. H. Smith appeal.

Affirmed.

John R. Connelly, of Sacramento, for appellants.

W. D. L. Held, of Ukiah, and Herbert V. Keeling, of Lakeport, for respondents.

PER CURIAM.

This action was brought to quiet title to rights in the waters of a spring. Plaintiffs Fred L. Morrison and Anna L. Morrison were from 1904 to 1923 owners of certain land hereinafter called the Morrison property; and since 1904 defendants and appellants were owners of land just above, known as the Butcher property. Both tracts are situated on a hillside sloping southwesterly toward Clear Lake. A ledge of rock situated on the Butcher property formerly held back percolating waters on said property, which rose to the surface in several springs. Some seepage flowed onto the lower tract, and was piped and used by the Morrisons for domestic and stock-watering purposes. In 1923 the Morrisons sold all their land except four acres to plaintiff Lake County Title & Abstract Company and Clear Lake Beach Company. These corporations subdivided it and sold lots. In March, 1925, Clear Lake Beach Company dug a tunnel through the ledge of rock into the Butcher property, blasting the rock with dynamite to do so. As a result the flow into the Morrison pipes was increased and the springs on the Butcher property ceased to flow except during the rainy season. In November, 1927, defendants commenced to dig a trench on their own land to the end of plaintiffs' tunnel to reach the water. Before its completion this action was filed and they were enjoined from proceeding further.

The court found that plaintiff Clear Lake Beach Company had committed a trespass upon defendants' property, and awarded damages in the sum of $500. The court also ordered a division of the water rights, awarding to plaintiffs .0028 cubic feet of water per second, and enjoined defendants from interfering with said amount.

Appellants appeal on a bill of exceptions, their chief contention being that the judgment cannot be supported by the evidence. In this connection they assert that the court awarded to the plaintiffs more than the entire flow of the stream. In support of this contention they point to the evidence of one of their own witnesses, which is, however, in conflict with other testimony. The defendants have failed to point out specifically wherein the record is deficient, but our own examination of the evidence satisfies us that the trial court properly disposed of the issues.

The judgment is affirmed.

CONSOLIDATED RESERVOIR & POWER Co. v. SCARBOROUGH et al.*

Civ. 4443.

District Court of Appeal, Third District, California.

March 11, 1932.

Rehearing Denied April 9, 1932. Hearing Granted by Supreme Court May 9, 1932.

1. Limitation of actions ⇨179(2).

Corporation's complaint against directors, alleging belated discovery of fraud because directors concealed information and prevented record being made in minutes of meeting, *held* insufficient to excuse failure to bring action within statutory period, where not alleging that transaction did not appear on other records of corporation (Code Civ. Proc. § 338).

2. Fraud ⇨41.

Generally, in fraud cases, plaintiff must allege that defendant made certain false material representations with knowledge of falsity and intent to defraud, and that representations were believed by plaintiff, who acted on such belief, and thereby suffered injury.

3. Limitation of actions ⇨195(5).

To avoid bar of statute in fraud action, plaintiff must show when fraud was discovered, circumstances of discovery, and sufficient facts showing justification for lateness of discovery (Code Civ. Proc. § 338).

4. Appeal and error ⇨236(2).

Abuse of discretion in refusing to permit filing of amended complaint is deemed waived and not open to debate on appeal, unless plaintiff formally asks leave to amend, notwithstanding court sustained demurrer without leave to amend.

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*For subsequent opinion see 16 P.2d 268.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by the Consolidated Reservoir & Power Company against Robert R. Scarborough, John E. Coffin, and another. From an order sustaining demurrers of appearing defendants to plaintiff's second amended complaint, without leave to amend, plaintiff appeals.

Affirmed.

Superseding opinion reported in 7 P.(2d) 754.

James Farraher, of Los Angeles, for appellant.

Pierson, Kegley & Gangestad, Scarborough & Bowen and Lawler & Degnan, all of Los Angeles, for respondents.

Mr. Justice pro tem. MILLER delivered the opinion of the court.

A rehearing in this case was granted to the end that the court might further consider the question as to whether the trial court abused its discretion in making the order complained of. But, in view of the fact that the case can better be dealt with as a whole, we will disregard our former opinion and treat the case anew.

This is an appeal from an order sustaining demurrers of the appearing defendants to plaintiff's second amended complaint, without leave to amend.

It is alleged that plaintiff owned real property of a value in excess of $150,000, and certain contracts of sale of real property on which there was still due the sum of $22,406.27, and some shares in a Mutual Water Company; that James G. Scarborough, John E. Coffin, and W. B. Scarborough were directors of plaintiff corporation; that W. B. Scarborough was the manager of the affairs of plaintiff; that he and James G. Scarborough were brothers, and Robert R. Scarborough was the son of W. B. Scarborough; that one Blakemore had placed certain trust funds in the hands of W. B. Scarborough individually; that he had lost the sum of $34,000 of such trust funds; that he had been called upon to make good the loss; that he had no funds with which to make good the loss, and that, to save and protect him in the premises, respondents conspired together to cause the plaintiff corporation to execute a note to said Blakemore for $34,000, and to execute a deed of trust on its said real property to secure the payment of said note; that on or about August 28, 1924, respondents, in pursuance of said conspiracy, caused a meeting of the board of directors of plaintiff corporation to be held, and at said meeting W. B. Scarborough, with knowledge of all the defendants, falsely represented to the directors that the corporation, and not he, owed said sum to said Blakemore, and that, pursuant to such conspiracy, and without any consideration therefor passing to plaintiff corporation, plaintiff executed and delivered its said note for $34,000 and deed of trust securing the same to said Blakemore; that said W. B. Scarborough and James R. Scarborough were men of considerable prominence and financial standing, and that Robert R. Scarborough was at the time practically insolvent, and had no credit, all of which was well known to W. B. Scarborough and James G. Scarborough; that said defendants, in pursuance of such conspiracy, falsely represented to the directors of plaintiff that plaintiff could not borrow any money upon its said property with which to pay the said note to Blakemore, but that Robert R. Scarborough had greater credit, and could borrow, but, in order for him to do so, it would be necessary for him to have title to the said real property, subject only to said deed of trust of $34,000, and that the directors should authorize and carry out a sale of said real property to him without consideration, to the end that he might borrow money and pay off said indebtedness of $34,000, and save plaintiff corporation from a foreclosure, and its stockholders from a stockholders' liability; that such deed was made to said Robert R. Scarborough, who then borrowed on said real property $70,000, paid off the $34,000 note, and applied the difference to his own use.

Plaintiff claims to have been in ignorance of the alleged fraud until August 1, 1928, at which time it claims to have discovered the same. It seeks to bring itself within the exception to the general rule, that an action for fraud must be brought within three years of the time of the commission of the fraud, by alleging: "That the fraud hereinabove alleged was not discovered until on or about the first day of August, 1928, for the reason that the minutes of the said meeting of the said Board of Directors fail to disclose the transaction or the facts hereinabove alleged, and for the further reason that the defendant directors and said Robert R. Scarborough concealed the facts hereinabove related from the stockholders of the plaintiff corporation; that the facts hereinabove alleged were not known or discovered by the stockholders of the corporation or the present Directors until an investigation of the affairs of the corporation was made by the present Directors on or about August 1, 1928, which revealed the said facts."

The demurrers involved herein are both general and special. Appellant, in support of its complaint, cites Lightner Mining Co. v. Lane, 161 Cal. 689, 120 P. 771, Ann. Cas. 1913C, 1093. That was a case involving an underground trespass which could be seen only through the workings of the defendant, whose mine adjoined the Lightner Company.

On the other hand, respondents rely on the case of Lady Washington Consolidated Co. v. Wood, 113 Cal. 482, 45 P. 809, in support of the order appealed from. In that case the action complained of was disclosed upon the minutes of the directors and in other books of the corporation, and the court held there that under such circumstances it was unavailing to plaintiff to allege that he did not discover the fraud. In effect, the court there said that one could not sit idly by and claim ignorance, when the means of knowledge were at hand.

[1] In the case at bar, however, it is alleged that the information was concealed; that the directors, defendants here, prevented any record of the transaction being made in the minutes of its meetings. If such was a fact, and if no other records of the corporation disclosed the transaction, then the acts were as successfully concealed as were the underground workings referred to in the case of Lightner Mining Company v. Lane, supra. But the record does not show that the transaction complained of does not appear on other records of the corporation.

[2] It is a general rule in cases of fraud that the plaintiff must allege that defendant made certain material representations; that they were false, and were known by defendant to be false; that they were made with intent to defraud; that they were believed by plaintiff, who acted upon such belief; and that he thereby suffered injury. The complaint fails to show the necessary facts.

[3] If an action for fraud be not commenced within three years, plaintiff is required, in order to bring himself within the exception provided for in section 338 of the Code of Civil Procedure, to allege when the fraud was discovered, setting forth sufficient facts to show justification for not having sooner discovered the fraud and the circumstances under which it was discovered, to the end that the court may determine whether it was in truth discovered when plaintiff claims it was. Lady Washington Consol. Co. v. Wood, supra; 26 C. J. 1063; Victor Oil Co. v. Drum, 184 Cal. 226, 193 P. 243. The necessary facts in this respect the complaint also fails to state.

The second amended complaint and the demurrers thereto that are involved in this case are substantially the same as was the first amended complaint and the demurrers thereto that were sustained with leave to amend.

[4] In reference to the question as to whether the trial court abused its discretion in not allowing plaintiff an opportunity to further amend its complaint, the record fails to show that, after the order was made sustaining the demurrers without leave to amend, the plaintiff formally asked permission to amend. And, however we might be inclined to view such an order under the circumstances indicated in the complaint, if acting in the place of the trial court, it is, nevertheless, a settled rule of law in this state that any abuse of discretion in refusing to permit the filing of an amended complaint must be deemed waived and is not open to debate on appeal, unless plaintiff formally asks the court for leave to amend, notwithstanding the court has made its order sustaining the demurrer without leave to amend. No such formal request having been made in this case, it follows that, under the authorities in this state, plaintiff cannot successfully complain on appeal that it was not allowed to amend its complaint. Philbrook v. Randall, 195 Cal. 95, at page 105, 231 P. 739, and cases there cited.

We are still satisfied that the demurrers were properly sustained. Harding v. Robinson, 175 Cal. 534, 166 P. 808; Knox v. Buckman Contracting Co., 139 Cal. 598, 73 P. 428; Lady Washington Consol. Co. v. Wood, 113 Cal. 482, 45 P. 809; Galusha v. Fraser, 178 Cal. 653, 174 P. 311.

We are also satisfied that the discretion of the court below in view of the record, is outside of the issues before us, and cannot be determined on this appeal.

The judgment appealed from is affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

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121 Cal.App. 630

DORNBERG et al. v. FRANK MELINE CO., Inc.

Civ. 8234.

District Court of Appeal, First District, Division 2, California.

March 15, 1932.

Rehearing Denied April 14, 1932. Hearing Denied by Supreme Court May 12, 1932.

1. Brokers ⚷86(1).

Evidence sustained finding brokers of parties to exchange of realty orally agreed that each should charge client prevailing commissions and divide them.

2. Brokers ⚷43(2).

Where brokers of parties to exchange of realty orally agreed to co-operate in making sale and divide commissions, contract was valid; statute being inapplicable (Civ. Code, § 1624, subd. 6).

3. Limitation of actions ⚷127(2).

Amendments of complaint in nature of elaborations of facts did not set up entirely new cause of action barred by statute (Code Civ. Proc. § 339, subd. 1).

Appeal from Superior Court, Los Angeles County; George W. McDill, Judge.

Action by Leo M. Dornberg and another against the Frank Meline Company, Incorporated. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Walter H. Hewicker and Louis E. Kearney, both of Los Angeles, for appellant.

Harold Nuzum, of Los Angeles, for respondents.

TUTTLE, Justice pro tem.

This is an action to recover a share of commissions from a real estate transaction. Judgment in the sum of $5,812 was rendered for plaintiffs. The appeal is from the judgment.

[1] One S. A. Kenoyer was the owner of a hotel in Oklahoma. He was the client of respondents, who were licensed real estate brokers. Appellant was also a licensed real estate broker, representing Joseph Schenck, who was the owner of California Building in Los Angeles. Respondents and appellant arranged a trade of these properties, and this trade was fully consummated. The trial court found that the parties orally agreed that each should charge his client the prevailing realty board commissions and that they would pool what commissions were received and split the same two ways: That the total realty board commissions in the transaction were $28,375, being composed of the following: $8,375 cash received by plaintiffs from Kenoyer, $5,000 in cash received by appellant from Schenck, and the equity in the Oklahoma property received by appellant at the admitted value of $15,000; that this equity was traded by appellant for Los Angeles property valued at $35,000; that plaintiffs were entitled to the difference between $14,187 and $8,375, or $5,812, the amount of the judgment.

It is contended that the evidence is insufficient to support the foregoing finding to the effect that such an agreement was made. An examination of the record discloses ample evidence to uphold this finding. For illustration, Mr. F. McArthur represented appellant in the transaction. Respondent Rogers testified that he had the following conversation with McArthur: "He said, 'now, if you have got the Kenoyer end of it, we will take the California end of it, and we will split Board commissions 50-50.' I says: 'What do you base the California Building? I base it $800,000,' and he says, 'you base your Miami property $300,000.00 which will make $1,100,000.00. You handle one end, and we will get the other, and we will go 50-50 on all expenses, and go 50-50 on the Board commissions.' "

It is contended that the agreement only applied to commissions actually received and that appellant never received the $15,000 equity in the Oklahoma property. The record shows the admitted value of this equity to be $15,000, and there is ample evidence to support the following finding made by the trial court: "The court finds that the defendants received as a commission upon said transaction the sum of Five Thousand Dollars ($5,000.00) in cash and as equity in the Kenoyer Hotel of the admitted value of Fifteen Thousand Dollars ($15,000.00)—That the defendant traded the equity in the Kenoyer Hotel property for property in Los Angeles of the value of Thirty-five Thousand Dollars ($35,000.00)." This finding is supported by Appellant's Exhibit B, which is the only written evidence of the basis of the exchange in the record. The value of this equity is there fixed at $15,000.

[2] The statute of frauds is invoked by appellant, it being contended that the contract between these parties was required under section 1624, subdivision 6 of the Civil Code, to be in writing. It is conceded by appellant that this provision does not apply to ordinary agreements between brokers for the division of commissions on the sale of real property, but it takes the position that this is a case where one broker employs another to effect a sale and agrees to pay, unconditionally, a stipulated sum. Aldis v. Schleicher, 9 Cal. App. 372, 99 P. 526. The case last cited arose out of the employment by one real estate broker (who was acting as the agent of the owner) of another broker to sell the real property of his principal. There was no agreement to divide commissions between the parties. The court viewed the case in the same light as though the owner directly employed the broker to make the sale, and held that the contract must be in writing under the section of the Civil Code cited above. But where, as in the instant case, the parties agree to co-operate in making the sale and to divide the commissions arising therefrom, the statute of frauds is not applicable, and an oral contract is valid. 4 Cal. Jur. 611.

[3] It is next contended that the cause of action is barred by section 339, subdivision 1, of the Code of Civil Procedure. The original complaint was admittedly filed within two years from the time the cause of action accrued. It alleged that the parties had entered into a joint adventure of the trade for the properties, under the terms of which defendant agreed to divide commissions. Plaintiffs pray for an accounting and for judgment in the amount found due plaintiffs. Thereafter, and some three years after the cause of action accrued, the court permitted plaintiffs to amend their complaint. It is contended that the amended complaint sets out an entirely new cause of action, and hence the action is barred. We are not in accord with this view. The amendments were in the nature of elaborations of facts

set forth in the original complaint, hence the amended complaint related back to the commencement of the action. 16 Cal. Jur. 551.

Other points raised by appellant have received our attention, but they are so obviously devoid of merit that no discussion of them is required.

Judgment affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

SOUTHERN PAC. R. CO. v. WILLETT.

Civ. 737.

District Court of Appeal, Fourth District, California.

Feb. 26, 1932.

Hearing Granted by Supreme Court March 28, 1932.

Appeal and error 🔑347(1).

In statute requiring appeal within 60 days from entry of judgment, "entry" means entry in judgment book, unless statute specifies otherwise (Code Civ. Proc. §§ 577, 581, 583, 664, 668, 939).

[Ed. Note.—For other definitions of "Enter; Entry," see Words and Phrases.]

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

On petition for rehearing.

Petition denied.

For former opinion, see 7 P.(2d) 713.

Arthur J. Dannenbaum, of San Francisco, and Theodore M. Stuart, of Fresno, for appellant.

Walter H. Stammer, of Fresno, for respondent.

MARKS, J.

In view of the decision in the case of Nelson v. Geiss (Cal. App.) 7 P.(2d) 720, rendered on January 27, 1932, which was not before us at the time the instant case was decided, we have given careful consideration to the petition for rehearing filed by the respondent after this court denied its motion to dismiss the appeal from the judgment.

Respondent complains because our opinion did not make "any reference to the three most important decisions upon which this respondent relies bearing upon the effect of the minute order; namely, Dempsey v. Underhill, 156 Cal. 718, at page 719, 106 P. 73; Tripp v. Santa Rosa Street Railroad, 69 Cal. 631, at page 632, 11 P. 219; and Howe v. Key System Transit Company, 198 Cal. 525, at page 531, 246 P. 39. Nowhere in the opinion does the court refer to any of these decisions, yet in the Dempsey Case the Supreme Court of this state determined definitely and positively that an order of dismissal under section 583 of the Code of Civil Procedure, the section here involved, is a final judgment and the time for appeal runs from the date of entry of that order."

The cases cited by respondent were not overlooked by us, but were carefully considered together with other cases not cited, before we reached our conclusions in the instant case and were not considered controlling of the questions involved. The general desire on the part of the bench and bar of the state to keep opinions within reasonable length makes it impossible for us to discuss all the cases cited by counsel in their briefs, especially when such cases are not decisive of the issues presented.

The latter part of the foregoing quotation from the petition for rehearing summarizes the holding of the Supreme Court in the case of Dempsey v. Underhill, supra. The original record on appeal shows that the "order" mentioned in the opinion of the Supreme Court and by counsel was a formal judgment of dismisssal dated December 6, 1906, signed by the Honorable J. W. Mahon, judge of the superior court, and indorsed as filed by the clerk on June 6, 1907. The certificate of the clerk shows that this judgment was "entered June 6, 1907, in the above-entitled action and recorded in Judgment Book 10 of said court, at page 395." The Dempsey Case was relied upon to support the conclusions reached in Nelson v. Geiss, supra. If it is authority at all, it tends to support the conclusion reached by this court.

In the case of Tripp v. Santa Rosa Street Railroad, supra, it appears from the opinion that the appeal was "from an order of the thirteenth of February, 1882, made after final judgment in the above-entitled action."

It is evident from an inspection of the record on appeal that there had been a final judgment rendered in the action, and that the orders appealed from were not in themselves appealable. One refused to vacate an order to transfer the case to the circuit court of the United States and the other refused to vacate the judgment. It was held that the order refusing to transfer the case was reviewable on an appeal from the judgment and was therefore not appealable, and that the order which refused to vacate the judgment was not appealable, as it is well settled that an appeal cannot be taken from an order refusing to vacate a judgment which is itself appealable.

The case of Howe v. Key System Transit Company, supra, might be construed as tending to support the contention of respondent if the same question before us in the instant case had been before the Supreme Court, namely, the time within which a notice of appeal must be given after the entry of the judgment or order from which the appeal is taken. No such issue was involved in the Howe Case, and it was not considered by the Supreme Court in its decision.

The case of Boyer v. City of Long Beach, 47 Cal. App. 617, 191 P. 35, contains dicta which lends support to the position of respondent. In that case an appeal was taken from an order of the trial court refusing to vacate an order dismissing an action, which motion to vacate was made more than six months after the order of dismissal. The opinion very properly held that, as the motion to "vacate the judgment was made more than six months after its entry," it was properly denied. No other question was involved in the appeal.

The case of Nelson v. Geiss, supra, cites and relies upon the case of Consolidated Const. Company v. Pacific Electric Railway Company, 184 Cal. 244, 193 P. 238, 240, in support of the conclusions there reached. The question before us and considered in Nelson v. Geiss, supra, was not before the Supreme Court, as the order involved had not been entered in either the minute or the judgment book. The following appears in the opinion: "In fact, strong reasons may be urged why the effective character which an order of dismissal under section 581 assumes, upon its mere entry in the minutes is an exception to the general rule that judgments must be entered in the judgment book before they become effective as judgments (Code Civ. Proc. §§ 664 and 668), and that the exception should not be extended beyond the particular case provided for by the statute. If this be the true rule, then judgment must be entered in the judgment book, in order that an order of dismissal under sections 581a or 581b be finally effective. But whether the true rule be this, or be that prescribed by section 581, the order in the present case was not finally effective as a judgment when the order vacating it was made, since it had not been entered in the minutes, nor had judgment upon it been entered in the judgment book. It follows that it was still within the control of the court, which could vacate it, if made inadvertently or through mistake. In the present case the court was plainly called on to vacate it, if it had authority to do so. Its action in making the order of vacation was therefore proper, and its subsequent action in setting aside that order was erroneous. Before concluding, we should, perhaps, say that when we have been speaking of an order of dismissal, or an order for judgment, as not effective until entered, we have been speaking of it only as effective as a final termination of the action, discharging the parties, so to speak, from before the court, and ending the general authority of the court over the action. In many other ways an order of dismissal or an order for judgment is effective before entered, or before judgment is entered upon it. See, for example, Fresno Estate Co. v. Fiske, 172 Cal. 583, 599, 157 P. 1127, and cases there cited."

It might be helpful to review the legislative changes made in section 939 of the Code of Civil Procedure. The original section was based upon the Practice Act, as amended by the statutes of 1865–66, at page 706, wherein it was provided that an appeal may be taken from a final judgment within one year after the rendition of the judgment. No amendments affecting the time in which an appeal might be taken were made up to the legislative session of 1897. Code Amendments 1880, p. 61; St. 1897, p. 55; St. 1899, p. 7. In 1897 (St. 1897, p. 55), the section was amended to provide that the appeal might be taken within six months after the entry of the judgment instead of one year after its rendition. In 1915 (St. 1915, p. 205), the section was further amended to provide that the appeal must be taken within sixty days from the entry of the judgment, in which condition it now remains.

In reaching our conclusions in the instant case we have borne in mind that the sole and determining question involved, in the phase of the case now under consideration, is, What started the time running within which the notice of appeal must be filed? As we have repeatedly observed, section 939 of the Code of Civil Procedure now provides that the appeal must be taken within sixty days from the entry of the judgment. "A judgment is the final determination of the rights of the parties in an action or proceeding." Section 577, Code Civ. Proc. "If the trial has been had by the court, judgment must be entered by the clerk, in conformity to the decision of the court, immediately upon the filing of such decision. In no case is a judgment effectual for any purpose until so entered." Section 664, Code Civ. Proc. the clerk must keep, with the records of the court, a book to be called the "judgment book" in which judgments must be entered. Section 668, Code Civ. Proc. The only exceptions to the rule thus established that in civil actions judgments must be entered in the judgment book to be effective are those specified in section 581 of the Code of Civil Procedure of which the instant case is not one.

Inspection of various records on appeal discloses that the Supreme and Appellate Courts have frequently used the term "order" when referring to a formal judgment, as was done in the case of Dempsey v. Underhill, supra. These records also show that, when the term "entered" was used, it generally referred to an entry in the judgment book unless a different place of entry was disclosed in the opinion. We have concluded that when, in 1897, the Legislature amended section 939 of the Code of Civil Procedure, changing the time for taking an appeal in a civil action, to a specified number of days after the entry of judgment instead of the rendition of judgment as before provided, it used the word "entry" in the technical sense in which it is used in sections 664 and 668 of the same Code and in the reported decisions, except where a different meaning was otherwise expressly provided by law. If we should approve the contention of respondent in this case, we would have to disregard this apparent intention of the Legislature when it adopted this amendment in 1897, and restore to the section some of the meaning which it possessed prior to that time.

We see no reason to change the conclusions reached in our original opinion in this case. The petition for rehearing is denied.

We concur: BARNARD, P. J.; JENNINGS, J.

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121 Cal.App. 623

OWENS-PARKS LUMBER CO. v. McCARTY et al.

Civ. 8221.

District Court of Appeal, First District, Division 2, **California.**

March 15, 1932.

Rehearing Denied April 14, 1932. Hearing Denied by Supreme Court May 12, 1932.

1. Mechanics' liens 🔑173.

Claim of lien for materials furnished relates back to time claimant began furnishing them.

2. Mortgages 🔑186(3).

Burden was on company claiming lien for materials, which it began delivering after trust deed was recorded, to show that latter did not constitute lien when first delivery was made.

3. Mortgages 🔑151(3).

Lien for materials furnished *held* subsequent to lien trust deed, recorded before first delivery thereof, though first advance, secured by deed, was made after such delivery.

4. Mortgages 🔑151(3).

Lien of trust deed, recorded before furnishing of materials, for which lien is claimed, is prior to such lien, where advances by mortgagee are obligatory, though consideration therefor does not pass until after materials are furnished.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by the Owens-Parks Lumber Company against Robert A. McCarty, the First National Bank of Culver City, and others. Judgment for plaintiff, and defendants First National Bank and another appeal.

Reversed.

Freston & Files and Sydney Wetzler, all of Los Angeles (Ralph E. Lewis, of Los Angeles, of counsel), for appellants.

Overton, Lyman & Plumb, of Los Angeles, for respondent.

TUTTLE, Justice pro tem.

This is an action brought to foreclose a mechanics' lien. While the action was pending, the real property sought to be charged with the lien was sold under a prior trust deed. A supplemental complaint was thereupon filed, seeking to impress a lien upon the surplus from said sale remaining in the hands of defendant Bank of America of California. A personal judgment was rendered against the owners of the real property in the sum of $2,092.33. Judgment was also rendered against Bank of America in the sum of $1,630.50, the surplus from said sale. This appeal is prosecuted from the judgment by Bank of America and First National Bank of Culver City.

Robert A. McCarty and Grace M. McCarty, defendants herein, on March 30, 1927, executed to the City Mortgage Company, a corporation, also a defendant herein, their promissory note, in writing, in the principal sum of $15,000, secured by a deed of trust covering real property owned by them at that time, which deed of trust was recorded on April 18, 1927.

Contemporaneously with the execution of this note and deed of trust, Robert A. McCarty and Grace M. McCarty executed another promissory note in writing, in the principal sum of $6,700, to plaintiff, Owens-Parks Lumber Company, also secured by deed of trust, covering the same property, which deed of trust was also recorded on the 18th day of April, 1927, and subsequent to the deed of trust securing the note for $15,000.

On April 24, 1927, Owens-Parks Lumber Company commenced delivery of building materials. These building materials were used by Robert A. McCarty upon his premises, which were deeded by him and his wife as security for the payment of the aforesaid two notes, prior to the delivery of the materials from the Owens-Parks Lumber Company. It was stipulated in open court that the heretofore described trust deeds were both executed and recorded prior to the construction of the building by McCarty and prior to the delivery of the materials by the Owens-Parks Lumber Company.

When Robert A. McCarty executed the promissory note in the amount of $6,700, and the second trust deed securing it, he designated the Owens-Parks Lumber Company as payee in this note and as the beneficiary under this deed of trust. This he did at the request of the City Mortgage Company, who advanced the consideration for this note. As a consequence thereof, the note was payable to Owens-Parks Lumber Company as a fictitious payee. The consideration for this note having been provided by the City Mortgage Company, the real party in interest, the note was accordingly delivered to it and not to the Owens-Parks Lumber Company; the latter being merely a fictitious payee without any interest in the note and at no time asserting any interest therein.

Two days after the City Mortgage Company and Robert A. McCarty had completed this transaction, Owens-Parks Lumber Company received actual knowledge of the execution of this note and of the recordation of the trust deed. Nevertheless, it proceeded to furnish material for the improvement of the real property covered by the aforesaid deeds of trust.

On June 28, 1927, Owens-Parks Lumber Company indorsed this note, wherein it was named as fictitious payee, to City Mortgage Company "without recourse." The City Mortgage Company later indorsed this note to defendant First National Bank of Culver City, as security for an indebtedness existing on the part of City Mortgage Company to First National Bank of Culver City in excess of $100,000.

Prior to October 11, 1927, Robert A. McCarty directed City Mortgage Company to pay Owens-Parks Lumber Company the sum of $1,000 for lumber and building materials supplied by Owens-Parks Lumber Company to Robert A. McCarty. This sum of $1,000 was paid by City Mortgage Company to the plaintiff and charged to Robert A. McCarty as part of the consideration for his $6,700 note. Upon receipt of this sum of $1,000 the Owens-Parks Lumber Company delivered to City Mortgage Company the following release: "12—10—27 Received payment of above order in full and we hereby release the premises described above from our lien privilege in so far as the City Mtg. Co. is concerned. Owens-Parks Lmbr. Co. By J. T. Watson 12/10/27."

On the 8th day of November, 1927, the Owens-Parks Lumber Company filed its claim for lien in the usual form for materials used in the construction of a building upon the property covered by the two deeds of trust.

On the 19th day of January, 1928, the plaintiff filed its complaint to foreclose a mechanics' lien, with the usual allegations respecting foreclosure pursuant to statute.

On the 9th day of July, 1928, the Bank of America of California, as trustee and pursuant to instructions, foreclosed the deed of trust securing the note of Robert A. McCarty to the City Mortgage Company, in the principal sum of $15,000, and sold the property for the sum of $16,419.50 to a purchaser who is a stranger to this action. After the satisfaction of the obligation secured, and after paying expenses of foreclosure, there remained a balance of $1,630.50, which respondent now seeks to recover.

The court found that the promissory note and trust deed were taken by appellant First National Bank in good faith from City Mortgage Company; that that debt from the Mortgage Company to said bank still exceeds the sum of $7,000.

The trial court also found that "each claim an interest in or to said property and that any claim or claims or interest or interests of all or any of said defendants are subject and subsequent to the claim of lien of the plaintiff." Appellants contend that this finding is not supported by the evidence.

[1, 2] The question to be determined is the matter of priority between the lien and the deed of trust for $6,700 and the material lien of respondents. Upon the face of the record it must be conceded that the trust deed is apparently a prior lien. The court found that the trust deed was recorded April 18, 1927, and that the delivery of materials (described in the notice of lien) was commenced on April 24, 1927. As a claim of lien for materials furnished relates back to the time when the claimant began to furnish them (17 Cal. Jur. 150), the burden was cast upon respondents to show in some manner that the trust deed did not constitute a lien when the first delivery of materials was made.

[3, 4] It appears, and the court found, that the trust deed and note were executed in favor of appellant without its consent or knowledge, and that it was executed without any consideration flowing to it. The court finds, however, that between the dates of April 30, 1927, and December 10, 1927, defendant City Mortgage Company made certain advances under the trust deed totaling about $5,000, and that the first of these advances was made April 30, 1927, and that this "was the first consideration paid or given for the execution and/or delivery of either said promissory note of $6,700.00 or said trust deed securing the same." The note in question is in the usual form. The trust deed recites that it is given as security for the payment of the note, and contains the customary recitals. No mention is made therein of future advances.

Under these facts respondent contends that the lien of the trust deed did not attach *until the first advance was made thereunder*, which was some time after it had commenced delivering materials. This is the basis of the asserted priority of its mechanics' lien over the lien of the trust deed owned by appellants national bank.

In support of their position respondents cite the case of W. P. Fuller & Co. v. McClure, 48 Cal. App. 185, 191 P. 1027, 1030, where it is held that: "Where, however, the mortgagee is not obligated to pay the full amount of the sum named or to make all the advances mentioned in the mortgage, but it is optional with him to do so or not, and he makes advances or payments after having notice that a lien has attached in favor of a third party, his lien for payments or advances made after such notice will be postponed to that of the junior incumbrance, and each of such advances will be deemed the equivalent of a new mortgage." The argument of respondent is based upon a false premise. The trust deed in the instant case did not provide for optional advances, nor did the trial court so find. The rule applicable to the facts in the instant case is announced in the case of Fickling v. Jackman, 203 Cal. 657, 265 P. 810, 812, as follows: "The decisions have clearly settled that, where the consideration for a mortgage or deed of trust has not passed until after work commenced or materials furnished, although the mortgage or deed of trust has been recorded prior to the commencement of work or the furnishing of materials, the lien of the mortgage or deed of trust is prior to the mechanics' liens where the making of the advances is obligatory on the part of the mortgagee or the beneficiary." The case of Tapia v. Demartini, 77 Cal. 383, 19 P. 641, 643, 11 Am. St. Rep. 288, is almost identical in its factual structure with the instant case. It was there held that: "The mortgage, as against subsequent incumbrancers, becomes a lien for the whole sum advanced, from the time of its execution, and not for each separate amount advanced from the time of such advancement, although the right to enforce the collection thereof can only arise upon each advancement being made. * * * The mortgage under consideration is in the ordinary form, and does not disclose upon its face that it is given in part for future advancements. While it is better and more consistent with open and fair dealings that the mortgage should express its object, this is held not to be necessary to its validity if the amount of liability to be incurred under it is expressly limited."

The court did not find, nor is there any evidence to support a finding, to the effect that advances under the trust deed were, by agreement, made optional. The note and trust deed themselves give no indication that the advances were to be made optional.

The learned trial judge indicated at the trial that the trust deed was tainted with fraud. He referred to it "as an absolutely fraudulent transaction" and observed that it was a "mere nullity." He does not so find or adjudge, nor is any such contention made by respondent upon this appeal. The latter limits the question before this court in the following language: "The question here is not whether the note and deed of trust are valid obligations of the makers, *but purely a question of priority of liens.*"

In conclusion, we might point out that the predicament in which appellant lumber company now finds itself is due to its own neglect. Before delivering the materials in question it ordered a search of the title from a title company. Instead of waiting for this report, it commenced delivery, and two days thereafter the report was made, showing the existence of this trust deed upon the public records. Notwithstanding, they completed deliveries throughout several weeks.

Furthermore, about two months after the execution of the note respondent indorsed the same, "Without recourse." By so doing it warranted that the instrument was genuine and in all respects what it purported to be, and that it had no knowledge of any fact which would impair the validity of the instrument, or render it valueless. Civ. Code, § 3146. And then we find respondent executing to City Mortgage Company, when it received a payment of $1,000 from that company, a receipt stating that "we hereby release the premises described above from our lien privilege in so far as the City Mtg. Co. is concerned." While the court found that this release "did not release the premises herein concerned from any and all claims which it (respondent) might have against said premises," the basis for such a finding appears to be the fact that when such release was executed the mortgage company had transferred the note to appellant national bank. There is no question but what appellant intended to release its lien at that time, and this simply accentuates the lack of equity in its position here.

We conclude that the lien of the trust deed is prior to that of the lien of respondent, and that the finding to the effect that the claim of appellants is subject and subsequent to the lien of respondents has no evidentiary support.

Judgment reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.

121 Cal.App. 552

PEOPLE v. WILLIAMS.

Cr. 2159.

District Court of Appeal, Second District, Dision 2, California.

March 11, 1932.

Criminal law 🔑982.

Denying defendant, convicted of manslaughter for causing death with pistol, permission to apply for probation, *held* not abuse of discretion, under circumstances (Pen. Code, § 1203).

Appeal from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

Andrew Bell Williams was convicted of manslaughter, and he appeals.

Affirmed.

Orbison & Irwin, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

CRAIG, Acting P. J.

Upon a charge of having caused the death of another with a pistol, the appellant was found guilty by a jury of manslaughter, a felony, a lesser offense necessarily included in the charge set out in the information. The ground assigned for reversal consists of asserted error upon the part of the trial court in refusing to grant the defendant permission to file an application for probation and in holding that it had not jurisdiction to hear or determine the same.

Section 1203 of the Penal Code provides that, in cases where discretion is conferred on the court, if it be determined that there are circumstances in mitigation of punishment prescribed by law, or that the ends of justice would be subserved by granting probation, the court shall have power to do so, except "that probation shall not be granted to any defendant * * * who used or attempted to use a deadly weapon in connection with the perpetration of the crime of which he was convicted, nor to one in the perpetration of the crime of which he was convicted inflicted great bodily injury or torture," etc.

It is the appellant's contention upon decided cases that the court should have permitted him to file his application for probation, and it is insisted that the slaying was accidental, or at most was unintentional, and that a revolver or pistol may be deemed a deadly weapon only when intentionally devoted to a use calculated to cause bodily harm. Conceding that such is the law in appropriate cases, the instant one is resolved by the argument into a question of fact for determination below. Upon a review of the entire record we cannot say that we are impelled to hold as a matter of law that the trial court abused its discretion. After a trial which we must presume in the absence of any criticism to have been fair and impartial, and an examination of the defendant prior to sentence, the trial court was fully advised as to all of the facts and circumstances. Its findings upon elements vital to probation were that "the defendant killed the decedent with a firearm. There was nothing accidental about it. There was no evidence to that effect. The defendant was charged with murder. It was not involuntary manslaughter at all. The evidence shows that it was voluntary manslaughter. The evidence would even have sustained a verdict of murder in this case." It is sufficient to observe that the principal authority cited in behalf of the appellant (People v. Lovelace, 97 Cal. App. 228, 275 P. 489) does not aid him.

The judgment is affirmed.

We concur: IRA F. THOMPSON, J.; FRICKE, Justice pro tem.

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121 Cal.App. 470

SEABOARD SURETY CORPORATION OF AMERICA v. MUNICIPAL COURT OF CITY OF LOS ANGELES, LOS ANGELES COUNTY, et al.

Civ. 7118.

District Court of Appeal, Second District, Division 1, California.

March 9, 1932.

1. Bail 🔑68.

Where judgment was rendered in municipal court that defendant pay fine or serve 50 days in jail, undertaking on appeal having obligation to pay fine *held* void as regards such obligation (Pen. Code, §§ 1273, 1292).

> The conditions of the bond were in substance that if on appeal judgment of the municipal court should be affirmed, defendant would surrender herself in execution of judgment, and that parties further undertook with reference to portion of judgment imposing fine that defendant would pay fine imposed by judgment, or such part of it as appellate court might direct if judgment was affirmed.

2. Bail 🔑80.

General rule is that upon surrender of defendant his bail is exonerated (Pen. Code, §§ 1273, 1292).

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Petition by the Seaboard Surety Corporation of America against the Municipal Court of the City of Los Angeles, County of Los Angeles, State of California, and others, for a writ of mandate. From a judgment discharging the alternative writ of mandate issued, petitioner appeals.

Reversed.

See, also, 208 Cal. 596, 283 P. 289.

Arthur T. Stollmack, of Los Angeles, for appellant.

Lloyd S. Nix, City Pros., and **Joe W. Matherly**, Deputy City Pros., both of Los Angeles, for respondents.

HOUSER, J.

On this appeal neither the city prosecutor of the city of Los Angeles, nor any other attorney qualified to represent the respondents herein, has seen fit to file a brief on behalf of the respondents.

The facts appear to be that following the conviction of a defendant in a criminal action in the municipal court, judgment was rendered to the effect that she pay a fine of $500, or that she serve 50 days in jail. Thereupon an appeal from said judgment was taken by said defendant to the superior court. For the purpose of effecting the release of the defendant pending appeal from the judgment, the appellant herein executed its undertaking in attempted compliance with the provisions of sections 1273 and 1292 of the Penal Code. On the hearing of the appeal, the judgment of the municipal court was affirmed. Within three days thereafter the defendant surrendered herself into the custody of the municipal court for the purpose of satisfying the judgment against her by imprisonment, rather than by the payment of the fine imposed by the said judgment. As appears from an uncontradicted statement in the record herein, at that time the judge who presided in said court "stated that there were certain irregularities in the bail bond posted by the petitioner herein and that in his opinion said appeal bond was liable for the fine imposed upon the said criminal defendant, and thereupon stated that he would look to the surety on the bail bond aforesaid for the payment of the fine imposed upon the said criminal defendant, and declared that the said criminal defendant was free from the custody of the court and allowed her to depart therefrom." Eight days thereafter, in another department of the municipal court, for the then asserted reason that the defendant in the criminal action had not appeared "in satisfaction of the judgment rendered against her" (when in truth and in fact, as hereinbefore set forth, said defendant theretofore had appeared in said court for said purpose), the undertaking executed by the appellant herein was by said court declared forfeited. Within ninety days following the date of the order of forfeiture of said undertaking, the defendant in said criminal action again surrendered herself to the custody of said municipal court for the purpose of satisfying the judgment of imprisonment theretofore rendered against her; and at the same time the appellant herein presented its motion to said court that the said order of forfeiture of the undertaking theretofore entered in said matter be vacated and set aside —which said motion was by said court denied, and the defendant was thereupon ordered committed to jail for fifty days in satisfaction of the said judgment. Thereupon, at the instance of the appellant, the superior court issued its alternative writ of mandate directed to said municipal court by which the latter court was directed either to set aside and vacate its order by which the said undertaking of this appellant was declared forfeited, or, failing in that regard, on a specified date to show cause why it had not done so. To such alternative writ of mandate the municipal court demurred generally; which demurrer was by the superior court sustained, with leave granted to the petitioner therein to amend its petition within ten days from the date of the order by which said demurrer was sustained. The petitioner having failed to amend its said petition within the time so allowed by the court, judgment was regularly rendered and entered by which the alternative writ of mandate theretofore issued in said matter was discharged. It is from said judgment that the instant appeal is prosecuted.

The principal point presented by appellant is to the effect that its undertaking on appeal from the criminal judgment rendered by the municipal court was void for the reason that included therein was a provision which purportedly created a liability against the bondsman not prescribed nor provided by statute. Referring to such undertaking, it is noted that in substance the conditions thereof are that if on the appeal to the superior court the judgment of the municipal court should be affirmed, the defendant would "surrender herself in execution of the judgment * * *; and we hereby further undertake with reference to that portion of said judgment imposing a fine, that said defendant will pay the fine imposed by said judgment, or such part of it as the appellate court may direct, if the judgment is affirmed or modified or the appeal is dismissed; or that, in case the judgment be reversed and the cause remanded for a new trial, that he will appear in the court to which the cause may be remanded and submit himself to the orders and process thereof; and that if he fails to perform either of these conditions, that we will pay to the People of the State of California the sum of Five Hundred dollars ($500.00), lawful money of the United States. If the forfeiture of this bond be ordered by the court, judgment may be summarily made and entered forthwith against the said Seaboard Surety Corporation of America. * * *"

That part of section 1273 of the Penal Code which is deemed applicable to undertakings of the character of that here under consideration is as follows:

"If the offense is bailable, the defendant may be admitted to bail * * * after conviction, and upon an appeal:

"First. If the appeal is from a judgment imposing a fine only, on the undertaking of bail that he will pay the same, or such part of it as the appellate court may direct, if the judgment is affirmed or modified, or the appeal is dismissed.

"Second. If judgment of imprisonment has been given, that he will surrender himself in execution of the judgment, upon its being affirmed or modified, or upon the appeal being dismissed, or that in case the judgment be reversed, and that the cause be remanded for a new trial, that he will appear in the court to which said cause may be remanded, and submit himself to the orders and process thereof."

With reference to the statutory condition of the undertaking, section 1292 of the Penal Code provides that "the undertaking must be conditioned as prescribed in section twelve hundred and seventy-three, for undertakings of bail on appeal."

As hereinbefore has been indicated, as to that part of the undertaking which relates to that portion of the judgment of imprisonment of the defendant, appellant takes no exception; its criticism being directed solely to the so-called alternative of the judgment which has to do with the fine imposed upon the defendant and as to which it is urged that because the undertaking in that regard purports to obligate the appellant herein to the performance of an act or duty not specified by the statute, the undertaking is void. Specifically, the point presented is that with reference to the fine imposed on the defendant, by the undertaking the bondsman promises that if as a result of the appeal the judgment be reversed and the cause remanded for a new trial the defendant will appear in the court to which the cause may be remanded and submit herself to the orders and processes thereof; whereas, by the terms of the statute no such promise is to be exacted either from the defendant in the action or from his bondsman.

In the case of People v. Cabannes, 20 Cal. 525, "a judgment had been rendered [by a justice of the peace] imposing a fine, and in default of payment, imprisonment in the county jail." On appeal to the then county court from such judgment an undertaking which set forth conditions substantially as were required in an undertaking on appeal in civil cases was filed. The judgment of the justice court having been affirmed, an action was brought on the bond, which action resulted in a judgment against the bondsmen. On appeal from the latter judgment it was held that, notwithstanding the existence of a statute similar to that now in force (hereinbefore set forth), the bond was unauthorized by statute, and consequently no action could be maintained on such instrument.

After stating the substance of the statute to which reference has been had, the Supreme Court said: "* * * This section prescribes the terms to be complied with in giving bail, and it is obvious that the second subdivision is the one to be considered in determining the effect of the bond. The justice seems to have regarded the judgment as imposing a fine only, and the counsel for the people contends that this is the proper view to take of it. It is plain, however, that the imprisonment is as much a part of the judgment as the fine; and to be relieved from that, *an obligation to pay the fine was not necessary.* In taking the bond, *the justice has exacted a security which the statute does not require;* and such being the case, we are of opinion that no liability resulted from its execution."

The question in the case of People v. Barrett, 6 Cal. App. 578, 92 P. 647, was whether an undertaking on an appeal from a judgment by which a fine was imposed on the defendant and his imprisonment for 30 days ordered was void because it contained conditions which were more burdensome than were required by the statute in such cases provided. Among other language, the opinion contains the following: "* * * *That portion of the bond which refers to the payment of the fine may be disregarded.* The fine, while fixed, was subject to payment at defendant's election by imprisonment. *The second subdivision of section 1273 is the one to be considered in determining the effect of the bond.* People v. Cabannes, 20 Cal. 526. The undertaking was therefore given in the sum fixed to insure the submission of defendant to the judgment and orders of the superior court *in execution of the sentence of imprisonment.*"

Were it not for the authority of the decisions hereinbefore quoted, this court probably would be of the opinion that the provisions of the first subdivision, and not the second, of section 1273, Penal Code, govern the bond requirements when the judgment is only for the payment of a fine, with the alternative of imprisonment. For it has been held several times and we believe correctly so held, that the alternative of imprisonment on nonpayment of the fine, "is not by way of punishment, but is merely the method of enforcing the satisfaction of the fine." In re Garrity, 97 Cal. App. 372, 275 P. 480, 481, and authorities there cited. On this theory although the "alternative" is a part of the judgment, it is merely incidental to "a judgment *imposing* a fine only," in contrast with "a judgment of imprisonment."

[1] But assuming the correctness of the declarations of law to which attention has been directed, it would seem to follow that the undertaking on appeal legally demandable of the defendant in the instant action did not require "an obligation to pay the fine," and that "in taking the bond [in regard to the fine], the justice has exacted a security which the statute does not require" (People v. Cabannes, 20 Cal. 525, 529), and consequently that the undertaking, at least in that particular, is void.

[2] As hereinbefore stated, on affirmance of the judgment from which the appeal was taken and in connection with which the undertaking was given, the defendant was surrendered into court for the purpose of satisfying by imprisonment the alternative of the fine imposed by the trial court. The general rule is that upon surrender of the defendant his bail is exonerated. Babb v. Oakley & Donaldson, 5 Cal. 93; People v. McReynolds, 102 Cal. 308, 36 P. 590.

The judgment is reversed.

We concur: CONREY, P. J.; YORK, J.

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121 Cal.App. 587

LANZ v. FIRST MORTGAGE CORPORATION et al.

Civ. 4461.

District Court of Appeal, Third District, California.

March 14, 1932.

1. Mortgages 🔑151(1).

Lien of bonds secured by trust deed antedating plaintiff's lien *held* prior thereto, regardless of when bonds were issued or whether advancements of "underwriter" of bonds made after plaintiff's lien was acquired were voluntary.

> From date of trust deed, the premises involved were impressed with a lien to secure the payment of the entire bond issue, regardless of when bonds were sold, and regardless of voluntariness of advancements made by "underwriter" (who had a so-called underwriting agreement whereby the owner and borrower on the premises assigned his rights in the proceeds of the bonds to the "underwriter," who was to guarantee to the bond purchasers the disbursement of the proceeds toward enhancing the security by the erection of a building), after plaintiff's lien was acquired, in violation of provision of underwriting agreement that building must first reach such a state that the proceeds of the bonds would complete it, since the underwriting agreement in no wise affected the trust deed or the obligation thereby secured.

2. Mortgages 🔑151(1).

As respects priorities, trust deed or mortgage securing future bond issue attaches for full amount as of date thereof, and each subsequent bond relates back automatically and completely to instrument creating indebtedness, so that whether future advances are voluntary or obligatory is immaterial.

3. Mortgages 🔑151(1).

To cut off lien of voluntary advancement made under prior mortgage, mortgagee must have actual notice of subsequent incumbrance.

> While, in the case of voluntary advancements, the lien of the mortgage cannot be enforced as against subsequent incumbrances, of which the mortgagee has actual notice, for advancements or indorsements made or given after such notice, the notice must be actual, and giving of constructive notice by recording of subsequent incumbrances is not enough.

4. Mortgages 🔑159.

Mortgagee's actual notice of incumbrance which acknowledged priority of mortgage would not destroy priority of mortgagee's lien for subsequent advancements, even if voluntary.

5. Mortgages 🔑151(6).

Holder of vendee's lien, although lien was subject to lien of bonds secured by prior trust deed, *held* entitled to lien on bonds held by persons who were not holders for value, and who took with knowledge of vendee's rights.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Edna J. Lanz against First Mortgage Corporation and others. From the judgment, defendants appeal.

Modified, and affirmed as modified.

Lewis Cruickshank and Gibson, Dunn & Crutcher, all of Los Angeles, for appellants.

Newlin & Ashburn and William R. Millar, all of Los Angeles, for respondent.

Mr. Presiding Justice PRESTON delivered the opinion of the court.

This action was for declaratory relief and an injunction. Inasmuch as the claims of plaintiff, if established, could be fully settled by the payment of money, stipulations were entered into and approved, the effect of which was to obviate the necessity of injunctive relief.

The rights which plaintiff sought to have adjudicated involved the question of lien priority as between herself and the various defendants. The facts will develop as we proceed.

On and prior to July 15, 1923, Frank A. Powell was the owner of a certain lot or parcel of land in the county of Los Angeles, subject to certain liens. On or about that date Powell and First Mortgage Corporation entered into a written agreement, which agreement is referred to throughout this controversy as the underwriting agreement. This agreement was in the form of a written offer by Powell and an acceptance by the First Mortgage Corporation.

The substance and effect of this agreement may here be noted. The Mortgage Corporation agrees to buy, at a 10 per cent. discount, $900,000 first mortgage bonds maturing at the rate of $4.000 per month for one hundred and seven months and the balance in ten years from date. These bonds are to be secured by deed of trust to Pacific Southwest Trust & Savings Bank, trustee, constituting a first lien on the lands described and on ten-story class "A" apartment building to be erected thereon, according to plans and specifications being prepared, to contain 225 apartments, more or less, and to cost not less than the proceeds of the loan. All apartments are to be suitably furnished and the furniture to be additional security. Powell was to furnish the title policy, pay all recording fees, furnish a survey locating the building on the lot, and to pay the cost of lithographing the bonds.

Powell further agreed to make all payments for materials furnished and labor performed in the erection of the building, until such time as the net proceeds of the loan shall be sufficient to complete the building, free from mechanics' liens, and to furnish a satisfactory sworn statement showing all existing contracts for the building, amount due on each, and give an estimate of the balance necessary to complete. When the First Mortgage Corporation is satisfied that the proceeds of the loan will complete the building free from mechanics' liens, it is directed to pay the net proceeds of the loan to the materialmen and contractors who furnished material and perform labor or both, in the erection of the building, upon the written order of Powell.

It is further agreed that no material shall be delivered on the ground or work done in connection with the construction of the building until after the trust deed securing the loan shall have been recorded. Each month Powell was to deposit one-twelfth of the yearly interest, and option is reserved by lender to pay in multiples of $1,000 in sixty days after one year and paying 3 per cent. bonus in amounts elected to be paid, last maturing bonds first.

Thereafter, on July 25, 1923, Powell and his wife made, executed, and delivered to First Mortgage Corporation a certain deed of trust, referred to as the trust indenture. This trust indenture was dated July 15, 1923, though actually executed and acknowledged July 23, 1923, and was duly recorded in official records of Los Angeles county on July 25, 1923.

The trust indenture created a first lien upon the property to secure the payment of a $900,000 bond issue, contemplating the issuance of serial bonds, the number and terms of which are set forth in said indenture.

Contemporaneously with the execution of said trust indenture, Powell executed and delivered to First Mortgage Corporation a temporary bond in the sum of $900,000, at which time the First Mortgage Corporation had not paid to Powell any money, nor had any money been expended by said corporation; that on or about October 1, 1923, and not before, the temporary bond was canceled, and 900 serial bonds in denominations of $1,000 were executed and delivered to First Mortgage Corporation and the temporary bond was canceled.

The First Mortgage Corporation thereafter offered these bonds for sale to the public, and prior to April 24, 1924, sold two hundred and fifty of the bonds.

Subsequent to the making of the underwriting agreement between Powell and the First Mortgage Corporation, the said Powell organized a corporation for the purpose, among others, of erecting an apartment building upon the premises. The plan of apartment was on the so-called "Own Your Own" idea. Powell then conveyed the premises to a corporation, which was called Hollywood Own-Your-Own Company. The deed of transfer expressly conveyed subject to the lien of the $900,000 trust deed.

This Hollywood Own-Your-Own Company proceeded to sell to the public undivided interests in the apartment building to be erected and the land occupied thereby, which undivided interests should carry the exclusive right to the use and occupancy of a given apartment or apartments, and should also carry an undivided interest in common with all other purchasers in and to the halls, basement, grounds, and other portions of the property.

The claim of plaintiff herein is based upon an ownership of two of the apartments sold under the plan. These contracts are of date December 6 and December 10, 1923.

On or before April 24, 1924, but subsequent to the date of plaintiff's contracts, the contractor, who had been erecting the apartment building on the premises, abandoned the work and erection of the building was suspended because the supervising architect had refused to issue any more certificates, expressly upon the ground that the balance of the proceeds of the loan would be insufficient to complete the structure. Up to this time the First Mortgage Corporation had advanced sums totaling $453,595.13, leaving an unexpended balance of the sum of $810,000, mentioned in the underwriting agreement, amounting to $356,404.87.

Incidentally, it is again noted that there was a 10 per cent. discount on the $900,000 bond issue; hence the reference to $810,000 as being the net total.

It is stipulated by the First Mortgage Corporation that the unexpended balance was known by it to be insufficient to complete the said building and at that time said corporation was the owner and holder of all of said bonds except 250 of said bonds.

On April 24, 1924, the First Mortgage Corporation entered into an agreement with one Byrnes, which agreement is referred to as the Byrnes completion agreement. This agreement provided that Byrnes would undertake the complete building free from all liens for material or labor, that he should furnish Mortgage Corporation with copies of all bills and contracts and allow the corporation at all times free and complete inspection of everything; that out, and only out, of the balance of funds held for owner by Mortgage Corporation, the corporation will deposit to the order of Byrnes two weeks' pay roll in the nature of a revolving fund covering two weeks in advance.

The agreement sets forth that the Mortgage Corporation is entitled to credit at that time against the bond issue for $406,345.13 on account of original discount and moneys theretofore advanced, and also to accrued and accruing interest in the sum of $47,250, and that the corporation will pay the balance on the order of the owner to Byrnes in making said pay roll, when and when only the building is completed.

The corporation agreed to withhold foreclosure of mortgages pending diligent construction and to carry the bond interest when sales of apartments have not been sufficient to liquidate such indebtedness. It is further expressly provided that the first lien of the Mortgage Corporation be always recognized as superior, and that nothing in the agreement shall constitute a variance or waiver of the rights of the bondholders.

On the same date was made a declaration of trust by said Byrnes, wherein and whereby he accepts deed of premises from the Hollywood Own-Your-Own Company, and declares the title in him as a trustee to perform as indicated in the agreement with the First Mortgage Corporation. The purpose of this declaration is to attest the fact that Byrnes is a trustee acting for Powell, Hollywood Own-Your-Own Company, and all persons furnishing labor or materials. In other words, Byrnes was to go ahead and finish the erection of the structure. The deed from Hollywood Own-Your-Own Company to Byrnes was dated May 15, 1924, and recorded November 21, 1924.

Thereafter Byrnes did obtain the furnishing of a large amount of labor and materials, but was unable to entirely complete the building, and ceased work upon said building on or about April 15, 1925.

The persons holding the bonds formed a bondholders' committee, and all of the holders of 888 bonds deposited their bonds with the committee. Of the total bonds deposited 58 were deposited by First Mortgage Corporation.

In 1926 suits were commenced by lien claimants to foreclose said liens. The Mortgage Corporation and bondholders' committee cross-complained, and obtained a decree to the effect that a total sum of $1,090,000 was due them, and the said amount was decreed a first lien upon the property, and a sale was ordered. This judgment became final. Neither plaintiff nor her assignors were parties to these suits or any of the actions.

In connection with the foregoing, it may be noted that plaintiff claims as an assignee of her parents, who were the original purchasers under the Own-Your-Own plan. No point is involved as to this feature.

And it may be stated further that one of the purposes of this present action was to enjoin the sale of the premises. However, deposit was made of sufficient moneys to satisfy any judgment that might be entered, and by stipulation the sale was permitted to proceed, or, at least, that feature is out of the case.

There are other facts surrounding the sale of bonds and the failure to obtain permits from the corporation commissioner, which will be discussed hereafter.

The foregoing details of the case are sufficient to give an understanding of the controversy here. Other facts admitted or supported by evidence will from time to time appear, and these will be noted in connection with the arguments which surround them.

Plaintiff's action was to secure judgment for the amount paid for the apartments as against Hollywood Own-Your-Own Company, F. A. Powell, and Gilbert H. Bessemyer, the latter being an officer of the company. She asks further that the said judgment decree the bonds to be void and that plaintiff has a first lien against the property. As an alternative to the latter demand, she asks that, if the bonds be declared valid, her prior lien attach as against the 58 bonds owned by First Mortgage Corporation, and that such lien attach to and follow the proceeds of any foreclosure sale to the extent of the funds therefrom apportioned to the said 58 bonds.

The lower court gave judgment to plaintiff in the total of $24,730.36, being principal and interest to date of judgment. The money judgment was against Hollywood Own-Your-Own Company. It was further adjudged that this amount was secured by a vendee's lien upon the real property, which lien was declared and adjudged to have been created when the Hollywood Own-Your-Own Company conveyed to Byrnes. It was decreed and adjudged that the vendee's lien thus created was and is a first and prior lien upon an undivided forty-four one hundredths' interest in and to the real property, and as to said forty-four one hundredths' interest the vendee's lien is prior and superior to the lien of the deed of trust and the bonds secured thereby.

By way of explanation it may be stated that the forty-four one hundredths' interest is arrived at with reference to the amounts advanced by the Mortgage Corporation before and after the Byrnes completion agreement. Out of the net loan of $810,000 the fifty-six one hundredths thereof was advanced prior to the Byrnes agreement and the balance thereafter.

It was the conclusion of the court below, as set forth in the findings, that all moneys paid under the Byrnes completion agreement were mere voluntary payments, not obligatory upon the lender, and made at a time after the liens had ripened, which said latter liens were expressly known by the mortgagee to exist.

The main controversy in this appeal is on the question of voluntary payments. Before taking up the question, however, certain other features of the case may be noted.

The contention of respondents to the effect that the entire bond issue was void is found without merit by the trial court, and the judgment was that said bonds were in all respects valid. No appeal is taken from that part of the judgment.

The appeals before us are those of the First Mortgage Corporation and the defendant grouped under the name of bondholders' committee.

All that is presented by the appeals is the question of priority of lien, although appellants do not concede the existence of any lien in favor of respondent.

The case has been exhaustively briefed, if such a term may be used, and no phase of the controversy has been left untouched. The catalogue of the respective contentions would require a volume equal in size to the combined briefs. It will suffice to analyze the situation from our own viewpoint, influenced, naturally, by the arguments presented and the authorities cited. In so doing, we begin with the first-noted transaction.

This was the offer and acceptance constituting the agreement between Powell, the owner, and First Mortgage Corporation. This is called the underwriting agreement and is dated July 15, 1923. By its terms Powell sold to the First Mortgage Corporation at a 10 per cent. discount the entire $900,000 bond issue. In substance and effect, however, it was not an actual sale, inasmuch as the intent of all parties was obviously that the Mortgage Corporation should act merely as selling agents in a sale to the general public. The bonds and the trust deed securing the same were issued and executed the same date, and were an inseparable part of the one transaction in so far as Powell and the Mortgage Corporation were involved. The deed of trust ran to the benefit of the legal holder or holders of the bonds. The underwriting agreement is an anomaly, as will more fully appear hereafter.

Powell had incumbered the property through a deed of trust to secure a bond issue for general sale. The present security was the bare lot of land unimproved, which security was in itself insufficient. The sufficiency of the security was to increase by the improvements to be made. The moneys secured through the sale of bonds were to be expended in the structure to be erected. Here was then the purpose of the underwriting agreement. The function of the Mortgage Corporation was to receive and disburse the moneys loaned Powell. This latter company was intended as an additional safeguard for those who might purchase the bonds.

Incidentally, it might be noted that at this point in the proceedings, the First Mortgage Corporation had a financial ability reflected in a $4,000 bank balance and a high-sounding name.

The deed of trust securing the bonds contained no provision as to the details of the expenditures, nor did it contain any covenants binding the owner to build. The entire effect of the so-called underwriting agreement was that Powell, the owner and borrower, assigned his rights to the money received from the sale of the bonds to the First Mortgage Corporation, which latter concern was to guarantee to purchasers of bonds the disbursement of the money toward enhancing the security. For this the Mortgage Corporation was to receive a 10 per cent. commission from Powell. Their underwriting agreement created a privity between Powell and the First Mortgage Corporation out of which resulted an active trust, the direct beneficiary being Powell, inasmuch as it was his money that would be received from the loan to him, secured by the trust deed covering his property. This underwriting agreement was, in no particular, a part of the trust deed, nor any restriction upon the bond issue or the bonds sold thereunder.

In the absence of the underwriting agreement, there was no obligation upon Powell to erect a building or to do anything else. Throughout the trust deed securing the bonds, frequent mention is made of buildings on the premises or thereafter to be erected, but nowhere is there any obligation to build. The trust deed does, however, specifically declare the real estate, together with improvements to be made, subject to the terms thereof, and burdened with the lien thereby created. If there had been no underwriting agreement of any sort, and Powell, through his own efforts, had been able to market the entire $900,000 of bonds to the public upon his express promise that the money so received would be expended in the completion of a building, it cannot be contended that the effect of the lien or its priority could in anywise be affected by any failure of Powell to proceed with construction. We, of course, except a situation wherein the bondholders themselves waive priority. Both sides argue from an artificial analogy whereby the situation is made parallel to the cases wherein a deed of trust or mortgage is given to secure future advances. Appreciative of the completeness of the arguments, and mindful of the sincerity and ability of counsel, we do, nevertheless, deem the analogy as absent.

Whatever may have been the thought in the origin of bonds to secure payment, and regardless of the idea that at the outset the theory may have been inseparable from that underlying mortgages, or other forms of security for the payment of money, it is now settled that this means of raising funds by way of loan has attained a distinct standing in the modern law.

The law, with its characteristic flexibility, not only attempts to adapt old principles to new situations, but likewise does establish new principles to meet changing conditions. And to attempt a forced adherence to some older rule, which is in no sense a rule of property, by a process which first admits the inapplicability of the former doctrine, but refuses to abandon the form while denying the principle, is but a subterfuge. In Central Trust Co. v. Continental Iron Works, 51 N. J. Eq. 605, 28 A. 595, 596, 40 Am. St. Rep. 539, we find this language: "Aside from these adjudications, the bonds of corporations, secured as are these bonds, are dealt with in commercial transactions, and are treated, almost without exception, by the courts, as a class by themselves, not subject, in all respects, to the stricter rules which pertain between natural persons."

In Schroeder v. Berlin Arcade Real Estate Co., 175 Wis. 79, 184 N. W. 542, 551, a Wisconsin case, we find the subject again elaborated upon. Quoting from that case, we find: "It will be seen, from the citations and authorities, that the courts have carefully guarded and protected the interests of bondholders secured by a mortgage or trust deed, and have generally and quite universally accorded them the priority which was originally contemplated by the issuance of such bonds and the execution of such trust deeds or mortgages."

In Claflin v. South Carolina R. Co. (C. C.) 8 F. 118, 126, the court says: "The bonds put out, while not for circulation as money, were intended as articles of commerce, to be bought and sold in the market, and passed from hand to hand as current negotiable securities. They were to be used in trade. When in the hands of the company their lien under the mortgage was suspended; but the moment they were out in the usual course of business, it again took effect as of the time the mortgage was given. Any other rule than this would materially impair the marketable value of this class of instruments, and tend to defeat the very object of their execution. The whole issue of such bonds must be treated as of the date of the mortgage, without regard to the time they were actually put out, unless the contrary is clearly expressed."

In the case of Landers-Morrison-Christenson Co. v. Ambassador Holding Co., 171 Minn. 445, 214 N. W. 503, 506, 53 A. L. R. 573, it is said: "The trust deed was not given to secure a debt to the Mortgage Company, but to secure the payment of an issue of coupon bonds which were intended to be sold and were sold to the public generally. The authorities are to the effect that advances made under such a trust deed or mortgage, even if not obligatory, have priority over all incumbrances arising subsequent to the recording of the trust deed; and that the rule which applies where voluntary advances are made by the mortgagee to the mortgagor under an ordinary mortgage does not apply where the mortgage secures coupon bonds which are payable to bearer and pass by delivery and have been sold to bona fide purchasers. The federal courts give such bonds priority as of the date of the mortgage securing them, although other liens have attached before they were sold."

The court in Welch v. Northern Bank & Trust Co., 100 Wash. 349, 170 P. 1029, 1032, after commenting upon the modern trend of bonding operations, says: "Such transactions are made for the benefit of these future investors, and it would be against the policy of the law, as it would be against natural equity, to hold that the right of a bondholder attached at the time he pays his money for the bonds, and not from the time the trust deed was made, and the bonds issued and certified by the trust company."

Innumerable decisions may be cited from many jurisdictions affirming the same doctrine.

[1] We conclude, therefore, that from the date of the trust deed in the instant case the premises involved were impressed with a lien to secure the payment of the entire bond issue, and that the date of sale of the bond becomes immaterial. And the trust deed covered not only the land described, but also any improvements thereon at the time, together with any additional structures, buildings, or other additions thereto. A lien having attached, its effect or priority could be lost either by satisfaction of the debt or obligation upon which the lien rested or by waiver. It is not contended here that there was either. We then find the premises here considered burdened with the lien of the trust deed. The owner Powell transferred this land to Hollywood Own-Your-Own Company, expressly subject to this lien. Still no question arises as to priority.

We now come to the entry of the plaintiff into the picture. When plaintiff purchased the apartments under the own-your-own plan, the agreement of sale, signed by plaintiff, contained this express notice: "The buyer understands that the seller has borrowed the sum of Nine Hundred Thousand Dollars, the net proceeds of which loan shall be used exclusively in the construction of said building and the cost of this enterprise as a whole and a mortgage or Deed of Trust covering the premises and building to be constructed thereon has been given as security for the payment of said loan, the time of payment of said loan to extend over a period of ten years." And not only is the mortgage or trust deed recognized, but provision is made for the payment of the bonds by the purchasers of the apartments.

From these provisions two features of the case are developed: First, it is manifest that plaintiff took her interest with full knowledge of, and in subordination to, the lien of the mortgage and trust deed; second, that whatever notice, actual or constructive, chargeable to the Mortgage Corporation or the bondholders included notice of plaintiff's said acknowledgment. At this point, assuming the bonds extant, it is clear that plaintiff could have no claim of lien prior to that of the bondholders.

At the time of plaintiff's contracts, the building had been started, the foundations were in, and some height had been attained, the record failing to disclose the exact stage of erection. Thereafter, building progressed, and in the course thereof the First Mortgage Corporation had advanced a total of $453,595.13. At this point the work of construction ceased, and it was known to said Mortgage Corporation that the remainder of the net bond issue was entirely insufficient to complete the building.

Here we meet again the original underwriting agreement. This agreement was between Powell and the First Mortgage Corporation. It could in no wise affect the trust deed or the obligations thereby secured. In fact, the very essence of the agreement contemplated the sale of the bonds, inasmuch as there was no other source from which moneys could be obtained. This underwriting agreement was primarily for the protection of the First Mortgage Corporation, and particularly so in view of the fact that Powell, the owner, was without resources individually, and also for the reason that it was then understood that the proceeds of the loan would complete the proposed building. The First Mortgage Corporation had no right of control over any of the funds, save and except as such right and power was vested in it by Powell. The status of the Mortgage Corporation was that of a disburser of funds borrowed by Powell. Irrespective of the terms of the agreement, the parties thereto had the reserved right to alter the terms thereof at any time, and, if the alteration was harmful to the rights of the bond purchaser, the latter would have such remedies as the law makes available. While this agreement was for the benefit of the owner, Powell, yet also was the control of the funds and the disbursement thereof for the benefit of the First Mortgage Corporation. The latter was to market the bonds to the public, and the salability of the bonds depended upon the security behind them. For this service the Mortgage Corporation was to receive a 10 per cent. bonus or profit, and guaranteed to the bondholders the erection of the improvements and protection accorded thereby. If it chose to weaken or destroy this guaranty, as it obviously did, this was a matter between the company and the bondholder, but in no sense a waiver of any right by the purchasers of the bonds.

The agreement stipulated that, when the Mortgage Corporation was satisfied that the proceeds of the loan would complete the building, it was directed to pay the net proceeds to the materialmen and contractors furnishing material and labor on the building, upon the written order of Powell. The advancement of the proceeds of the loan began at once, and the trial court impliedly finds these were not merely voluntary advances, inasmuch as the entire theory of the judgment restricts the voluntary advances to those made at a time when it became manifest that the proceeds of the loan would not complete the building.

To repeat, the parties to the agreement, being Powell and the Mortgage Corporation, by their own conduct determined that the funds should be applied immediately when available and written orders were given by Powell for their disbursement. There is no dispute that these funds went into the property. After the sum of over $450,000 had been expended, it was then, for the first time as far as the record discloses, that it became evident that the balance would not complete the building, and the said building was then five stories up. It was then, according to the theory of respondent and the apparent theory of the judgment, that the Mortgage Corporation and the bondholders should abandon the building, lose the $450,000 as far as the security of the premises assured it, and thereby effect the saving of the remainder, which saving would represent a salvage of one-half.

We have now the so-called Byrnes completion agreement. It will be noted that in this agreement there was no requirement that the $356,000 complete the building, nor was that the intention of the parties. In the course of construction up to this point, there had accrued many unpaid claims for labor and material, which claims were admittedly subject to the trust deed securing the bonds. As the situation stood, no one could realize on the unfinished building. Therefore, the owners deeded to Byrnes as a trustee for the creditors, including specifically the bondholders, the purpose of the trust being the completion of the building. Thereupon Byrnes, with the full consent and authorization of the creditors, entered into the completion agreement. The lien of the mortgage in its full amount was specifically recognized and the entire transaction acknowledged the priority of this lien. Byrnes thereupon undertook to complete the building, and in this endeavor the Mortgage Corporation advanced the remaining $356,000, plus the additional amount comprising the balance of the loan.

[2] The finding of the trial court and the judgment following determine all advances under the Byrnes completion agreement to have been voluntary advances and not within the protection of the original lien as against intervening liens accrued. This conclusion is based entirely upon the assumption that the entire transaction, with reference to the bond issue, was that of a mortgage to secure future advances. It may be conceded that, where a mortgage secures future advancements, it is necessary that such advancements be made pursuant to the requirements of the mortgage, and that, if made without the said requirements and with actual notice of intervening liens, the priority claimed under the mortgage will not prevail. As we have heretofore indicated, we do not consider the present transaction as one to secure future advancements. The authorities cited establish the proposition that the trust deed or mortgage securing a future bond issue attaches for the full amount as of the date thereof, and each subsequent bond relates back automatically and completely to the instrument creating the indebtedness. By this conclusion we take the question of voluntary advancement out of the case entirely. It being apparent that the disposition of the moneys by the borrower can in nowise affect the obligation to repay or the security behind said obligation, it follows that, in the absence of some controlling equity, the lien of the mortgage or trust deed could not be affected by an unwise expenditure. Landers-Morrison-Christenson Co. v. Ambassador Holding Co., 171 Minn. 445, 214 N. W. 503–506, 53 A. L. R. 573.

As the situation presents itself, upon analysis, it parallels a condition where the owner had borrowed outright, upon the security of his land, the sum of $900,000, and had deposited that money in a bank or other depositary upon an agreement between himself and the depositary that the money would be expended only when a contemplated building could be completed with the funds deposited. It could not be successfully contended that the advancement to the owner of these funds before the happening of the conditioned event would affect the lien of the original loan. In the instant case, as we have pointed out, there was no privity between the bondholders and the First Mortgage Corporation other than that created by the guaranty of the Corporation to complete the building. If this guaranty created a privity, then it must follow that the expenditure of the moneys received was obligatory, beyond question, regardless of how far it might complete the building, for the reason that any deficiency was to be advanced or made good by the guarantor.

And further it is to be noted that the mortgage and trust deed securing the bond issue created a first lien upon the land and all improvements thereon or thereafter to be erected or made. For the purposes of full discussion, however, we may accept respondent's theory to the extent that the rule of law applicable to future advancements under a mortgage governs the instant case.

[3] It is the settled law of this state that, to cut off the lien of a voluntary advancement made under a prior mortgage, the mortgagee must have actual, and not constructive, notice of the subsequent incumbrance. In the case of voluntary advancements, the lien of the mortgage cannot be enforced as against subsequent incumbrances, of which the mortgagee has actual notice, for advancements or indorsements made or given after such notice. The notice must be actual. Constructive notice by the recording of subsequent incumbrances is not enough. Tapia v. Demartini, 77 Cal. 383–387, 19 P. 641, 11 Am. St. Rep. 288; Savings & Loan Soc. v. Burnett, 106 Cal. 514–532, 39 P. 922; Atkinson v. Foote, 44 Cal. App. 149–159, 186 P. 831; 17 Cal. Jur. 897–900.

[4] The fact is found and undisputed that First Mortgage Corporation did have actual notice of the contract between plaintiff and Hollywood Own-Your-Own Company. What notice was given by this contract? Obviously, the contract itself answers the query. Notice was given that Hollywood Own-Your-

Own Company had agreed with plaintiff to erect and construct a building, and that plaintiff had agreed to purchase certain apartments therein; that the plaintiff understood and agreed that the full sum of $900,000, secured by the deed of trust or mortgage, was a lien prior to his contract, and took the contract subject thereto. And further that the contract itself set up a means whereby plaintiff should, as a condition of his full ownership, discharge the lien of the mortgage or trust deed. This contract between the Own-Your-Own Company and plaintiff not only subordinated the right of plaintiff to the lien of the mortgage and assumed a discharge thereof, but went further. It provided that the net proceeds of the loan should be used exclusively in the construction of the building and the enterprise as a whole.

So, therefore, even under the rule of future advancements under a mortgage, the mortgagee here, if so treated, would have no actual notice sufficient to deny his lien for advancements, even if voluntary, as against any lien arising from the contract noticed. Throughout the discussion, we have assumed the existence of a lien in favor of plaintiff. This assumption may be accepted as well founded, notwithstanding the arguments advanced to the contrary. But in every lien and indispensable thereto is an object upon which it may fasten. Lien and obligation are inseparable, and the only obligation here is that created by Hollywood Own-Your-Own Company and fastened upon the premises and the buildings to be thereon placed. The mere act of the Own-Your-Own Company could create no greater lien than could an absolute transfer by it, in the absence of some act or waiver or forfeiture chargeable to prior lienholders. The lien is in the nature of a proceeding in rem whereby the specific property to which the contract relates becomes answerable for its performance. And where, as here, the specific property exists only as subjected to recognized prior liens and incumbrances, the lien is limited to this property thus and as chargeable.

We conclude, therefore, that from the nature of the transaction the advancements made do not come within the rule of payments made under a prior mortgage; that the same were not voluntary advancements; and, lastly, that if they might be so considered, they were made without actual knowledge of a prior or intervening incumbrance.

On this conclusion, the judgment of the court below must be modified.

Many other points presented become unnecessary to determine.

Respondent, however, insists that we should again consider the question of the validity of the entire bond issue upon his contention that all of the bonds are void and of no effect. The argument is that no permit was ever obtained from the commissioner of corporations. It is not necessary to detail the argument or the facts upon which it rests. This question was passed upon by the trial court, and there is no appeal from that portion of the judgment decreeing the bonds valid. We may add, however, that we do not hold that the door of inquiry is closed on that account alone. It is not at all inconceivable that the court, sua sponte, might, upon a complete showing, declare the entire bond issue of no effect, if issued without authority. However, no such showing is made to justify action of that character by the court.

There is a dispute of fact as to some of the essentials going to constitute the claimed illegality.

The point urged is mainly as to an intent to get around the future demands and requirements of the law. In other words, it is conceded that, at the time of the execution of the trust deed and issuance of the temporary bond, one single bond, there was no illegality connected with the proceeding. However, between this time and the actual issuance and sale of the separate bonds, the law, previously enacted, became operative, which required the permit of the corporation commissioner. Evidence was adduced, though denied to some extent, that the scheme of issuing a temporary bond and the plan of issuing serial bonds later was with the intent to evade the provisions of this (since demonstrated in this case) most salutary statute. Even that is not persuasive. Our scheme of legislative demands, excepting in emergency measures, a period of time to elapse between enactment and effect, and in the zone between the situation remains unchanged, and acts done and performed are governed by the law as it then exists, rather than the law as it will be at some future time. The motive which implies a lawful act is immaterial.

We further conclude, without comment, from the record before us that the plea of laches and limitation are not supported. Such likewise was the finding of the trial court.

[5] There remains one other matter to be determined. We have seen that the relationship created under a bond issue between the bondholders and the property and all third persons is one of exception from the general rules of negotiable instruments. On grounds of public policy and economic expediency a peculiar safeguard is thrown about the bond purchaser, and his title and rights are the objects of tender solicitude. Yet, this distinction does require bona fides and fair dealing. It is not entirely the welfare of the bondholder that is involved, but likewise the security of public finance and investment. One holding a bond, transferable merely by

delivery, is not immune from all of the demands of equity and conscience, regardless of all other considerations and purely by reason of the fact that he holds a bond issued for sale to the general public.

The trial court found, upon sufficient evidence, that there were 106 bonds deposited with the bondholders' committee, the holders and owners of which were not holders for value and without notice, but who took and held with full knowledge of all of the facts and conditions surrounding the negotiations and the results, and who either directly or constructively participated throughout in the entire transactions.

These bondholders and the number of bonds owned by each appear as follows:

First Mortgage Corporation.......	58 bonds
W. B. Hiett.....................	28 bonds
Guardian Investment Company....	20 bonds

The facts found are but perfunctorily questioned, and it is needless to exhaustively detail them.

The spirit of the rule of exception, as hereinbefore referred to, is wholly equitable though in part an economic safeguard.

The unfortunate jumble is directly traceable to the activities of the First Mortgage Corporation. The high-sounding guarantee of the practically penniless corporation, its delinquency in affording the protection to all of the bondholders, which was well within its power, its willful and ruinous laxity in disbursing the funds acquired after full notice, all combine to take from it the protection given one who is blameless. It took these bonds as its private venture, and from the outset was in closest privity with the owner, Powell, and with him actively brought about the situation from which it would now claim the benefit, exempt from the consequence of its own act.

The judgment of the trial court is modified to provide for a decree giving plaintiff a vendee's lien upon the premises, subject to the prior lien of the bondholders, but providing further that this lien of plaintiff attaches to the 106 bonds listed, and that from any fund impounded in the court below or from the funds derived from any sale of the premises under foreclosure, or other sale, to satisfy the lien of the trust deed, the lien of plaintiff attach to such portion of such funds as proportionately represents the share otherwise due and payable to the owners of the said 106 bonds.

As thus modified, the judgment is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

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121 Cal.App. 571

YOST-LINN LUMBER CO. v. WILLIAMS et al.

GORDON-HARRISON-RUSSELL, Inc., v. SNYDER et al.

Civ. 8269.

District Court of Appeal, First District, Division 1, California.

March 12, 1932.

Mortgages 🔑151(3).

Where mortgagee after accrual of mechanics' liens and with notice thereof, and after assigning mortgage, completed building under option to do so on owner's abandonment, mechanics' liens *held* inferior to rights of mortgage assignee, who took with knowledge of facts, only to extent of amount represented by portion of loan advanced to time of abandonment, but not as to portion advanced thereafter.

Appeals from Superior Court, Los Angeles County; J. T. B. Warne, Judge.

Separate actions by the Yost-Linn Lumber Company against Ray Williams, Frances Nusewander, and others, and by Gordon-Harrison-Russell, Incorporated, against Florence L. Snyder, Frances Nusewander, and others. The actions were consolidated for trial. From an adverse judgment, Frances Nusewander appeals.

Affirmed.

Robert E. Austin and John N. Helmick, both of Los Angeles (Justin F. Kragh, of Los Angeles, of counsel), for appellant.

Earle M. Daniels and D. Chase Rich, both of Los Angeles, for respondents.

KNIGHT, J.

These actions to foreclose materialmen's liens were consolidated for trial, and from the judgment entered therein the defendant Frances Nusewander has appealed. There is no dispute about the facts, and the sole question of law involved is whether, as the trial court held, the liens of the materialmen were superior to a portion of the mortgage lien held by the defendant Frances Nusewander.

According to the admitted facts, the defendants Ray and Emily Williams, in order to finance the construction of a building on a lot of which they were the owners, obtained from the Wilshire Mortgage Corporation a loan of $5,500, evidenced by a note for that amount, secured by a first mortgage on said lot, and a building and loan agreement providing for the advancement and expenditure of the $5,500 as the work on the building progressed. Following the execution of said documents, the mortgage corporation opened on its books a building-loan account with the Williams and credited the same with the sum of $5,500. At the same time the Williams also gave a trust deed to the property (which is not here involved) in favor of Jennie C. Ward, to secure the payment of a note for $3,850, the trust deed being made subject to said mortgage. All of the instruments above mentioned bore date August 18, 1926; the mortgage and trust deed were recorded on September 23, 1926; and on October 4, 1926, plaintiffs commenced and thereafter continued up to March 10, 1927, to furnish materials for the erection of said building. In the meantime, to wit, on November 24, 1926, the mortgage corporation assigned its mortgage to the defendant Frances Nusewander; and on December 28, 1926, the Williams deeded the property to the defendant Florence Snyder. With reference to the assignment of the mortgage to Frances Nusewander, the court found at the time it was assigned "the improvements on said real property were partially completed, and that on said date the said Frances Nusewander took the said mortgage with full notice of existing claims by materialmen and laborers." On February 28, 1927, the plaintiff Yost-Linn Lumber Company filed its claim of lien for the materials it had furnished; on March 10, 1927, all work on the construction of the building was abandoned; and on the following day the plaintiff Gordon-Harrison-Russell, Inc., filed its lien for materials furnished. One of the covenants and conditions of the loan agreement provided that "the party of the first part [the mortgage corporation] is not obligated to advance the funds as herein provided, or any part thereof, if said building is not erected in strict accordance with said plans and specifications. * * *" It also contained the following provision: "It is agreed that in the event that the work of erecting said building is abandoned for a period of thirty days, then the party of the first part may, at its option, but is not obligated to do so, complete said building, using for that purpose the funds remaining in its hands; and any funds so used for such completion shall be deemed as paid to the party of the second part under the terms of this agreement; and any costs and charges incurred in the completion of said building in excess of said amount shall be a lien on the hereinbefore described property and be secured in a like manner as the mortgage and trust deed."

The abandonment of the work continued for more than 30 days, and at the expiration of that time the mortgage corporation, exercising its option under the terms of the loan agreement, took possession of the premises, and completed the erection of the improvements thereon in accordance with the plans and specifications. To accomplish such purpose it necessarily expended the full balance of $3,000 remaining in the $5,500 loan fund; and in this regard the court found that in "expending and advancing the balance due under said loan contract it was and is a voluntary advancement, and was not required by the building loan agreement then outstanding." On November 14, 1927, by reason of the default in payment of money to Jennie C. Ward, the property was sold pursuant to the terms of the trust deed, and Jennie C. Ward became the purchaser thereof. From the foregoing facts the trial court concluded as a matter of law that as between Frances Nusewander and plaintiffs the former held a prior and subsisting mortgage lien against the property to the extent only of $2,500, which represented the portion of the loan advanced up to the time of the abandonment of the work.

We are of the opinion that the trial court did not err in so holding. As said in Fickling v. Jackman, 203 Cal. 657, 662, 265 P. 810, 812: "The decisions have clearly settled that, where the consideration for a mortgage or deed of trust has not passed until after work commenced or materials furnished, although the mortgage or deed of trust has been recorded prior to the commencement of work or the furnishing of materials, the lien of the mortgage or deed of trust is prior to the mechanics' liens where the making of the advances is obligatory on the part of the mortgagee or the beneficiary." Citing a number of authorities. "But," continues the court, "where the advances are optional with the mortgagee or beneficiary, the lien of the mortgage or deed of trust is postponed to the date or dates respectively as of which the advances actually are made. W. P. Fuller & Co. v. McClure [48 Cal. App. 185, 191 P. 1027], supra; Jones, Chat. Mortg. (3d Ed.) § 97." There is a similar restatement of the rule in Smith v. Anglo-California Trust Co., 205 Cal. 496, 271 P. 898, and the decision in W. P. Fuller & Co. v. McClure, 48 Cal. App. 185, 191 P. 1027, 1030, cited approvingly in both of the foregoing cases, expounds in greater detail that part of the rule relating to the effect of making optional payments. In this regard, quoting from the case of Valley Lumber Co. v. Wright, 2 Cal. App. 288, 84 P. 58, the court says: " 'There is a marked distinction recognized by the cases between advances which are optional with the mortgagee and advances which are agreed to be made, i. e., obligatory, and the amounts definitely fixed. This distinction is stated in Savings, etc., Soc. v. Burnett, 106 Cal. 514, 532, 533, 39 P. 922, where the court seems to regard Tapia v. Demartini, 77 Cal. 383, 19 P. 641, 11 Am. St. Rep. 288, as stating the rule as to optional advances, as also does Hall v. Glass, 123 Cal. 500, 56 P. 336, 69 Am. St. Rep. 77.' Valley Lumber Co. v. Wright, 2 Cal. App. 291, 84 P. 58." And continuing, the court goes on to say:

"Where a mortgagee has obligated himself to make advances, such advances tack, and the mortgage, when recorded, is a valid lien for all the advances actually made, although they may have been made after notice of a subsequent mortgage or incumbrance of the property. Where, however, the mortgagee is not obligated to pay the full amount of the sum named or to make all the advances mentioned in the mortgage, but it is optional with him to do so or not, and he makes advances or payments after having notice that a lien has attached in favor of a third party, his lien for payments or advances made after such notice will be postponed to that of the junior incumbrance, and each of such advances will be deemed the equivalent of a new mortgage. In such cases the mortgage lien attaches as and when the optional advancements are made. The rule is stated in Cyc. as follows: 'A mortgage given to secure future advances has priority over mechanics' liens subsequently arising to the extent of the full amount advanced, including what is advanced after, as well as before, the accrual of the mechanics' liens, where the making of such advances was obligatory upon the mortgagee under the terms of his contract with the mortgagor; but as to mere voluntary advances made after the mechanics' liens accrued, and with notice thereof, the mortgage is postponed.' 27 Cyc. 239, 240. This statement of the rule is, we think, substantially correct, and is either sustained or recognized by the following authorities." Citing numerous authorities.

In the present case, as pointed out, the loan agreement pursuant to the terms of which it was agreed the money was to be expended, expressly provided that in the event of the abandonment of the work on the building for a period of 30 days the mortgage company "*may, at its option, but is not obligated to do so*, complete said building, using for that purpose the funds remaining in its hands." Obviously, therefore, following the 30-day period of abandonment of the work it was not obligatory upon said corporation to advance any further sums of money whatever; and that being so, under the law as declared in the foregoing authorities and in the case of Althouse v. Provident Mutual, etc., Ass'n, 59 Cal. App. 31, 209 P. 1018, which involved a clause in the deed of trust somewhat similar to the one here under consideration, the trial court was correct in finding as it did that the sums of money expended subsequent to the abandonment of the work constituted voluntary advances, and that having been made after the accrual of the materialmen's liens and with notice thereof, were not the subject of any superior lien.

Appellant argues that by granting the application for the loan and taking the mortgage as security therefor, followed by the opening of a building-loan account with a credit of $5,500, the mortgage corporation became obligated to advance the full amount thereof; and in support of the argument she relies largely upon the conclusions reached in the cases of Valley Lumber Co. v. Wright, supra, and Smith v. Anglo-California Trust Co., supra. But an examination of the decisions therein will disclose that the facts of those cases were essentially different from those here, for the reason that neither of those cases involved a covenant such as we have here, providing that upon the happening of a certain event it was optional with the mortgagee to advance the remaining portion of the loan.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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BROWN v. LUDDY et al.

Civ. 4440.

District Court of Appeal, Third District, California.

March 10, 1932.

Rehearing Denied April 9, 1932. Hearing Denied by Supreme Court May 9, 1932.

1. Mines and minerals 🔑29(3).

Valid location of mineral lands made and kept up has effect of grant by government of right of present and exclusive possession of lands.

2. Mines and minerals 🔑29(1).

Mining claims *held* "property."

[Ed. Note.—For other definitions of "Property," see Words and Phrases.]

3. Public lands 🔑117.

Patent may be collaterally impeached by showing government had no jurisdiction to dispose of land.

4. Public lands 🔑116.

Known mineral deposits do not pass under patent to agricultural land.

5. Mines and minerals 🔑9.

Public land, to be subject to mineral entry, must be known at time to be valuable for minerals, and minerals must be found in paying quantities.

6. Mines and minerals 🔑38(15).

In action to quiet title to quartz mining claim, evidence warranted finding plaintiff's claim was on mineral land.

7. Mines and minerals 🔑38(20).

Where locator has located quartz mining claim and done assessment work each year, it must be held land is valuable for mining.

8. Mines and minerals ⟹29(3).

Homestead Act had no retroactive effect on right to mining claim located before enactment, since claimant's right to surface was valuable property right, and there was contract between government and claimant which could not be impaired (Homestead Act Dec. 29, 1916).

9. Mines and minerals ⟹29(3).

Where mining claim was located in 1896, and all legal requirements and annual assessment work had been performed, but no patent was issued, claimant *held* entitled to surface title as against patentee under agricultural homestead patent issued in 1927, which overlapped (30 USCA §§ 21, 26; 43 USCA § 201).

10. Mines and minerals ⟹38(2).

Owner of equitable title may quiet title against owner of legal title in suit involving mining claim.

11. Quieting title ⟹51.

In suit to quiet title, cross-complainant may obtain relief affecting additional land when cause of action includes such additional land.

Appeal from Superior Court, Calaveras County; J. A. Smith, Judge.

Suit by Rosalie M. Brown, individually and as administratrix of the estate of W. H. Brown, deceased, against Wm. H. Luddy and another, in which defendant named filed a cross-complaint. From a judgment for defendants, plaintiff appeals.

Judgment affirmed in part, and cause remanded, with directions to modify judgment.

James H. Boyer, of Oakland, for appellant.

Joseph R. Huberty and Huston & Huberty, all of Woodland, for respondents.

Mr. Justice pro tem. COMSTOCK delivered the opinion of the court.

Plaintiffs brought this action to quiet title to a quartz mining claim known as the "Never Sweat Quartz Mine" in Calaveras county. Defendants answered, and also filed a cross-complaint to quiet title to certain lands patented to the defendant Luddy by the United States government as a stock-raising homestead.

The mining claim was located on the public domain in 1896 by plaintiffs' predecessors in interest. All requirements of the law in respect to the location of quartz mining claims were fulfilled, and the annual assessment work has all been performed. No patent has been issued to plaintiffs. In 1922 the defendant Luddy made application for a stock-raising homestead, and thereafter, on the 12th day of January, 1927, a patent to said homestead was issued to him by the United States. Plaintiffs had no actual knowledge of said defendant's application, and no contest was made on the issuance of the patent. The mining claim is of the usual dimensions, 600x 1500 feet. The patent to Luddy describes a tract of land 481.97 acres in extent, and overlaps the mining claim on 1.96 acres of the southerly end thereof. In the course of the development of the claim, several cuts have been made near the point of discovery about the center thereof, and a tunnel has been driven into the ground about 300 feet in length. The ore and waste material have been removed from the portal of this tunnel, which is located about 325 feet northerly of the north boundary of the patented homestead, and much of it has been taken across the main county road running through the claim near its southerly end and dumped on the southerly side thereof. Defendant Luddy has known at all times since 1897 of the existence of the tunnel, and has noticed the dirt and rock being dumped below the road during much of that time. He was roadmaster on that road for a number of years under his father, who was a supervisor of Calaveras county, and was very familiar with the locality. He did not at the time he made his affidavit and proof for the purpose of securing his patent actually know where the boundary lines of the Never Sweat claim were nor had he ever made any effort to locate or ascertain where they lay.

The only interest of the defendant Raggio is as a purchaser from Luddy under a partially performed contract for the sale and purchase of 3.41 acres of land, which includes the 1.96 acres in dispute. Under the terms of this contract, Raggio is entitled to possession during performance, but title is retained by Luddy. A deed conveying a good and merchantable title is to be executed and delivered by Luddy when performance is complete.

Plaintiffs' amended complaint is in the usual form of a complaint to quiet title to real estate, except that it does not allege title in fee in plaintiffs, but only that they are the owners and in possession, and entitled to possession, of a parcel of land consisting of a quartz mining claim known as the Never Sweat lode, particularly describing it, and that at all times in said complaint mentioned there has existed, and still exists, in and upon said quartz mining claim, valuable mineral deposits, which fact for many years past has been known to defendants. The prayer, substantially, is that defendants be required to set forth the nature of their claims; that the adverse claims of defendants be determined; that it be adjudged that plaintiffs are the owners of said premises, and that defendants have no estate or interest whatever in said land or premises; that defendants be forever debarred from asserting any claim therein adverse to plaintiffs, and for general equitable relief. The answer denies ownership of said claim by plaintiffs, admits that defendants claim an interest in the premises adverse to plaintiffs, and alleges ownership thereof in fee in the defendants; denies that there exists, or that there ever existed upon the said premises, any valuable mineral deposits; denies that defendants or either of them ever had knowledge of the existence of any valuable mineral deposits in or upon the property described or any part or portion thereof; and alleges that there is not and never has been any mineral deposit of any kind or value in or upon said land or any part thereof. The cross-complaint alleges that on January 12, 1927, the land claimed by Luddy was public domain of the United States; that on said day it was duly patented to him; that Luddy is the owner in fee thereof; and that plaintiffs claim an interest adverse to him. The prayer is to quiet title to the entire 481.97 acres in the defendants. Plaintiffs answered the cross-complaint, denying all of the allegations thereof, except as to the issuance of the patent to Luddy, and alleging that there was excepted from the property patented all minerals in the lands patented, together with the right to prospect for, mine, and remove the same; denied that the patent was regularly issued, and alleged that at all times in the cross-complaint mentioned, and for many years prior thereto, there existed, in and upon the property described in plaintiffs' complaint, valuable mineral deposits, the existence of which was at all times known to defendants and by Luddy concealed from the General Land Office when he made application for the patent.

Judgment was entered in favor of the defendant Luddy on the cross-complaint, declaring him to be the owner in fee of the 481.97 acres claimed by him, "except as to all coal and mineral contained therein, together with the right to prospect for, mine and remove the same, subject and pursuant to the provisions and limitations of an Act of Congress entitled 'Stockraising Homestead Act of December 29, 1916'" (39 Stats. 862 [43 USCA §§ 291–301]), and quieting his title thereto against all claims of the plaintiffs. It was further adjudged that the plaintiffs are the owners, subject to the paramount title of the United States, of all of the Never Sweat Quartz Mining claim except the 1.96-acre portion thereof in conflict with defendant Luddy's patent, and that as to such portion plaintiffs are the owners, subject to the paramount title of the United States, of all coal and mineral, if any, contained in the land within said conflicting portion of said claim, "together with the right to prospect for, mine and remove the same subject and pursuant to the provisions and limitations of an Act of Congress entitled 'Stockraising Homestead Act of December 29, 1916'" (39 Stats. 862), and plaintiffs' title thereto was quieted against the defendants. Defendant Luddy was awarded his costs against plaintiffs. Plaintiffs moved for a new trial, which was denied. The appeal is by plaintiffs, and is taken from the judgment.

Plaintiffs contend that the evidence is insufficient to support the findings and that the findings do not support the judgment. It is also urged that the court erred in denying their motion for a new trial.

The only subject-matter of the controversy on this appeal is the surface rights in the 1.96 acres brought into conflict by the overlapping descriptions.

The principal point made by plaintiffs is that, a valid location having been made and kept alive to the present time by the performance of all assessment work thereon, the exclusive right to the possession, enjoyment, and control of all of the surface included within the lines of their claim, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies within such surface lines, extended downward as described in the statutes pertaining to such locations, had become vested in them, and that the United States was powerless to deprive them either of their surface rights or their rights to the minerals in the land by subsequent patent to the defendant Luddy. Answering this contention, the defendants assert that the suit is a collateral attack upon the patent, and that, the Land Department being a special tribunal vested with judicial power to determine the claims of all parties to the public lands which it is authorized to dispose of, and with power to execute its judgments by conveyances to the parties entitled to them, the issuance of the patent is a conclusive adjudication that the patentee has performed all acts necessary to entitle him to the patent, and that the land in dispute is agricultural and not mineral in character, that such adjudication is not open to collateral attack, but can be questioned only in a direct proceeding brought by or on behalf of the United States, or in an equitable proceeding to give relief against the enforcement of rights under a patent fraudulently obtained, and that plaintiffs' suit is not of such character.

[1, 2] We have no doubt of the correctness of the general rule contended for by defendants in respect to the conclusive effect of a patent issued by the Land Department in a case where it has power or authority to act in the premises. The question before us, however, is whether the mining claim was property of such character that control of the exclusive right to its possession and enjoyment had passed out of the hands of the government, and whether, in view of the mining laws and the rights guaranteed under

them to locators of mining claims on the public domain, the Land Department had any authority to convey to an applicant for a stock-raising homestead the surface rights previously vouchsafed to the locator under a valid location made and kept good in compliance with such laws. It has frequently been held that a valid location of mineral lands made and kept up in accordance with the statute has the effect of a grant by the United States of the right of present and exclusive possession of the lands located. Belk v. Meagher, 104 U. S. 284, 26 L. Ed. 737; Gwillim v. Donnellan, 115 U. S. 45, 5 S. Ct. 1110, 29 L. Ed. 348. And that a mining claim is property in the fullest sense of the word. Forbes v. Gracey, 94 U. S. 762, 24 L. Ed. 313. In discussing the nature and character of a mining claim, our Supreme Court, in Watterson v. Cruse, 179 Cal. 379, at page 382, 176 P. 870, 872, said: "While the paramount fee remains in the government until it has issued its patent, yet as to every one else—'the estate acquired by a perfected mining location possesses all of the attributes of a title in fee, and so long as the requirements of the law with reference to continued development are satisfied, the character of the tenure remains that of a fee.' 2 Lindley on Mines (3d Ed.) § 539; Merritt v. Judd, 14 Cal. 59; Hughes v. Devlin, 23 Cal. 501; Buchner v. Malloy, 155 Cal. 253, 100 P. 687. The interest of the locator is treated as a vested estate. Hughes v. Devlin, supra; Clipper M. Co. v. Eli M. Co., 194 U. S. 220, 48 L. Ed. 944, 24 S. Ct. Rep. 632; see, also, Rose's U. S. Notes."

The following language used by the Supreme Court of the United States in Clipper M. Co. v. Eli M. Co., 194 U. S. 220, 24 S. Ct. 632, 634, 48 L. Ed. 944, is applicable to the case before us: "In St. Louis Min. & Mill. Co. v. Montana Min. Co., 171 U. S. 650, 655, 43 L. Ed. 320, 322, 19 S. Ct. 61, 63, the present Chief Justice declared that 'where there is a valid location of a mining claim, the area becomes segregated from the public domain, and the property of the locator.' Nor is this 'exclusive right of possession and enjoyment' limited to the surface, nor even to the single vein whose discovery antedates and is the basis of the location. It extends (so reads the section) to 'all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically.' In other words, the entire body of ground, together with all veins and lodes whose apexes are within that body of ground becomes subject to an exclusive right of possession and enjoyment by the locator. And this exclusive right of possession and enjoyment continues during the entire life of the location, or, in the words of Chief Justice Waite [Gwillim v. Donnellan, 115 U. S. 45, 5 S. Ct. 1110, 29 L. Ed. 348], just quoted, while there is 'a valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States.' There is no provision for, no suggestion of, a prior termination thereof."

See, also, Wilbur v. United States ex rel. Krushnic, 280 U. S. 306, 50 S. Ct. 103, 74 L. Ed. 445.

[3] It is well settled that a patent may be collaterally impeached and its operation as a conveyance defeated by showing that the government had no jurisdiction to dispose of the lands; that is, the law did not provide for selling them, or that they had been previously reserved from sale or dedicated to special purposes or had previously been transferred to others. Van Ness v. Rooney, 160 Cal. 131, 116 P. 392; Mery v. Brodt, 121 Cal. 332, 53 P. 818; St. Louis Smelting Co. v. Kemp, 104 U. S. 636, 26 L. Ed. 875; Wright v. Roseberry, 121 U. S. 488, 7 S. Ct. 985, 30 L. Ed. 1039.

[4] In view of the principles enunciated in the cases above referred to, can it be said that the Land Department had jurisdiction to dispose of the surface rights included within the limits of plaintiffs' mining claim and thus by operation of law withdrawn from the public domain and belonging to them as property having all of the characteristics of a fee and vested in them with all of the force and effect of a grant? If this were so, then much of the valuable mineral land on the Pacific Coast, and indeed in all of the states, would be held by a very weak tenure. It is a matter of common knowledge that, since the commencement of the development of the vast mineral resources of this country, mining properties of great value have been held and worked without it being deemed necessary to procure patents from the government. Mills and machinery of stupendous value have been erected and maintained upon the surface of these lands and enormous sums expended in development, upon the faith of the quality and strength of the title acquired by a perfected location kept up by continued assessment work under the laws and policy of our government relative to its mineral lands and their disposition. If titles held by such tenure are subject to devestiture by the issuance to subsequent applicants for patents of agricultural or other classes of lands, upon a procedure whereby constructive notice only may be received by the mineral locator, then surely a large part of the mining industry of our nation is builded upon an insecure foundation, and a strong incentive is furnished for unscrupulous persons to attempt encroachments upon valuable mineral lands by making entry upon adjoining lands under pretext of having no knowledge of the location of the boundaries of such mining claims and including portions thereof in such entry. We do not deem it

necessary, however, to extend our remarks upon the principles or policies under consideration in this case, for most of the questions involved have been exhaustively covered by the opinion of our Supreme Court in the case of Van Ness v. Rooney, 160 Cal. 131, 116 P. 392, 395. That was a case where plaintiff sued to quiet his title to a quartz mining claim, which he proved had been validly located and continuously developed as required by law, against defendant, who was the successor in interest of the Central Pacific Railroad Company, which had received a patent from the government subsequent to the mining location and covering the same land. It was contended in that case, as here, that the suit was an unauthorized attack upon the patent, and that the issuance of the patent constituted a conclusive adjudication that the lands included therein were not mineral lands. The patent contained a reservation of "all mineral lands should any such be found" in the tracts granted, with the exception of coal and iron lands. While recognizing that such reservation did not include mineral lands discovered for the first time after the issuance of the patent, the court held that known mineral lands which were such at the date of the patent did not pass thereby. Its decision was not based upon the construction of the reservation in the patent alone, however, but also upon the broader grounds that known mining claims do not pass by a subsequent patent of the land covered thereby, and that the government has no power to convey property that has already passed to others. In this regard the court said: "As a general proposition, and as applied to the disposition of its public lands by the government of the United States, the rule contended for by appellants is undoubtedly true. The land department is vested with special power to determine the claims of different persons to public lands it is authorized to dispose of. The duty is cast upon it to determine the character of the public lands, as to whether it is mineral land reserved under the provisions of the general law from sale, or agricultural or other land of which it may make disposition. The determination of this question of the character of the land being given to the land department, the general rule is that the issuance of a patent is a conclusive determination that the land is agricultural, or such other character as might be disposed of under the general law providing for the disposition of public lands, and not mineral land reserved from sale, and the effect of the issuance of a patent to the land as agricultural land is to transfer to the patentee all mineral deposits which may be subsequently discovered within its boundaries, but which were not known to exist at the time the patent was issued. While this is the general rule as to vesting in the patentee of agricultural land the title to all mineral deposits, the existence of which were unknown when the patent was issued, the rule is equally established that mineral deposits known to exist in the land at the time the patent was issued do not pass under it." Van Ness v. Rooney, 160 Cal. 131, 116 P. 392, 395. See, also, Belk v. Meagher, 104 U. S. 279, 26 L. Ed. 735; Golden v. Murphy, 31 Nev. 395, 103 P. 394, 105 P. 99; Deffeback v. Hawke, 115 U. S. 392, 6 S. Ct. 95, 29 L. Ed. 423; Mantle v. Noyes, 5 Mont. 274, 5 P. 856; Noyes v. Mantle, 127 U. S. 348, 8 S. Ct. 1132, 32 L. Ed. 168; Silver Bow Min. & M. Co. v. Clark, 5 Mont. 378, 5 P. 570; Butte City Smoke-House Lode Cases, 6 Mont. 397, 12 P. 858.

[5, 6] What constitutes known mineral land has been the subject of much discussion by the courts. In order to bring land within the class subject to mineral entry, it must be shown that the land is known at the time to be valuable for its minerals, and that minerals are found in such quantities as to justify expenditures in the effort to extract them. The mere fact that the land contains particles of mineral or veins of mineral-bearing rock does not necessarily impress it with the character of mineral land within the meaning of the laws reserving mineral lands from entry for agricultural purposes. Alford v. Barnum, 45 Cal. 482; Madison v. Octave Oil Co., 154 Cal. 768, 99 P. 176; Diamond Coal & Coke Co. v. U. S., 233 U. S. 236, 34 S. Ct. 507, 58 L. Ed. 936; note 21, title 30, c. 2, p. 37, USCA. Whether the land in dispute in the case at bar was known to be valuable for its mineral deposits was an issue in the case. In finding that plaintiff was the owner of the Never Sweat Claim, the trial court necessarily found that such claim was upon mineral land, for a valid quartz mining claim cannot be made without a discovery of a vein or lode containing mineral within its limits. This discovery is the very basis of a valid quartz claim. McElligott v. Krogh, 151 Cal. 126, 90 P. 823. Without a discovery of mineral, that is, mineral deposits in sufficient quantity and of sufficient value to classsify the land as mineral land, the trial court could not have found in favor of a valid location and thus quieted plaintiffs' title even to the portion of said claim not in conflict, for plaintiffs were entitled to that relief only upon the strength of their own title. Lindley on Mines, § 176. Indeed, we are compelled to conclude that no other finding could have been made under the law applicable to this case, in view of the undisputed showing of compliance with the law in respect to the location and continued development of the claim. In so concluding we have not overlooked the many cases cited by defendants in their briefs and by their counsel on oral argument to the effect that there must be a point of time at which the character of land as mineral is to be determined by the gov-

ernment, and that this point of time is at the granting of a patent, and, when then determined, is conclusive. That this general rule exists cannot be denied. Many cases of our own and the United States courts have announced it. We have been unable to find, however, any case which has applied the rule where the patentee's rights were initiated subsequently to the date when the mining claimant's rights attached and where the courts gave full consideration to facts similar to those before us. But we do find that the courts have held that there is another point of time at which the character of known mineral lands can be fixed so as to prevent the government exercising any effective authority to deprive mining claimants of rights duly initiated and maintained under the mining laws. The United States Supreme Court in Noyes v. Mantle, 127 U. S. 348, 8 S. Ct. 1132, 1135, 32 L. Ed. 168, in considering the effect of a patent for a placer claim upon a previously located quartz claim in conflict therewith, said: "Where a location of a vein or lode has been made under the law, and its boundaries have been specifically marked on the surface, so as to be readily traced, and notice of the location is recorded in the usual books of record within the district, we think it may safely be said that the vein or lode is known to exist, although personal knowledge of the fact may not be possessed by the applicant for a patent of a placer claim. The information which the law requires the locator to give to the public must be deemed sufficient to acquaint the applicant with the existence of the vein or lode. A copy of the patent is not in the record, so we cannot speak positively as to its contents; but it will be presumed to contain reservations of all veins or lodes known to exist, pursuant to the statute. At any rate, as already stated, it could not convey property which had already passed to others. A patent of the government cannot, any more than a deed of an individual, transfer what the grantor does not possess."

This case was quoted with approval in Van Ness v. Rooney, supra. In the last-mentioned case the court commented upon several California cases relied upon as supporting the doctrine that a patent is conclusive against collateral attack and distinguished them as being cases where the attack on the patent was made by junior claimants. We note that some of these distinguished cases are relied upon by the defendants here; namely, the cases of Jameson v. James, 155 Cal. 275, 100 P. 700, and Saunders v. La Purisima, etc., Co., 125 Cal. 159, 57 P. 656. The court said: "But the plaintiff here is not a junior claimant. He had made a valid mining location and initiated his title to his mining claim in the quarter section in question nearly six months before the issuance of the patent to the railroad company, and, as the law is that mineral deposits whose existence are known when the patent is issued do not pass under it, the patent was ineffectual to transfer any title to the appellants as to the mining claim of the respondent." Van Ness v. Rooney, supra.

It is plain that the same distinction applies in the case before us.

[7] This court has held that, when a locator has made his discovery and located his claim and done his assessment work each year since location, it must be held that the land is valuable for mining. Batt v. Stedman, 36 Cal. App. 608, 173 P. 99.

[8, 9] Defendants urge that Van Ness v. Rooney, supra, is distinguishable from this case in that by the terms of the patent therein all "mineral lands" were specifically and expressly excepted from the grant. We have already observed that, had the lands not been known mineral lands at the date of the patent, they would have passed and their status would have been established as nonmineral by the action of the Land Department in issuing the patent, and that the decision was not based wholly upon the language of the grant. It was the law when plaintiffs' predecessors made their location, and still is the law, that mineral lands are reserved from sale except as otherwise expressly provided by law (Rev. St. U. S. § 2318, title 30, chap. 2, § 21, USCA, and notes); that a mining claim gives surface as well as subsurface rights to all lands included within the lines of the location (Rev. St. U. S. § 2322, title 30, chap. 2, § 26, USCA), and that mineral lands are not liable to homestead entry (Rev. St. U. S. § 2302, title 43, chap. 7, § 201, USCA). Whatever may have been the effect of the enactment of the Stock-Raising Homestead Act of December 29, 1916, upon the existing policy of the United States in respect to the disposition of its mineral lands and upon existing statutes guaranteeing to lode claimants surface rights in their claims, we think it plain that such legislation, in providing for a reservation to the United States of all coal and other *minerals in the land* (italics ours), a provision found in the defendant Luddy's patent and which defendants claim distinguishes this case from that of Van Ness v. Rooney, supra, did not have any effect retroactively upon the rights of plaintiffs to their claim located long previous to such enactment. Plaintiffs' right to the surface of their claim, being a valuable property right vested in them, could no more be taken away from them by subsequent legislation than impaired by subsequent grant. Favot v. Kingsbury, 98 Cal. App. 284, 276 P. 1083; Silver Bow Min. & M. Co. v. Clark, 5 Mont. 378, 5 P. 570. Furthermore, the mining statutes are, in effect, an offer by the government to sell the public mineral lands to the locator, who, by making a val-

id location thereon, accepts the offer and thereby closes the contract of purchase, and on compliance with its terms becomes entitled to a conveyance. Mantle v. Noyes, 5 Mont. 274, 5 P. 856, affirmed in Noyes v. Mantle, 127 U. S. 348, 8 S. Ct. 1132, 32 L. Ed. 168; Silver Bow Min. & M. Co. v. Clark, 5 Mont. 378, 5 P. 570; Butte City Smoke-House Lode Cases, 6 Mont. 397, 12 P. 858. This being so, to give any retroactive effect to said Stockraising Homestead Act would impair the obligation of the contract, which cannot lawfully be done. It is not necessary for us to construe the patent to Luddy, as we base our conclusion that it is ineffective to convey any surface title to him as to the 1.96 acres in dispute upon the statutes which gave such surface rights to plaintiffs' predecessors and the rule which declares that the government has no power to grant that which it has already by virtue of its laws and a compliance therewith assured to another with all of the force and effect of a grant.

[10] Defendants deny the right of plaintiffs to maintain this action, basing this contention upon the rule that the owner of an equitable title cannot quiet his title against the owner of the legal title. De Leonis v. Hammel, 1 Cal. App. 390, 82 P. 349; Klein v. Lange, 91 Cal. App. 400, 267 P. 130; Newport v. Hatton, 195 Cal. 132, 231 P. 987; Fouch v. Johnston, 199 Cal. 437, 249 P. 852. It is too well settled to require comment that this rule does not apply to suits to quiet title to mining claims. 17 Cal. Jur. 521; Van Ness v. Rooney, supra.

The conclusions we have reached make it unnecessary to pass upon the question of whether plaintiffs have properly pleaded or have proven fraud and the other related points discussed in the briefs.

[11] Plaintiffs suggest that it was improper to include in the cross-complaint property other than that described in the complaint. It has been held that a cross-complainant may obtain relief affecting additional land when his cause of action includes such additional land as well as that with which the plaintiff is concerned. 21 Cal. Jur. 81; Stockton Sav. & L. Soc. v. Harrold, 127 Cal. 612, 60 P. 165. We have not gone into this subject with relation to the issues in this case, however, in view of plaintiffs' admission that they are not injured by the decree as to the additional land.

From a consideration of the entire record, it appears that the trial court was in error in quieting defendant Luddy's title to the surface or any part of the 1.96 acres in conflict and in refusing to quiet plaintiffs' title to the whole of the Never Sweat Claim. Upon the record herein [see Tupman v. Haberkern, 208 Cal. 256, 280 P. 970; Edwards v. Jenkins et al. (Cal. Sup.) 7 P.(2d) 702], we find that the plaintiffs' claim was not a part of the public domain open to a stock-raising homestead entry at the time Luddy made entry on the land including said 1.96 acres thereof or at the time he secured his patent; that the patent purporting to cover said 1.96 acres did not convey the same to Luddy; that the Never Sweat Quartz Mine claim, as described in plaintiffs' amended complaint, at all times mentioned in the pleadings contained valuable mineral deposits and were known by defendants to contain such; that plaintiffs are the owners of said claim, including the surface, subject to the paramount title in the United States; and that defendant Luddy is the owner in fee of the lands described in the Luddy patent, subject to the reservations contained therein, excepting that portion thereof in conflict with said Never Sweat Quartz Mine claim.

The cause is remanded, with direction to the trial court to modify the judgment by quieting plaintiffs' title to the whole of the mining claim, including the surface of the 1.96 acres in conflict, and by denying defendants relief as to any portion of said claim, surface, or otherwise, and by awarding plaintiffs their costs. In all other respects, the judgment is affirmed. Appellants to recover their costs on this appeal.

We concur: PRESTON, P. J.; R. L. THOMPSON, J.

DRAFFEN v. UNITED STATES FIDELITY & GUARANTY CO.*

Civ. 723.

District Court of Appeal, Fourth District, California.

March 14, 1932.

Rehearing Denied April 13, 1932. Hearing Granted by Supreme Court May 12, 1932.

1. Principal and surety 🔑59.

Surety cannot be compelled to extend its liability beyond language of its undertaking.

2. Injunction 🔑252(1).

Defendants against whom temporary injunction has been wrongfully issued are limited in their recovery to terms of bond (Code Civ. Proc. § 529).

3. Injunction 🔑252(8).

In proper case, damages recoverable under bond may include reasonable attorneys' fees incurred in securing dissolution of temporary injunction wrongfully issued.

🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 17 P.2d 121.

4. Injunction ⚷252(4).

Where temporary injunction restrained lessors from interfering with possession of realty by assignee of oil lease, lessors could not recover under bond for damages resulting from acts of subsequent assignee.

> Lessors could not recover, since bond merely undertook to pay damages resulting from issuance of the temporary injunction, and, as the activities on the realty by the subsequent assignee were in its capacity, as owner of the lease, and for its own purposes and benefits, the damages did not come within bond.

Appeal from Superior Court, Los Angeles County; Wilber F. Downs, Judge.

Action by J. A. Draffen and wife against the United States Fidelity & Guaranty Company. J. A. Draffen having died, Mary E. Draffen, as administratrix of his estate, was appointed in his stead. From an adverse judgment, defendant appeals.

Reversed.

Anderson & Anderson, A. G. Ritter, and Edward C. Mills, all of Los Angeles, for appellant.

Wood & McArthur and Doyle, Clark, Thomas & Johnson, all of Long Beach, for respondent.

MARKS, J.

This action was instituted in the court below by J. A. Draffen and Mary E. Draffen, who were husband and wife. While the appeal has been pending J. A. Draffen died, and Mary E. Draffen was appointed and qualified as the administratrix of his estate, and has been substituted here as such administratrix. We will hereafter refer to J. A. Draffen and Mary E. Draffen as the respondents.

Early in December, 1924, the Beaver State Oil Company instituted an action in the Superior Court of Los Angeles county against respondents, wherein it sought and secured a temporary injunction against them. The Beaver State Oil Company gave an undertaking on this injunction in the sum of $10,000, with appellant as surety. The respondents secured a judgment of dismissal of the action in which the temporary restraining order was issued on July 25, 1927, and instituted this action for damages. Judgment was rendered in their favor in the sum of $10,000, from which appellant has prosecuted this appeal.

In respondents' complaint, admitted by appellant, the restraining order is described as follows: "A temporary injunction restraining and enjoining these plaintiffs from interfering with the possession, occupation and use by said Beaver State Oil Company of lot 17, tract 530, in the city of Lomita, county of Los Angeles, state of California, including the oil well equipment and appurtenances of the oil well known as 'Beaver State No. 2,' together with means of ingress and egress, all until the further order of said court, and restraining the plaintiffs herein (J. A. and Mary E. Draffen), their agents, servants and employees, from in any wise molesting, interfering with, intimidating or annoying the said Beaver State Oil Company, its agents, servants or employees engaged in or about said premises until the further order of said court." The condition of the undertaking given by appellant is as follows: "Does hereby undertake in the sum of ten thousand dollars ($10,000), and promise to the effect that in case said temporary injunction shall issue, the said plaintiff will pay to the said party enjoined such damages, not exceeding the sum of ten thousand dollars ($10,000), as such parties may sustain by reason of the said temporary injunction if the said superior court finally decide that the said plaintiff was not entitled thereto."

The facts of the case may be briefly summarized as follows: The respondents were the owners of the lot in the city of Lomita which has been heretofore described. On October 9, 1923, they leased this property to B. Gildner for the purpose of having him explore, drill for, and remove, oil, gas, and other hydrocarbon substances therefrom, the respondents to receive a 25 per cent. royalty of the gross production. Thereafter, on a date not disclosed in the record, Gildner assigned this lease to the Beaver State Oil Company, which drilled an oil well upon the premises, and which produced oil for a short time. On November 17, 1924, the Beaver State Oil Company assigned this lease to the Lewis Oil Corporation. On January 15, 1925, the Lewis Oil Corporation assigned the lease to the Julian Petroleum Corporation. Early in August, 1924, the respondents gave notice of intention to forfeit the oil lease to Gildner and the Beaver State Oil Company, alleging various violations of the terms of the lease. On November 7, 1924, they gave notice to Gildner, the Beaver State Oil Company, and the Lewis Oil Corporation that the lease was forfeited. Prior to this date they had taken possession of the property, the oil well, and its machinery, and were producing oil from the well. They recovered a total of approximately 8,818 barrels from the well, which they sold for $1 per barrel. At the time of the institution of the action by the Beaver State Oil Company in which the temporary injunction in question here was issued, respondents were in possession of the property, and continued in such possession until the 10th day of January, 1925, when the temporary restraining order was served upon them. They thereupon delivered the possession of

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

the property to the Julian Petroleum Corporation, which proceeded to take the well off production in order to work upon it, and then never was able to get it to produce again. Respondents had actual notice of the assignments of the lease heretofore noted, shortly after each assignment was made.

Respondents sought to recover damages against appellant under the terms of its bond, alleging that they paid, or became obligated to pay, the sum of $1,000 in attorneys' fees in the dismissal of the action in which the restraining order had been issued; and that they had suffered other actual damage far exceeding the penalty of the bond.

Appellant seeks a reversal of the judgment upon three grounds: First, that the court erred in denying its motion for nonsuit; second, that the court erred in denying its motion for an instructed verdict to the jury; and, third, that the evidence fails to sustain the verdict and judgment. The first two grounds need not be considered, as they of necessity will be included within a discussion of the third.

Appellant maintains that all of the damages proved at the trial were the result of the activities of the Julian Petroleum Corporation and not of the Beaver State Oil Company, and therefore are not recoverable under the terms of the bond.

[1-3] It is well-settled law in this state that a surety has the right to stand on the letter of its bond, and that there is no way in which it can be compelled to extend the liability beyond the language of the undertaking. Curtiss v. Bachman, 110 Cal. 433, 42 P. 910, 52 Am. St. Rep. 111; Carter v. Mulrein, 82 Cal. 167, 22 P. 1086, 16 Am. St. Rep. 99; Tarpey v. Shillenberger, 10 Cal. 390. It is also well settled that the defendants against whom a temporary injunction has been wrongfully issued are limited in their recovery to the terms of the bond. Section 529, Code Civ. Proc.; Rice v. Cook, 92 Cal. 144, 28 P. 219. In a proper case damages may include reasonable attorneys' fees incurred in securing the dissolution of a temporary injunction wrongfully issued. 14 Cal. Jur. 310.

[4] The temporary injunction restrains and enjoins the respondents from interfering with the possession, occupation, and use of the real property in question by the Beaver State Oil Company, its agents, servants, or employees. The bond in question undertook to pay damages resulting by reason of the issuance of the temporary injunction. It is therefore evident that no recovery can be had for any damages which did not result from any acts of the Beaver State Oil Company or its agents, servants, or employees as such damages would not come within the provisions of the bond. There is no evidence in the record indicating that the Julian Petroleum Corporation was in any way acting as the agent, servant, or employee of the Beaver State Oil Company. It was the assignee of the oil lease. All its activities upon the real property were in the capacity of such assignee, as owner of the lease, and for its own purposes and benefits. It is immediately apparent from this statement of the facts that the damages proven for which judgment was rendered did not come within the contract of the bond.

In the case of Moore v. Maryland Casualty Co., 100 Cal. App. 658, 280 P. 1008, 1011, three cases were considered which were similar in principle to the instant case. In the Moore Case it was said: "In the case of Gobbi v. Dileo, 58 Or. 14, 34 L. R. A. (N. S.) 951, 111 P. 49, 113 P. 57, and the later case of Burley Tobacco Growers', etc., v. Pennebaker, etc., 221 Ky. 718, 299 S. W. 734, it is held that the surety on an injunction bond is not liable for the theft or appropriation of the property by strangers to the litigation. This principle seems sound and reasonable, for under such circumstances the loss cannot be anticipated, or attributed to the wrongful act of the complainant, who procured the injunction, unless it could be shown that his negligence in the lack of care of the property contributed to the loss or theft. But that feature was not involved in either cause. The court in these cases merely holds that the theft or appropriation of the property by a stranger to the litigation was not the proximate result of the granting of the injunction. In the case of Wood v. Hollander, 84 Tex. 394, 19 S. W. 551, the recorded facts indicate that, subsequent to the issuing of an injunction, a receiver was appointed, and by order of the court the property involved in the litigation was intrusted to the receiver during which time the damage accrued. Upon dissolution of the injunction, damages were sought to be recovered against the surety. It was held that the injunction bond was not liable, for the reason that the responsibility had been transferred to the receiver, and the loss was therefore not by reason of the injunction, although the receiver would be liable on his bond, as such, for his mismanagement."

The respondents, while alleging the incurring of necessary attorneys' fees to secure the dismissal of the action in which the temporary injunction was issued, and the dissolution of the injunction, introduced no evidence in support of this allegation. They may be able to do so upon a second trial of this action, if it be tried again.

For the reasons given, the judgment is reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

121 Cal.App. 512

TEMESCAL WATER CO. v. MARVIN et al.

Civ. 566.

District Court of Appeal, Fourth District, California.

March 10, 1932.

1. Evidence 🔑545.

Evidence sustained finding hydraulic engineer was incompetent to testify to value of property sought to be condemned for reservoir.

2. Evidence 🔑555.

Opinion of hydraulic engineer respecting market value of land sought to be condemned for water storage purposes *held* properly stricken under circumstances.

> The opinion was properly stricken out because based on consideration of the land condemned as part of a completed project involving use of land sought in conjunction with other lands.

3. Eminent domain 🔑131.

Law contemplates that owner of land taken shall be compensated for full market value thereof.

4. Eminent domain 🔑131.

Major factor in ascertaining market value is what land is worth in market for purposes for which sought to be condemned, not what it is worth to condemnor.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Eminent domain action by the Temescal Water Company against Anna M. Marvin and others. From the judgment, named defendant and certain other defendants appeal.

Affirmed.

Anderson & Anderson and Victor T. Watkins, all of Los Angeles, for appellants.

Walter S. Clayson, of Corona (Hewitt, McCormick & Crump and Guy Richards Crump, all of Los Angeles, of counsel), for respondent.

JENNINGS, J.

This is an action in eminent domain by which plaintiff sought to condemn twelve parcels of land, the properties of various defendants. Plaintiff is a mutual water company engaged in the business of supplying water to the lands of its stockholders for irrigation purposes and to the inhabitants of the city of Corona for domestic use. At the time the action was instituted, plaintiff was engaged in the construction of a dam on property which it owned in a certain canyon. The land on which the dam was being constructed is known as the "Van Fossen Property," and the dam is generally referred to as the "Van Fossen dam." The various parcels of land sought to be condemned were sought by plaintiff to form part of a reservoir to be created by the impounding of water behind the Van Fossen dam. Of the various parcels of land thus sought to be condemned, the largest is a parcel which is designated as parcel No. 12 owned by defendants Bertha T. Kuert and Ira J. Kuert. This parcel comprises an entire section of land. Following the conclusion of the trial which was had before the court and a jury, impaneled for the purpose, the jury returned verdicts fixing the reasonable market value of the various parcels. The jury found the reasonable market value of parcel No. 12 to be $16,000. Thereupon the court made findings of fact which adopted the values fixed by the jury in its verdicts and rendered its decree permitting the plaintiff to acquire and take the land sought upon making payment to the defendants of the various amounts which had been found to be the reasonable market value of the respective parcels. The record shows that plaintiff duly paid into court the sums of money thus provided to be paid, whereupon the court rendered final judgment of condemnation, decreeing that plaintiff is the owner in fee of the land sought to be condemned. From the judgment determining the value of the various parcels of land and providing that plaintiff should acquire and take it upon payment of the amounts therein specified, certain defendants have appealed.

During the trial of the action, two hydraulic engineers, John A. Bell and H. Hawgood, were called as witnesses by appellants for the purpose of having these witnesses give their opinions as to the values of parcels of land sought to be condemned. The court sustained respondent's objections to the testimony of the witness Bell, and granted respondent's motion to strike from the record the testimony of the witness Hawgood as to the value placed by him on the respective parcels. Appellants complain of the court's rulings in the instances specified, and assign them as errors warranting a reversal of the judgment.

[1] The question presented by the court's ruling sustaining respondent's objections to the testimony proposed to be elicited from the witness Bell regarding the market value of the land relates to the qualification of the witness. The witness stated that he had examined the land sought to be condemned from two sources of information. These were, first, personal examination of the land for one day, which was four days prior to the commencement of the trial, and, second, study and examination of government topographical maps covering not only the area where the

reservoir site is located but the general area where the San Jacinto river originates and through which it flows. He described the two beneficial uses for which the land in section 35 was adapted from an engineering standpoint, and further stated that he had familiarized himself with the different uses to which land is generally adaptable, and that the land in section 35 could be put to other beneficial use, irrespective of its uses viewed solely from an engineering standpoint. The witness was then asked if he could give an opinion as to the reasonable market value of section 35, to which he gave the following answer: "Before I answer that, I would ask whether there is any such a market value for part of the river, and I reply No, so it would be a contradiction of terms if I said market value." Counsel for respondent was then permitted to interrogate the witness relative to his qualification to give an opinion as to the market value of the land in section 35. This inquiry developed the following facts: That the witness was not acquainted with real estate values, and would not attempt to testify as to such values; that in giving his opinion as to the value of the land he would base his answer in part upon the fact that the land was being considered for reservoir purposes. The court then asked the witness the following question: "You were asked by Mr. Anderson if you knew the market value of land similar to this, what it would sell for in the market. I understood you to say you did." Whereupon the witness replied: "I don't think I did say anything like that." The court then sustained respondent's objection that no proper foundation had been laid to warrant the witness giving his opinion as to the market value of section 35; the court remarking that he thought the witness had not been shown to be competent to testify as to the value of the land. Further effort was then made to qualify the witness to give his opinion as to the market value of the land in section 35. During this latter examination, the witness stated that he was able to give an opinion as to the market value of the land uninfluenced by the fact that respondent had commenced a project which involved the acquisition of a reservoir site, and that the land in section 35 would be included as a part of the reservoir site. Prior to being permitted to give his opinion, counsel for respondent was again allowed to cross-examine him touching his qualification to give an opinion as to market value of the land. During this cross-examination, the witness, in reply to the inquiry what he understood to be meant by the expression "market value," stated that he understood it to be the price that a seller could procure for property, provided he had a reasonable time to find a buyer who was willing to pay the price he wanted to pay for it. The latter part of the answer is obviously indefinite. The witness later dispelled the uncertainty by the statement: "I said willing to pay the price—he is willing to pay the price asked." The answer indicated that the witness did not comprehend the true meaning of market value, and that, despite repeated efforts to qualify him to testify as to the market value of the land, he did not show himself to be so qualified, and the court's discretion was not abused in refusing to permit him to give the sought-for opinion.

[2] A somewhat different problem is presented by the court's action in granting respondent's motion to strike from the record the testimony of the witness H. Hawgood as to the market value of land in section 35 and in other parcels sought to be condemned. This latter witness, after testifying as to his long familiarity with the area involved with respect both to its topography and the geological formation of the region, stated his opinion as to the adaptability of section 35 for a reservoir site. He was then permitted without objection to give his opinion as to the market value of the land in section 35, and stated that in his opinion the market value of section 35 was $178,200. He also gave his opinion of the market value of land in other parcels sought to be acquired by respondent. However, on cross-examination this witness stated that, in giving his opinion as to the market value of the land in section 35, he had taken into consideration the value of section 35 in connection with the Van Fossen dam, and that the land in section 35 was part of a reservoir which would be formed by the erection of the Van Fossen dam, and that, if section 35 were not used in connection with the Van Fossen dam, his estimate of the market value of section 35 would be less. He further stated that, when he placed a valuation of $178,200 on section 35, he had in mind that the land had such value as a completed project in connection with the Van Fossen dam, and that it would be used by respondent in connection with the Van Fossen dam. Respondent thereupon moved to strike his testimony as to market value of the land, which motion was granted. Further examination of the witness was then had to develop the capacity of the witness to give an opinion as to market value. During this examination, the witness stated that he could give such an opinion completely eliminating from consideration by him any value that the land might have as a completed project. He then again stated that in his opinion the land in section 35 had a market value of $178,200. Upon further cross-examination, the witness testified that in thus giving his opinion of the market value of the land in section 35 he had taken into consideration the construction of the Van Fossen dam, that the dam would cost approximately $200,000, and that it would be necessary to overflow lands to the north of section 35 in order to develop a maximum storage capacity of 5,100 acre feet, and that he considered these three features as inter-

related parts of one project. Respondent thereupon again moved to strike from the record the testimony of this witness as to market value on the ground that the witness in giving his opinion as to market value had considered the land in section 35 as part of an interallied project, contemplating the erection of a dam on the Van Fossen property and the creation of a storage reservoir on lands above the dam site. The motion to strike the testimony was granted.

In giving consideration to the contention of appellants that the court committed reversible error in thus striking from the record the testimony of the witness Hawgood as to the market value of the land, we bear in mind that the qualification of the witness to give an opinion respecting the value of the land is not involved. No objection for insufficient showing of qualification was interposed. The ground of the motion to strike was that the witness, in giving an estimate of market value of the land, had taken into consideration elements that were improper to be considered in arriving at the conclusion presented that the market value of the land was $178,200. From the summary of his testimony hereinabove presented, it conclusively appears that this witness, in giving his opinion as to market value, took into consideration the following factors: First, the construction of the Van Fossen dam; second, that the dam would cost approximately $200,000; and, third, that, in completing the project for the storage of water, land lying to the north of section 35 owned by persons other than the owners of section 35 would necessarily be overflowed, and finally that he considered these three features as interrelated parts of the project contemplated. The witness thus took into consideration that the land in section 35 would be used in connection with respondent's land and with other land separate from that in section 35, and that section 35 was part of a project for the storage of water by respondent. This brings the problem within the rule announced in San Diego Land, etc., Co. v. Neale, 88 Cal. 50, 65, 25 P. 977, 981, 11 L. R. A. 604, in the following language:

"The question was not what the property was worth to the person intending to acquire it and the dam-site and the remainder of the reservoir by purchase or condemnation for the purpose of supplying water over the territory tributary to the system, but what was the market value of the property itself; in other words, what the defendants could have obtained for their land if it had been offered for sale in the market, a reasonable time being given within which to make the sale. The plaintiff must compete in the market with bona fide purchasers generally, but its necessities cannot be taken advantage of. So far as the value of the land in controversy may have been increased to purchasers generally by the construction and use of the plaintiff's dam and reservoir, or as a part of the entire reservoir-site, such fact should be considered; but the value of the land when used in connection with the plaintiff's land cannot be taken as a criterion, for this would be taking the value to the plaintiff as the measure of compensation. The jury had a right to consider the fact, in determining the market value, that the land in controversy was in proximity to a dam-site, and to consider its adaptability for reservoir purposes, and to determine whether or not its market value had been enhanced by improvements put upon adjoining property; but for the reasons stated its adaptability for reservoir purposes should not have been considered 'in connection with such dam-site and other adjacent lands.'"

Again it is said in Sacramento, etc., R. R. Co. v. Heilbron, 156 Cal. 408, 412, 104 P. 979, 981: "* * * the test is not the value for a special purpose, but the fair market value of the land in view of all the purposes to which it is naturally adapted; that, therefore, while evidence that it is 'valuable' for this or that or another purpose may always be given and should be freely received, the value in terms of money, the price, which one or another witness may think the land would bring for this or that or the other specific purpose is not admissible as an element in determining that market value, for such evidence opens wide the door to unlimited vagaries and speculations concerning problematical prices which might under possible contingencies be paid for the land, and distracts the mind of the jury from the single question—that of market value—the highest sum which the property is worth to persons generally, purchasing in the open market in consideration of the land's adaptability for any proven use."

[3, 4] The above quotations clearly indicate that in eminent domain proceedings the law contemplates that the owner of land shall be compensated for the full market value of the property taken, and that the major factor to be determined in ascertaining market value where land is sought for reservoir purposes is what it is worth in the market for such purposes, not what it is worth to the condemnor. Obviously, if the worth to the condemnor is to be the measure of market value, advantage may always be taken of the necessities of the condemnor, and a value essentially different from that which obtains in a competitive market will be reached. The case of City of Stockton v. Ellingwood, 96 Cal. App. 708, 275 P. 228, 232, is relied upon by appellants as authority strongly supporting their contention that the trial court committed reversible error in striking from the record the opinion of the witness Hawgood as to the market value of the land sought to be condemned. In embarking upon an analysis of the decision in the Elling-

wood Case, it must be conceded that the problem therein presented was strikingly similar to that which is presented by the appeal herein. In the Ellingwood Case it appeared that the city of Stockton proposed to erect a restraining dam on the Calaveras river which should serve the double purpose of controlling the flood waters of the stream during the rainy season, thus avoiding the danger of periodical flooding, and the storing of large quantities of water for domestic, irrigation, and power purposes. The defendants were owners of several tracts of land which would in part be submerged in the event of the construction of the proposed dam. The action involved the ascertainment of the value of the land proposed to be submerged. The cause was tried before the court sitting without a jury. It was contended by the city of Stockton on appeal that the findings of the court as to the compensation to be awarded to the various defendants for land taken were not supported by evidence which was legally admissible. It appeared that the testimony introduced on the part of the respondent landowners was practically all directed to the availability and adaptability of the lands for reservoir purposes, and that the special value for such purposes gave to the land sought to be condemned a market value largely in excess of that which it would have for other purposes. This testimony was sought to be stricken from the record, and appellant assigned as reversible error the court's action in denying its motion to strike. In affirming the judgment, the District Court of Appeals for the Third District points out that the testimony elicited on cross-examination as to all the physical capacities and adaptabilities of the land sought to be condemned did not furnish a basis for striking out the opinions of the witnesses, given on direct examination, as to general market values. It was conceded that portions of the testimony of various witnesses brought out upon cross-examination might properly have been eliminated as being speculative in character upon proper motion, but that advantage could not be taken of such defects under the claim that the trial court committed error in refusing to strike from the record the opinions of respondents' witnesses as to the market value of the various parcels of land. It was said that, in determining values in actions of eminent domain, where, for certain purposes, the lands are extremely valuable, and for other and different purposes, of little or no value, courts are confronted with many difficulties, the chief of which is sometimes the apparent fact that there is no market value, in the strict sense of the word, but that this does not entitle a plaintiff to take the lands sought to be condemned without paying just compensation. Taking into consideration, first, that the action was tried by the court without the assistance of a jury, and, second, that the court found that the lands sought to be condemned had a market value substantially less than that fixed by any of the expert witnesses, it was held that the court had not committed reversible error in refusing to strike testimony respecting the availability of the lands for reservoir purposes, even though the expert witnesses in giving such testimony had in mind a completed project. It is this latter factor which obviously gives the greatest encouragement to appellants in their contention that the trial court erred in striking from the record the testimony of the witness Hawgood as to the market value of the lands herein sought to be condemned since it is at this precise point that the decision in the Ellingwood Case most closely touches the problem presented in this appeal. From the reported testimony of the witness Hawgood it is apparent that, when he fixed the market value of section 35 at the figure $178,200, he had in mind, not only the availability of the land for reservoir purposes and that the land was peculiarly adapted to the specific purpose for which it was sought, but that he also had in mind a completed project of which the land in section 35 was a necessary part. If, under such circumstances, bearing in mind that the court was trying the action with a jury, it shall be held that the court committed reversible error in eliminating such evidence from the record, then indeed a vital blow has been struck at the long-established doctrine that, in fixing the market value of lands sought to be taken by proceedings in eminent domain, advantage may not be taken of the necessities of the condemnor. As was said in Spring Valley Water-Works v. Drinkhouse, 92 Cal. 528, 533, 28 P. 681, 682:

"The question is thus presented whether, assuming that the land sought to be taken was specially valuable for the purpose named, it was relevant and competent to show such value. There is undoubtedly some conflict in the authorities as to the admissibility of questions put in this form; but we think the point was decided in favor of the admissibility of such evidence in the case of San Diego Land, etc., Co. v. Neale, 78 Cal. 63, 20 P. 372 [3 L. R. A. 83], and in the same case on a second appeal to this court, 88 Cal. 50, 25 P. 977 [11 L. R. A. 604]. Nor would this rule, as supposed by respondent, justify the admission of speculative opinions based upon the necessities of the plaintiff, or what the plaintiff could afford to give for the land rather than to do without it. If it should appear, during the course of the examination, that a witness had given an opinion as to value formed upon any such considerations, it would be the duty of the court to strike such opinion evidence out, as resting upon an illegal and improper basis. The rule is, that the owner is entitled to the market value of his land, to be determined in view of all the facts which would naturally affect its value in the minds of purchasers generally, which necessarily makes it proper to consider for what purpose it is most valuable."

In Santa Ana v. Harlin, 99 Cal. 538, 34 P. 224, 226, the court said: "The present market value of the land is the measure of damages, and not its value in use to the owner or to the parties seeking to condemn it."

In City of Stockton v. Ellingwood, supra, it is said: "The different elements considered by the witnesses in giving their opinions as to market value may be inquired into upon cross-examination, and if, upon such cross-examination, it appears to the court that the witnesses' testimony is based upon improper considerations, or upon what is usually termed as speculative only, it should be stricken from the record or withdrawn from the consideration of the court or the jury."

Since, therefore, the opinion of the witness Hawgood as to the market value of the land sought to be condemned was based upon a consideration of the land as part of a completed project, involving, as it did, the use of the land sought in conjunction with land of the respondent and with other land separate from the lands of appellants and respondent, a consideration which we believe was improper, the action of the trial court in striking such an opinion from the record was proper.

The judgment is therefore affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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121 Cal.App. 509

NOJIRI v. AZUMA et al.

Civ. 4529.

District Court of Appeal, Third District, California.

March 10, 1932.

Sales ⚷52(5).

Evidence sustained finding that defendant purchased lettuce and agreed to pay stipulated price for packing making him liable therefor.

Facts disclosed defendant purchased lettuce, and engaged plaintiff by telephone conversation to pack the lettuce purchased at a stipulated price per crate, and later wrote a letter to plaintiff in effect setting forth the same agreement to pay stipulated price for packing lettuce.

Appeal from Superior Court, Sacramento County; J. R. Hughes, Judge.

Action by N. Nojiri, doing business under the firm name and style of Nojiri Fruit Company, against E. Azuma and others, copartners, doing business under the firm name and style of T. Watsuru. From a judgment for plaintiff, defendant E. Azuma appeals.

Affirmed.

Robert H. Schwab, of Sacramento, for appellant.

Johnson & Lemmon, of Sacramento, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff began this action to obtain judgment against the defendants in the sum of $900, for and on account of expenses incurred in packing lettuce in the county of Sacramento, for and on behalf of the defendants, and shipped to the defendants at their place of business in the city of Chicago; and also for the further sum of $1,155 upon an assigned claim of one K. Tomita, for the value of the lettuce raised by the said Tomita, and sold to the defendants, and packed and shipped by the plaintiff. The plaintiff had judgment for the costs and expenses of packing the lettuce referred to, and also upon the assigned claim of Tomita for the value of the lettuce owned and produced by him, sold to the defendants, and packed and shipped by the plaintiff.

The court found, in accordance with the allegations of the complaint, that the plaintiff packed the lettuce produced upon the premises of Tonita, and agreed to pay for such packing the sum of 75 cents per crate, and also found in favor of the plaintiff upon the assigned claim of Tomita, for the value of the lettuce raised by him, and sold to the defendants.

The action was dismissed as to the fictitious defendants. The lettuce in question was all shipped to the Sogo Bussan Company in Chicago. The judgment went against the defendants E. Azuma and I. Watsuru. From this judgment the defendant E. Azuma has appealed.

The only question presented upon this appeal is whether the findings of the court as to the responsibility of E. Azuma is supported by the testimony. While there is some conflict in the testimony, a résumé thereof, as hereinafter set forth, we think sufficiently supports the findings of the trial court. It appears therefrom that the defendant Azuma telephoned to the plaintiff, and the substance of the conversation over the telephone was that Azuma engaged the plaintiff to pack the lettuce purchased from Tomita, and would pay the plaintiff 75 cents per crate. This telephone conversation was had in the presence of the witness Murakami. There is also testimony in the record showing the purchase of the lettuce from Tomita by the defendant Azuma. There is no denial in the testimony of the fact that the lettuce raised by Tomita was packed by the plaintiff, and by him shipped to the defendants E. Azuma and T. Watsuru, or rather, to the Sogo Bussan Company, under which name the business was transacted. We quote the following testimony which we think is sufficient to support the findings of the trial court. We begin with that of the witness Murakami, relating to the conversation relative to the packing of the lettuce, to wit:

"Mr. Johnson: Q. What was the conversation, Mr. Nojiri? A. Well, Mr. T. Watsuru came over to the office, and he asked me if I can pack lettuce for him.

"Q. Yes. A. And I asked him who for, and he said for Mr. Azuma.

"Q. Yes.

"Q. Now, did you have any conversation with Mr. Azuma or Mr. T. Watsuru? A. Yes.

"Q. When? A. Well, early part of November, Mr. Azuma called up from our packing house, West Sacramento, and asked me: 'Are you going back to pack lettuce?' and I says: 'Yes', and—

"Q. (Interposing.) And was there anything said about the price? A. Yes; seventy-five cents a crate."

Also, plaintiff's testimony on cross-examination:

"Q. And now, can you remember the words that were said at that time? A. Yes, sir—I couldn't remember exactly the words he said; no.

"Q. Couldn't remember the exact words? A. No; he said he wanted me to pack the lettuce, and I says I would.

"Q. He wanted you to pack lettuce? A. Yes.

"Q. And you said you would? A. Yes."

Murakami testified in part as follows:

"Q. Did Mr. Azuma telephone to Mr. Nojiri while he was there? A. Yes.

"Q. He called Mr. Nojiri on the telephone? A. Yes.

"Q. And you heard Mr. Nojiri—or Mr. Azuma talk with Mr. Nojiri on the telephone at that time? A. Yes, sir.

"Q. Now, what conversation did you have with Mr. Azuma and Mr. E. Watsuru? A. Well, Mr. E. Watsuru came over and introduced Mr. Azuma to me. Mr. Azuma was the head fellow down at Chicago, Sogo Bussan Company.

"Mr. Johnson: Yes. Just say what was said. He said that he was—go ahead. A. Yes. I was introduced—Mr. E. Watsuru introduced me to Mr. Azuma, and Mr. Azuma told me that Mr. E. Watsuru had a talk with Mr. Nojiri, and Mr. Nojiri agreed to have the lettuce that came from Mr. Tomita's ranch packed for Sogo Bussan Company, and that it was all agreed upon.

"Q. Now, was there any letters written there? A. Yes. After Mr. Azuma telephoned Mr. Nojiri, why, he sat in my office desk and wrote a letter to Mr. Nojiri.

"Q. And did you see him write that letter? A. Yes, sir.

"Q. Did you read the letter? A. Yes, sir.

Mr. Schwab: You what?

"Mr. Johnson: Did you read the letter?

"Mr. Schwab: Well, what was the answer?

"Q. Mr. Johnson. Yes. A. Yes.

"Q. Do you know what was done with the letter? A. I take it up to Mr. Nojiri.

"Q. The next day? A. The next morning.

"Q. Yes. And you read it at that time, though, did you? A. I read it, after,—it was before noon.

"Q. I see. Now, do you remember what the letter said? A. It said that Mr. Azuma—Sogo Bussan Company, will pay seventy-five cents per crate for all the lettuce that Mr. Tomita sell to Sogo Bussan.

"The Court. Will you read that, Mr. Pipher? (The answer is read by the reporter.)

"The Court: Seventy-five cents a crate for what—packing it, or what? A. I think we were supposed to just pack it for their office.

"The Court. Q. The letter was dealing with the cost of packing it? A. Yes."

Ito, Tomita's foreman, testified as follows:

"Q. What was that conversation, what was said, and by whom?

"Mr. Schwab: When was that?

"Mr. Johnson. Early part of November. Just give the conversation. A. Well, W. Watsuru said that 'this man has a store in Chicago, and he is my boss, and he asked me to him.'

"Q. And what else was said, if anything? A. Then Mr. Azuma asked me to seek good lettuce.

"Mr. Schwab: How is that? A. Asked me to seek good lettuce.

"Q. Mr. Azuma? A. Yes, and I said I want to get as good a price as I can get.

"Mr. Johnson: Q. What else was said then? A. Then Mr. E. Watsuru said that they would pay at Sacramento price, and, if the lettuce should sell at better price in the east, I was to get best of the two prices.

"Q. Anything else said? A. Then Mr. W. Watsuru said that they would put up bond, if necessary, for payment."

These statements were made when Ito, Watsuru, Murakami, Azuma, and a Mr.

Toyota were present, and whether Watsuru was the agent of Azuma or one of the principals in making the purchase is of no consequence, because in either event Azuma was liable under the contract. Again, we have the statement of the witness K. Toyota who was present at the time the lettuce was purchased, and he gave the following testimony:

"Q. Just what was said there? A. Mr. Watsuru said, 'Mr. Azuma is my boss, having store in the east.'

"Q. To Mr. Watsuru. And was that all that was said? A. Then Mr. Azuma said, 'If you give us good lettuce, I'll pay a good price.' "

No other question being presented for our consideration, it follows that the judgment of the trial court must be, and the same is hereby, affirmed.

We concur: PRESTON, P. J.; R. L. THOMPSON, J.

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121 Cal.App. 476

BOSWELL v. MERRILL et al.

Civ. 7129.

District Court of Appeal, Second District, Division 1, California.

March 9, 1932.

1. Landlord and tenant ⚷194(1).

Where lessor unqualifiedly takes possession delivered to him by tenant, he thereby releases tenant.

2. Appeal and error ⚷1011(1).

Trial court's finding on conflicting evidence that lessor unqualifiedly took possession of property delivered to her by tenant was not open to review in appellate court.

3. Appeal and error ⚷1071(5).

Finding respecting lessor's good faith in re-renting premises *held* immaterial, where court found lessor unqualifiedly took possession of property delivered by tenant, thus releasing tenant.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by Mary Alla Boswell against B. M. Merrill and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

Walters & Mauk, of Los Angeles, for appellant.

Hewitt, McCormick & Crump, of Los Angeles, for respondents.

TAPPAAN, Justice pro tem.

The defendants had judgment in the court below and plaintiff appeals therefrom. Plaintiff, the owner of a so-called service station, leased the same, together with equipment, to defendants Merrill and Jessup for a term of years. The lessees at the time of the execution of the lease deposited with the lessor a sum equal to the rent for the last three and one-half months of the lease. Among other provisions of the lease was one that provided as follows: "It is expressly understood and agreed by and between the parties hereto that upon the actual taking or use of any property for the widening of Tenth Street, and at any time thereafter and during the progress of said improvement, or any other public improvement, that shall, in the opinion of the Lessees, materially interfere with peaceful or profitable occupation of the demised premises or any portion thereof, the Lessees may, at their option, wholly terminate this lease by giving notice to the Lessor of their intention so to do."

Defendant Newlin by a written instrument guaranteed the performance on the part of the lessees of the covenants of the lease. This guaranty was limited to the original parties to the lease.

On the 19th day of August, 1927, and during the term of the said lease, the defendant-lessees caused to be served upon plaintiff, as lessor, a notice of their intention to terminate said lease under the provision of the lease as to public improvements heretofore referred to and quoted, and demanded the return of the sum deposited by them upon the execution of the lease. Plaintiff thereafter, on August 25, 1927, notified lessees that she refused to recognize their right to terminate the lease and demanded that they pay certain rent then due and unpaid, and "unless this demand is complied with immediately, I shall take such steps as may be necessary to enforce its terms."

On August 29, 1927, the date fixed for the termination of the lease in the notice served upon plaintiff by defendant lessees, defendant Jessup delivered to plaintiff the keys to the leased premises. Within the next day or two plaintiff put one McCulloch in charge of the station and on September 15th leased it to him for the balance of the lease originally made to defendants, and at a monthly rental of $200 less than they were bound to pay under the lease had with them. Plaintiff wrote some ten letters offering to lease the premises in question, inquired of a Mr. Young the prospects for leasing the premises, and then leased to McCulloch on the terms proposed by him.

⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Appellant in her specifications of error alleges error on the part of the trial court as to some six of its findings, but fails to point out any grounds of the alleged error, except in two instances. In these two cases the ground indicated is that the evidence is insufficient to support the questioned findings.

The theory of the defense, with which the trial court must have concurred in making its findings, is perhaps best stated in the language of Rehkopf v. Wirz, 31 Cal. App. 695, 696, 161 P. 285, 286, cited and relied on by respondents:

[1] "Where a tenant abandons the leased property and repudiates the lease, the landlord may accept possession of the property for the benefit of the tenant and relet the same, and thereupon may maintain an action for damages for the difference between what he was able in good faith to let the property for and the amount provided to be paid under the lease agreement. Bradbury v. Higginson, 162 Cal. 602, 123 P. 797. But a lessor who chooses to follow that course must in some manner give the lessee information that he is accepting such possession for the benefit of the tenant and not in his own right and for his own benefit. If the lessor takes possession of property delivered to him by his tenant and does so unqualifiedly, he thereby releases the tenant. Baker v. Eilers Music Co., 26 Cal. App. 371, 146 P. 1056; Welcome v. Hess, 90 Cal. 507, 25 Am. St. Rep. 145, 27 P. 369. An unqualified taking of possession by the lessor and reletting of the premises by him as owner to new tenants is inconsistent with the continuing force of the original lease. If done without the consent of the tenant to such interference, it is an eviction, and the tenant will be released. If done pursuant to the tenant's attempted abandonment, it is an acceptance of the surrender and likewise releases the tenant."

[2] The cause of action set up in plaintiff's complaint is that she, after due notice to defendants, relet the premises surrendered by defendants at the best price obtainable, and demands damages in a sum equal to the difference she would have received from defendants under the lease surrendered, and that which she will receive under the reletting. The only evidence in the record that plaintiff accepted possession of the premises for the benefit of the tenants, and not in her own right, is found in the testimony of plaintiff and her witnesses as to the conversation had at the time defendant Jessup delivered to her the keys of the leased station. Plaintiff and her witnesses testified that at that time such notice was in fact given defendant Jessup. This is flatly denied by the defendant Jessup, and he gives another version of the conversation which, considered in relation to all the surrounding circumstances, was entitled to as much credence as that of plaintiff and her witnesses. The trial court which heard the witnesses give their testimony believed the defendants' version as to this matter of fact.

"In such cases, as in others, the determination of that court in favor of either party upon conflicting or contradictory evidence is not open to review in this court. Sherman v. Sandell, 106 Cal. 373, 39 P. 797. If therefore the evidence offered by plaintiffs, taken by itself, was sufficiently 'clear, satisfactory and convincing' to satisfy the trial court that the deed was in fact a mortgage, the finding made cannot be overthrown merely because numerous witnesses, whose character is not impeached, gave positive testimony to the contrary effect. As was said in Wadleigh v. Phelps, 149 Cal. 627, 637, 87 P. 93, 98, the appellate court 'will not disturb the finding of the trial court to the effect that the deed is a mortgage, where there is substantial evidence warranting a clear and satisfactory conviction to that effect. All questions as to preponderance and conflict of evidence are for the trial court.'" Couts v. Winston, 153 Cal. 686, 689, 96 P. 357, 358.

[3] The only other finding attacked by appellant involves the question of the good faith of plaintiff in re-renting the premises. This finding was immaterial in view of the position assumed by the court in the finding just considered relating to the question of notice. The surrender was absolute and no right to re-rent for the benefit of the defendants existed. It is only in the event that the landlord informs the tenant that he will re-rent for his benefit that the question as to the amount of rent secured upon the re-rental becomes material. Here the court found that no such notice had been given.

From an examination of the record here presented, evidence is found therein sufficient to sustain all of the findings merely mentioned in appellant's assignments of error without designation as to the alleged grounds of error.

For the reasons herein stated the judgment appealed from is affirmed.

We concur: CONREY, P. J.; YORK, J.

ANDERSON v. MARYLAND CASUALTY CO. et al.

Civ. 4433.

District Court of Appeal, Third District, California.

March 10, 1932.

Rehearing Denied April 9, 1932. Hearing Denied by Supreme Court May 9, 1932.

1. Executors and administrators 🔑351.

Statute prohibiting recovery of property from heir unless necessary to pay debts or legacies did not prevent succeeding administrator from suing executor, heir, selling land, and appropriating proceeds (Code Civ. Proc. § 1452).

2. Executors and administrators 🔑351.

In action by succeeding administrator against executor selling land and appropriating proceeds, evidence showed such proceeds were necessary to pay debts and legacies (Code Civ. Proc. § 1452).

3. Executors and administrators 🔑351.

In action by succeeding administrator against executor selling land and appropriating proceeds, evidence sufficiently showed when executor appropriated proceeds.

4. Executors and administrators 🔑351.

Condition of bonds executed on sale of land by executor was not fulfilled when proper sale was made and moneys received by executor (Code Civ. Proc. §§ 1389, 1390, 1396).

5. Executors and administrators 🔑351.

Additional bond given by executor selling land is general undertaking and ties to entire administration of estate (Code Civ. Proc. §§ 1389, 1390, 1396).

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

Action by Leo J. Anderson, as administrator with the will annexed of the estate of John Quincy Wrenn, against the Maryland Casualty Company and another. From a judgment for plaintiff, defendant named appeals.

Affirmed.

John Ralph Wilson, of San Francisco, for appellant.

Abe Darlington and Henry S. Lyon, both of Placerville, and S. H. Jones, of Sacramento, for respondent.

Mr. Presiding Justice PRESTON.

The action is one brought by respondent Anderson, as administrator with the will annexed of the estate of John Quincy Wrenn, against Maryland Casualty Company and Joseph T. Wrenn to recover on three surety bonds, wherein the said casualty company was the surety and Joseph T. Wrenn was principal.

There are three separate undertakings, each given pursuant to the requirements of section 1389, Code Civ. Proc.

The facts are, in the main, undisputed. John Quincy Wrenn died testate. In his will, duly admitted to probate, he nominated Joseph T. Wrenn as executor to act without bonds and the latter, after regular proceedings had, was duly appointed executor and thereafter qualified as of February 18, 1921.

The said Joseph T. Wrenn was a son of deceased and named in his will as a legatee. After disposing of various sums of money and certain specific estate, the entire residue was devised to Joseph T. Wrenn and the widow and two other children, share and share alike. The total value of the estate was approximately $98,000 and the approximate portion thereof to be distributed in specific legacies was less than one-eighth, leaving seven-eighths to be distributed under the residuary.

During the course of probate, it became necessary to sell certain parcels of real estate. Three different sales were ordered, the sales conducted and the property sold in each instance, and likewise in each instance, an order was made confirming the sale and ordering execution of conveyances in conformity thereto.

On March 20, 1928, an order was made authorizing the executor to sell certain real estate and in said order an additional bond was required pursuant to section 1389, Code of Civil Procedure. Accordingly, on April 6, 1928, said bond was presented and approved, being the usual form of bond upon sale of real property and in the sum and amount of $5,500 with the said Joseph T. Wrenn as principal and Maryland Casualty Company as surety. Thereafter, under similar sales and orders, two other bonds were given and approved, as follows: May 8, 1928, in the sum of $500; June 14, 1928, in the sum of $12,000.

Each bond was under a separate order and on a different piece of real estate. Each sale was had pursuant to order and the statute governing, and thereafter a full report of proceedings was returned with prayer for confirmation. The return showed that the sales under the respective orders were for cash in the following amounts:

Under the first bond	$5,500
Under the second bond	500
Under the third bond	4,450
Making a total received of	$10,450

It seems conceded that while all of the money was accounted for as having been received, yet the same has been retained by the executor and never delivered to the plaintiff, who has succeeded to the administration.

The unchallenged finding of the court below is that Joseph T. Wrenn, executor, has diverted the money from the estate and wrongfully, unlawfully and fraudulently appropriated the same, and the whole thereof, to his own use.

In the trial court judgment went for plaintiff, and defendant Maryland Casualty Company appeals.

Three grounds of appeal are urged. Inasmuch as one ground is based upon another, the net result is that there are but two that require consideration. First, appellant sets forth the admitted fact that Joseph T. Wrenn was an heir and devisee of the decedent and then cites section 1452, Code of Civil Procedure, which section was in force and effect at all times embraced within the period of the administration. This section provides as follows: "The executor or administrator is entitled to the possession of all the real and personal estate of the decedent, and to receive the rents and profits of the real estate until the estate is settled or until delivered over by the order of the court to the heirs or devisees; and must keep in good tenantable repair all houses, buildings and fixtures thereon which are under his control. After the expiration of the time for the presentation of claims, he is not entitled to recover the possession of any property of the estate from any heir, who has succeeded to the property in his possession or from any devisee, or legatee, to whom the property has been devised or bequeathed, or from the assignee of any such heir, devisee, or legatee, unless he proves that the same is necessary for the payment of debts or legacies, or of expenses of administration already accrued, or for distribution to some other heir, devisee, or legatee entitled thereto. The heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of the real estate, or for the purpose of quieting title to the same, against any one except the executor or administrator; but this section shall not be so construed as requiring them so to do."

The specific language relied upon is to the effect that after the expiration of the time for presentation of claims, the administrator is not entitled to recover possession of any property of the estate from any heir, who has succeeded to the property in his possession, or from the devisee or legatee to whom the property has been devised or bequeathed or from the assignee of any such heir, devisee, or legatee, unless the administrator proves that the same is necessary for the payment of debts or legacies or of expenses of administration already accrued or for distribution to some other heir, devisee, or legatee entitled thereto.

It is conceded in the instant case the time for presentation of claims has expired.

[1, 2] Therefore, argues appellant, there being no showing of such necessity and the appellant being an assignee of the heir and devisee, the action will not lie. There is no merit in this contention.

The defaulting executor at no time claimed or held the funds as heir or as devisee. He had received the money in his capacity of executor and had returned accounts of sale and annual accounts showing the funds to be held by him in the course of administration.

Under our system of probate, since early times, the policy governing has been to favor heirs as administrators, as evidenced by section 1365, Code of Civil Procedure, and the language thereof to the end that relatives of a deceased are entitled to administer only when entitled to succeed to his estate or some portion thereof. If in every case or proceeding where an heir was administrator the provisions of section 1452 controlled, the result would be chaotic. It would result, as it would here, in a situation where an administrator could reduce his share to cash by sale of the salable property and then leave the remaining heirs at the mercy of forced sales of less desirable property to the detriment not only of the interests of the other heirs, but likewise to the ruin of the estate. The contention seems too frivolous for serious consideration. However, it happens that appellant's contention does not rest upon a solid factual basis.

In the record before us and specifically a part thereof upon the offer of appellant, we find certain proceedings denominated as proceedings to abate the present suit and to apply the remainder of the estate to the discharge of debts, prorating against the distributive share of the defaulting executor. Issue was joined in these proceedings, and after a hearing, wherein witnesses were sworn and examined and documentary evidence received, the court made its findings as follows:

That there were debts unpaid and that the legacies remained unpaid as did likewise the costs of administration; that there was no money or other personal property in the hands of the administrator with the will annexed; that the property remaining in the hands of the administrator consisted entirely of real estate for which there was no ready market and consisted principally of timber lands; that the value of the real property other than the timber lands is much less than the amount of debts, legacies, and expenses of administration remaining unpaid and if sold for full value, would not yield a sum sufficient to pay such obligations and that in order to pay said obligations it would be necessary to sell the timber lands; that the timber land is of a character such that it cannot be sold at a forced sale of any sum approximating its true value or without great loss or damage to the estate and those interested therein; and that there would be danger that such a sale would leave the estate in an insolvent condition.

The order thus made was in reality a judgment in the proceeding and sufficient to determine the facts necessarily before the court. Being again in evidence here, the court below, mindful of its own records, accepted as true these findings and again found substantially the same facts. Therefore, we find a complete answer to appellant's first contention, regardless of which construction we place upon section 1452, Code of Civil Procedure.

[3] Next appellant contends that the judgment must be reversed because there is absolutely no evidence in the record to show when Joseph T. Wrenn, executor, appropriated to himself the money which the court below found to be due from him to the estate.

The record does sufficiently show that the executor sold the real estate described in the orders of sale and that he received therefor sums totaling the amount of the judgment and that he has failed to turn it over to the administrator. Obviously, the moneys received from the sale could not have been misappropriated before the sale.

[4] Appellant strenuously contends that the condition of the bonds was fulfilled when a proper and legal sale was made and the moneys therefrom received by the executor. The section requiring these bonds in sale of real estate negatives this contention. Section 1389, Code of Civil Procedure, provides that an additional bond must be required before a sale of real estate is confirmed and further provides that no additional bond is required if the bond already given is equal to twice the value of the personal property, including the annual rents, profits, and issues of real estate and twice the amount to be received from the sale.

Section 1396 provides that the court may require a bond on sale of real estate in estates where the will admitted to probate provides that no bond shall be required. Section 1390 provides the condition of the bond and the condition is the same whether the bond be given as the original bond upon qualifying or an additional bond upon sale of real estate. In either case and in both the condition of the bond is that the administrator shall faithfully execute the duties of the trust.

The ordinary procedure in probate is to require a bond from the administrator in an amount equal to twice the value of the personal property, including the income from any real estate owned. It often happens that the estate has but little personal property and a large amount of real estate from which no revenue is produced. In such cases the bond is nominal at the outset. But as money is received from a sale of real estate the portability of the estate increases and the old bond and new bond required under the section in amounts are required to total only a sum equal to twice the value of the personal property, including the money about to be received.

By way of illustration, if an administrator had already given a bond in the sum of $15,000 and the total of personal property and income were less than $2,000, he would not on a sale of $5,000 be required to give another bond, and the amount required as additional bond is exactly what the words import, namely, additional bond and not a separate bond.

[5] The fact that before the sale the executor here was acting without bond does not alter the principle. An additional bond given on a sale of real estate is a general undertaking and ties to the entire administration of the estate. Elizalde v. Murphy, 163 Cal. 681, 126 P. 978.

The judgment is affirmed.

We concur: PLUMMER, J.; THOMPSON, J.

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121 Cal.App. 617

AZZARO v. O'CONNELL.

Civ. 8110.

District Court of Appeal, First District, Division 2, California.
March 15, 1932.

Rehearing Denied April 14, 1932. Hearing Denied by Supreme Court May 12, 1932.

1. **Automobiles** ⚷244(4).

In action for death of boy struck by speeding automobile, evidence showed automobilist was guilty of gross negligence.

2. **Pleading** ⚷258(4).

Permitting defendant to file amendment to answer covering plea of contributory negligence at close of trial *held* error, where amendment was not asked for or granted to conform to proof.

3. **Negligence** ⚷141(11).

Instruction that it was father's duty to keep child from placing himself unnecessarily in position of danger in which it might be anticipated injury could occur *held* error.

4. **Negligence** ⚷93(3).

Degree of care put on parent toward child is that of ordinary prudent person acting under similar circumstances.

⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

5. Automobiles ⚷246(30, 60).

Instruction that it was duty of person on street to look about and see approaching vehicles, and that he will be conclusively presumed to have seen what he could have seen in proper performance of such duty, *held* error.

6. Automobiles ⚷206.

Person standing at curb of street 100 feet wide may rely upon expectation that automobiles will obey traffic rules.

7. Negligence ⚷122(1).

Presumption exists that person takes ordinary care of own concerns.

8. Automobiles ⚷244(55).

In action for death of boy struck by speeding automobile which traveled 60 feet along sidewalk before striking boy standing at curb, evidence showed boy was not contributorily negligent.

9. Trial ⚷252(2).

Instructions should be based on evidence adduced or on reasonable inference from evidence disclosed by record.

10. Automobiles ⚷246(39).

Instruction on issue of imminent peril *held* error, where evidence showed automobilist took no precautions to avoid collision.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Anselmo Azzaro against Roy O'Connell. From a judgment for defendant, plaintiff appeals.

Reversed.

Chauncey Tramutolo, of San Francisco, for appellant.

Ernest I. Spiegl, of San Francisco, for respondent.

NOURSE, P. J.

Plaintiff sued for damages for the death of his minor son, a child nine years of age. The jury returned a verdict for defendant, and plaintiff appeals on typewritten transcripts.

The child was standing at the curb in front of plaintiff's automobile which was parked at the easterly curb of Bayshore boulevard, about 160 feet south of Thornton avenue. Defendant was operating a Chevrolet sedan southerly along the boulevard, and, when he reached a point about 160 feet north of the parked car, his machine veered to the east and to the left until it struck the sidewalk on the easterly side of the boulevard, and then traveled, with two wheels on the sidewalk, a distance of 60 feet, striking the child at the curb, and then crashing into the parked car. Plaintiff based his charge of negligence on the excessive speed of defendant which was shown by eyewitnesses and by the fact that the force of the blow upon plaintiff's car drove it backward about 40 feet from the point of collision. Negligence is also laid to defendant because of his failure to use his brake or to take any other measure to avoid the collision. On the part of the defendant, the only explanation of the accident is that his car "shimmied" while he was traveling near the center of the boulevard, suddenly veered to the left, and that he "must have reached for the brake and stepped on the accelerator instead."

The admitted facts are that the collision occurred at about 9:30 a. m. of January 1, 1930; that it was a clear day, with no rain or fog; that the boulevard, which is 100 feet wide, was dry and singularly free from traffic within the block where the collision occurred; that the district was "residential", and that defendant was traveling in excess of the statutory speed limit. From defendant's testimony, it appears that his car had frequently given him the same trouble; that, when the wheels "shimmied," he jerked the steering wheel violently in an endeavor to straighten the wheels; that his car continued to the left at an increased speed, as he must have stepped on the accelerator instead of the brake; that, after the left wheels mounted the sidewalk, he continued in that position for a distance of 60 feet along the curb without the use of a brake at any stage.

[1] The right front wheel, fender, and headlight of defendant's car were smashed; the right front fender, bumper, and headlight of plaintiff's car were smashed. The plaintiff's car was parked adjoining the curb. Plaintiff had raised the hood on his car on the side next to the curb, and had his head thus covered while defendant approached. When the collision occurred, the defendant's car was still traveling partly on the sidewalk, and the child was struck while standing very close to the curb and in front of his father's car. The position of the two cars immediately after the collision gave unmistakable evidence of defendant's admitted negligence in the operation of his car, both as to the excessive speed and as to the failure to use his brake. On this issue of negligence the uncontradicted evidence is so clear and convincing that it is impossible to account for the verdict upon any theory other than that the jury was confused by the instructions which are here complained of.

[2] The issue of contributory negligence was not raised until the close of the trial, when defendant asked and obtained leave to file an amendment to his answer covering that plea. The amendment should not have

been allowed because it was not asked for or granted to conform to proof—there being no proof to which it might conform, and, further, having been presented after the evidence was closed and no proof having been tendered to support it, the request served no purpose except to confuse the jury in a case which, without this element, was as plain and simple a case of gross negligence on the part of defendant as could be presented to any jury.

The error was emphasized by instructions given at the request of respondent covering the issue of contributory negligence. This subject was referred to repeatedly in the instructions given upon respondent's request. Thus the jury was instructed, that "it was the duty of the plaintiff * * * to keep the child from placing himself unnecessarily in a position of danger in which it might be anticipated that the injury could occur." And again that "it was the duty of a person upon the public highway to look about and see approaching vehicles in his line of vision and, in case of an accident, he will be conclusively presumed to have seen what, in the exercise of ordinary care, he could and should have seen in the proper performance of such duty."

[3, 4] The instruction is an incorrect statement of the duty of a parent toward his child. We know of no law that requires a parent to keep his child off the public streets or away from any other "position of danger" when such child is nine years of age and in possession of all his faculties. We know of no law which requires a parent to keep such a child away from any position of danger "in which it might be anticipated that injury could occur." To so hold would be to require the parent to exercise extreme care to the extent that he must first be assured that danger could not possibly be anticipated. In this respect the degree of care put on the parent is that of an ordinary prudent person acting under similar circumstances, and his duty, like that of an adult crossing a street, is to be fixed only upon a consideration of all the circumstances of place, time, and physical conditions at the time of the accident. In this respect we said in Kinnear v. Martinelli, 84 Cal. App. 721, 727, 258 P. 686, 689: "In determining whether a pedestrian used such due care as is commensurate with apparent present dangers, the jury should consider the location involved, the existing state of the traffic, the opportunity for obtaining a clear view of the street from every direction whence approaching vehicles might endanger an attempt to cross the street, the presence of obstructions to the view such as buildings, passing cars, driving storms, clouds of dust, or darkness, and, from these and all other facts and circumstances present, determine whether the particular pedestrian used that degree of care which would be required of an ordinarily prudent person under like circumstances."

[5-8] But the last portion of the quoted instruction is equally objectionable. As applied to the facts of this case, the instruction placed a burden upon the appellant and his child far beyond that required by accepted rules of care. It told the jury that it was the duty of a person standing at the easterly curb of a public street 100 feet wide to be constantly on the alert for vehicles approaching from the north, whereas the accepted rule is that a person in such position may "rely upon the expectation that automobiles will conform to the customary rules of traffic and travel only upon the proper side of a street." Rignell v. Font, 90 Cal. App. 730, 734, 266 P. 588, 590, citing Harris v. Johnson, 174 Cal. 55, 161 P. 1155, L. R. A. 1917C, 477, Ann. Cas. 1918E, 560, Averdieck v. Barris, 63 Cal. App. 495, 218 P. 786, and Gornstein v. Priver, 64 Cal. App. 249, 221 P. 396. But the jury was also told that such a person "will be conclusively presumed to have seen what * * * he could have seen in the proper performance of such duty"; i. e., the duty to look in all directions as above defined. We know of no such conclusive presumption. To the contrary, there is a well-settled presumption that a person takes ordinary care of his own concerns, and, applying that presumption to the case at hand, we have the conclusion of due care which dispels every inference of contributory negligence, as there is not a word of testimony which might tend to dispute that presumption in any degree.

[9] We conclude that the giving of this instruction was error, because it was an incorrect statement of the legal duty of the appellant and of the deceased, and because the issue of contributory negligence was not supported by any competent evidence, and should not have been left to the jury. In this respect the case does not differ from Kinnear v. Martinelli, 84 Cal. App. 721, 726, 258 P. 686, 688, where it is said: "Instructions should be based upon evidence actually adduced or upon reasonable inference from the evidence disclosed by the record. 24 Cal. Jur. 830, § 95; Risdon v. Yates, 145 Cal. 210, 78 P. 641; Hirshberg v. Strauss, 64 Cal. 272, 28 P. 235. * * * We are of the opinion that the giving of this instruction under the facts of this particular case where there is a total absence of any evidence to show the conduct of the deceased during the period covered by the instruction is fatal error. The burden was on the defendant to show that the deceased failed to look easterly along Mission street 'before he crossed to the east of the center line;' defendant failed to meet this requirement; there was no evidence in the record of the conduct of the deceased at that particular time; the presumption of law refutes this charge of negligence. The instruction is therefore not applicable to the facts and is erroneous."

[10] The instruction on the issue of imminent peril should not have been given. The evidence, without conflict, discloses that respondent found himself in the position of danger wholly through his own fault—he knew his car was likely to "shimmy," but continued on his course at an unlawful rate of speed with his foot on the accelerator, and, though he traveled along the sidewalk for a distance of 60 feet before striking the child, he did not sound his horn or give any signal of danger and did not apply the brake. To instruct the jury under these circumstances that the respondent might be excused if he failed "to take every precaution or to adopt every means of safety" is to inject a false issue in the case where the evidence demonstrates that he took no precautions whatever to avoid the collision—that, in fact, as the danger increased his negligence increased.

The judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.

215 Cal. 279

CLARK v. McCLURG.

L. A. 11184.

Supreme Court of California.
March 29, 1932.

Rehearing Denied April 28, 1932.

1. Damages 🔑87(1), 91(1).

Exemplary damages are not recoverable as matter of right, and may be awarded only under evidence of fraud, malice, or oppression (Civ. Code, § 3294).

2. Damages 🔑87(2).

Ordinarily, exemplary damages are not recoverable in absence of showing of actual damages (Civ. Code, § 3294).

This is true, since exemplary damages are mere incidents to the cause of action and can never constitute basis thereof.

3. Appeal and error 🔑1070(1).

Where plaintiff established right to compensatory damages in action for libel and slander, fact that jury assessed entire damages as exemplary constitutes error of form only.

4. Appeal and error 🔑930(2).

Reviewing court assumes jury gave heed to instructions.

5. Libel and slander 🔑33.

Law presumes general damages follow from utterance or publication of matter slanderous or libelous per se.

For this reason, where publication is slanderous or libelous per se and is false and unprivileged, a cause of action for actual or compensatory damages is conclusively established.

6. Libel and slander 🔑125.

Where plaintiff established right to compensatory damages for libel and slander, verdict assessing entire damages as exemplary *held* liberally construed as general verdict covering all damages, both actual and punitive.

The jury inadvertently or by some mischance assessed the entire damages as exemplary instead of segregating them, but reviewing court construed the verdict liberally rather than strictly as an erroneous verdict.

7. Appeal and error 🔑1170(10).

Judgment should not be reversed because of form of verdict (Const. art. 6, § 4½).

8. Libel and slander 🔑123(8).

In action for libel and slander, defendant was not entitled to nonsuit on ground of privilege in view of evidence showing malice.

Assuming that publication was privileged, evidence was sufficient to justify submission of question whether privilege was deemed to have been lost by reason of fact that libel was published maliciously and without reasonable or probable cause for believing it constituted true statement.

In Bank.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Margaret Clark against Lillian Sanford McClurg for damages for libel and slander. From an adverse judgment, defendant appeals.

Affirmed. Appeal from order denying motion for new trial dismissed.

Rehearing denied; SHENK and SEAWELL, JJ., dissenting.

For former opinion herewith adopted, see 4 P.(2d) 149, which superseded 295 P. 1038.

Wolfson & Swarthe, Louis L. Swarthe, Burnett Wolfson, and Earl I. Swetow, all of Los Angeles, for appellant.

Grant B. Cooper, H. D. Greenschlag, and Cooper & Collings, all of Los Angeles, for respondent.

PER CURIAM.

After further consideration of this case, we are satisfied that our former opinion written by Mr. Chief Justice Waste correctly states the law applicable to the issues involved herein, and we hereby adopt the same as the final opinion of this court. It is as follows:

In this action for damages, the first count of the complaint is based on an alleged slander asserted to have been uttered by the defendant of and concerning the plaintiff, while the second count sounds in libel. The jury brought in the following verdict: "We, the jury in the above entitled action, find for the plaintiff and assess her damages in the sum of ——— ($———) Dollars as actual damages and the sum of Five Thousand ($5,000.00) Dollars as punitive damages, making a total of Five Thousand ($5,000.00) Dollars, this 20th day of September, 1928." From the judgment entered the defendant prosecuted this appeal, urging, among other things, that the verdict is contrary to law and void. This point was presented to the court below by means of various motions, each of which was denied.

[1, 2] Citing section 3294 of the Civil Code and decisions of the courts of this and other jurisdictions, the appellant contends that a finding of exemplary or punitive damages must be predicated upon and bear a reasonable proportion to a finding of actual or compensatory damages, and that it necessarily follows that the judgment in the instant case, based as it is solely on a finding of exemplary damages, must be reversed. The respondent concedes the rule to be "that exemplary damages cannot be recovered in the absence of a showing that actual damages were suffered," but argues that there is a legal presumption

that actual damages follow a publication which is libelous per se. The utterances and printed statements constituting the basis of this action are, if false and unprivileged, slanderous and libelous per se.

Exemplary or punitive damages are not recoverable as matter of right. Their allowance rests entirely in the discretion of the jury, and they may be awarded only where there is some evidence of fraud, malice, express or implied, or oppression. Such damages are mere incidents to the cause of action and can never constitute the basis thereof. This being so, it is generally held that exemplary damages are not recoverable in the absence of a showing of actual damages. The authorities are substantially in accord on the foregoing propositions. 8 R. C. L. 590–594; 17 Cor. Jur. 968–974; 8 Cal. Jur. 861–866. Section 3294 of the Civil Code concisely states the law of California in this particular. It reads: "In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

[3-5] Actual damages being shown, it becomes essential to determine whether the money extent thereof must be found in order to sustain a finding of punitive damages. Upon this proposition the decisions are in hopeless conflict. 8 R. C. L. 593, § 137; 33 A. L. R. 384–417; 2 Sutherland on Damages, 1321–1327, § 406. The following cases are cited as illustrative of this lack of uniformity:

In Gilham v. Devereaux, 67 Mont. 75, 214 P. 606, 33 A. L. R. 381, it is held that: "The foundation for the recovery of punitive or exemplary damages rests upon the fact that substantial damages have been sustained by the plaintiff. Punitive damages are not given as a matter of right, nor can they be made the basis of recovery independent of a showing which would entitle the plaintiff to an award of actual damages. Actual damages must be *found* as a predicate for exemplary damages. This is the rule announced in many authorities. * * *" (Italics ours.)

The contrary rule finds expression in McConathy v. Deck, 34 Colo. 461, 83 P. 135, 4 L. R. A. (N. S.) 358, 7 Ann. Cas. 896, wherein it is declared: "If actual damage is shown, even though its amount is *not shown or found*, and the other elements entitling the plaintiff to exemplary damages are present, exemplary damages may be awarded. In other words, after actual damage is shown it is unnecessary to show its money extent to sustain a judgment for exemplary damages."

Research has failed to disclose any California case in which this point was directly involved. There are expressions in some of our decisions tending to support the rule represented by the Montana case above cited, while others contain declarations apparently favorable to the Colorado rule. To illustrate: It is stated in Lewis v. Hayes, 165 Cal. 527, 533, 132 P. 1022, 1024, Ann. Cas. 1914D, 148, that, "A plaintiff is entitled to such [punitive] damages *only after the jury*, in the exercise of its untrammeled discretion, *has made the award*." (Italics added.) See, also, Davis v. Hearst, 160 Cal. 143, 173, 116 P. 530, and Wright v. Baldwin, 47 Cal. App. 147, 149, 190 P. 377. On the other hand, the following cases contain expressions which appear to support the rule that an award of exemplary damages may stand if plaintiff merely establishes his right to compensatory damages: Chavez v. Times-Mirror Co., 72 Cal. App. 694, 696, 237 P. 1085; Pickwick Stages v. Board of Trustees, 54 Cal. App. 730, 731, 215 P. 558; Warfield v. Krueger, 96 Cal. App. 671, 274 P. 764, 765.

Upon the subject of damages, the court below properly instructed the jury in this case as follows: "You are instructed that it is not necessary to a recovery by the plaintiff that she should have proved specific damages if she has otherwise suffered actionable wrong at the hands of the defendant; nor is it necessary that plaintiff should have shown any actual intent or desire on the part of the defendant to injure plaintiff by the publication in question. In other words, where the false words complained of are slanderous and actionable per se, and there is no proof of express malice on defendant's part, the jury may render a verdict in favor of the plaintiff, even though she has not proved any special damage unless it be shown that the publication was privileged as elsewhere explained in these instructions, the jury may infer the existence of malice from proof of the publication of false and unprivileged actionable words. * * * You are instructed that in an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud or malice, express or implied, the plaintiff in addition to the actual damages may in the discretion of the jury recover damages for the sake of example and by way of punishing the defendant. The award of exemplary damages depends directly and solely upon the presence of malice in fact in the mind of the defendant. If it was present they may be given. If it was absent, they cannot be allowed. * * *"

We must assume that the jury gave heed to these instructions. From the fact that it awarded punitive damages to the plaintiff, the conclusion necessarily follows that it must have found that with "malice in fact" the appellant gave utterance to the slander and published the libel complained of. In other words, the jury by its verdict has impliedly found that the appellant maliciously uttered and published certain false and unprivileged statements of and concerning the respondent, which statements, as we have already indicated, were respectively slanderous and libelous per se. The law presumes that general damages follow from the utterance or publication of matter slanderous or libelous per se. Hence where, as here, the publication is slanderous or libelous per se, and is false and unprivileged, a cause of action for actual or compensatory damages is conclusively established. Lewis v. Hayes, 177 Cal. 587, 591, 171 P. 293; Dunn v. Hearst, 139 Cal. 239, 240, 73 P. 138; Childers v. Mercury P. & P. Co., 105 Cal. 284, 289, 38 P. 903, 45 Am. St. Rep. 40; 1 Sutherland on Damages, 4541, § 1216; 33 A. L. R. 414. Respondent must, therefore, be held to have established her right to compensatory damages, and the fact that the jury, inadvertently or by some mischance, assessed the entire damages as exemplary, instead of segregating them, constitutes an error of form rather than of substance. In Courtney v. Blackwell, 150 Mo. 245, 272, 51 S. W. 668, 676, the court declares: "The jury did find for the plaintiff, and in so doing found that the defendant had published the slander with which he was charged; and upon that finding the plaintiff was entitled to have actual damages assessed in her favor, the slander being of that character from which the law implies such damages. They also found, as is apparent on the face of the verdict, when read in connection with the instructions, that the slander had been wantonly and maliciously published; and it was also within their province to assess exemplary damages therefor in her favor. So that there was in fact a basis under the instructions for the assessment of both actual and exemplary damages. But, by some mischance, in the form of the verdict which was given to the jury no place was left therein for the separate assessment of the actual damages, and the whole was returned in a lump sum, according to the form, as exemplary damages. This was an error of form, and not of substance, and as, under the facts and circumstances of the case, the assessment was reasonable and just, we do not think the judgment ought to be reversed for this error." The cited case and the case at bar, in each of which the jury either inadvertently or by some mischance omitted to assess the compensatory damages, are clearly distinguishable from the cases of Hoagland v. Amusement Co., 170 Mo. 335, 70 S. W. 878, 94 Am. St. Rep. 740, and Gilham v. Devereaux, 67 Mont. 75, 214 P. 606, 33 A. L. R. 381, for in the latter cases the jury, by its verdict, expressly found and determined that the respective plaintiffs had not suffered any actual damages.

[6, 7] We are disposed to liberally construe the verdict in this case as a general verdict covering all of respondent's damages, both actual and punitive, rather than strictly as an erroneous verdict. The judgment should not be reversed because of the form of the verdict. Const. art. 6, § 4½.

This cause was taken over after decision by the District Court of Appeal, Second Appellate District, Division 1, in order that we might fully consider the foregoing point of law. We adopt as and for the remainder of the decision of this court the following portion of the opinion prepared by Mr. Justice Houser of the District Court of Appeal:

[8] "On the trial of the action, after plaintiff had rested her case in chief, defendant presented a motion to the trial court to the effect that an order of nonsuit be entered as against the plaintiff. The ground of the motion was that as to each count contained in the complaint the communication or publication respectively alleged to have been uttered or published by defendant was privileged within the provisions of section 47 of the Civil Code. The motion was denied, and appellant herein presents for consideration of this court the question of whether, in making such ruling, prejudicial error was committed by the trial court.

"As to the first count in the complaint, since the answer thereto contained no defense that the communication of which complaint was made was privileged, it is plain that no error occurred in the order to which attention has been directed. Besides which condition the circumstances shown by the evidence were such that no privilege could attach to the situation in question. Relating to the second count, and as to which the defense of privilege was presented in the answer, on examination of the record herein it is equally clear that the contention of appellant cannot prevail. Assuming that the alleged libel was of such a character that, within the terms of the statute, its publication was privileged, nevertheless, because of the facts and circumstances surrounding its publication, the evidence was sufficient to justify the submission to the jury of the question of whether the privilege accorded to defendant was deemed to have been lost by reason of the fact that the libel was published by defendant maliciously and without reasonable or probable cause for believing that such publication constituted a true statement of facts.

"Regarding the further contention by appellant that the verdict was for an excessive amount, and consequently must have been rendered under the influence of passion and prejudice, it need only be said that, considering the evidence relating to each of the two counts in the action, together with that part of the evidence which disclosed the social and financial standing of each of the parties to the litigation, it cannot be said that 'the amount awarded is so grossly excessive as to shock the moral sense, and raise a reasonable presumption that the jury was under the influence of passion or prejudice.' Wilson v. Fitch, 41 Cal. 363, 386."

We agree with the District Court of Appeal that the assessment of damages in this case is just and reasonable. See Meyers v. Berg (Cal. Sup.) 298 P. 806.

Our examination of the record satisfies us that the evidence is amply sufficient to warrant a recovery by the plaintiff. The denial of appellant's motion for a directed verdict was proper. We have found nothing requiring a reversal.

The judgment is affirmed. The appeal from the order denying the motion for new trial is dismissed.

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122 Cal.App. 41

GOLDSON CO. v. THOMAS HAVERTY CO. et al.

H. W. LAWSON MFG. CO. v. SAME.

BOORSTEIN v. SAME.

Civ. 7112-7114.

District Court of Appeal, Second District, Division 1, California.

March 21, 1932.

Rehearing Denied April 11, 1932. Hearing Denied by Supreme Court May 19, 1932.

1. Negligence ⚷134(11).

Evidence justified finding that plumber's negligent failure to close valves after lengthening steam pipes proximately caused property damages by permitting emission of water.

A plumbing company was employed to lengthen steam pipes used in a manufacturing business. The company's workman was told by an employee of the manufacturer that the water in the pipes was turned off, but he made no inspection of his own, nor test after he completed the work. He did his work after all the manufacturer's employees had left the premises, except two, who left with him. The next morning water was issuing from the open extensions, and had seeped down and injured the plaintiffs' premises below.

2. Appeal and error ⚷1048(6).

Any error in admitting testimony on cross-examination would not justify reversal, where witness' answers denying knowledge were without apparent influence on result.

YORK, J., dissenting.

Appeals from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Separate actions by the Goldson Company, by the H. W. Lawson Manufacturing Company, and by Harry Boorstein, against the Thomas Haverty Company and another. From judgments of the Superior Court reversing judgments for plaintiffs, rendered by the municipal court, plaintiffs appeal.

Reversed.

A. J. Getz, of Los Angeles, for appellants.

R. J. O. Culver, Paul Nourse, and Forrest A. Betts, all of Los Angeles, for respondent.

PER CURIAM.

The three above-entitled actions were originally filed in the municipal court of Los Angeles and were consolidated for trial. Judgment was rendered in each case for the plaintiff against the defendant Thomas Haverty Company, and in each case judgment was entered that plaintiff take nothing as against the defendant Joseph Zukin, Inc. Thereupon, defendant Thomas Haverty Company filed in said court a motion for a new trial, which motion was denied, and the Haverty Company appealed to the Superior Court of Los Angeles county. On the 7th day of August, 1928, an order was made and entered in said Superior Court in each case reversing the judgment of the municipal court against the defendant Thomas Haverty Company and ordering a new trial. It is from the latter judgments that this appeal is taken.

The judgments of the municipal court were reversed by the Superior Court upon several stated grounds. We shall assume, as counsel in their briefs have assumed, that the only matters necessary for consideration on this appeal relate (a) to the sufficiency, or insufficiency, of the evidence to sustain the findings of the municipal court; and (b) to the alleged error of the trial court in admitting certain evidence.

[1] The occurrence which gave rise to these three actions was as follows: Joseph Zukin, Inc., a corporation, conducted a dress manufacturing establishment on the eighth floor of the M. J. Connell building in the city of Los Angeles, and in the operation of such business it became necessary to press the dresses so manufactured. For that purpose, a large boiler was maintained by said company for the production of steam. During working hours, the steam, after forming in the boiler, was transmitted through a main pipe line to a steam line, which was suspended over a long pressing table, from which latter line extensions or "drops" were hung downward to the table and connected by means of rubber hose with pressing irons. Valves were attached to these extensions or "drops" by which the operators of the irons were enabled to turn the steam on and off as it was or was not required, in connection

with the pressing operation. On or about the 15th day of October, 1926, it became necessary to lengthen the extensions or "drops" in order to make the valves more accessible to the operators. The Thomas Haverty Company was engaged in the plumbing and steamfitting business, and was called upon to make the necessary adjustments. The employee of that company performed the work desired at the end of the regular business day on the 15th of October, 1926. When employees of Joseph Zukin, Inc., entered the factory on the morning of October 16th, the floor thereof was covered with water, which was issuing from open valves attached to the extensions which had been installed by the Thomas Haverty Company the night before, and it was found that during the night large quantities of water had escaped from these valves and had seeped down to the premises occupied by the plaintiffs and appellants located on the fifth, sixth, and seventh floors of the same building.

Appellants now contend that the evidence produced at the trial in the municipal court supported the findings, that the findings supported the judgments, and that the findings are sufficient as a matter of law to support and justify the judgments entered by the municipal court.

The evidence shows that the Haverty Company was employed to install longer "drops" or extensions in connection with the pressing table, and that the employee of that company was told by employees of the Zukin Company before he started to work that everything was "down"—water turned off and gas extinguished, but he made no inspection of his own. No test was made by him after finishing his work to ascertain if there was any steam or water in the pipes. He did his work after all Zukin Company employees had left the premises, except two who left at the same time when he left; after which the premises were securely closed and locked until morning.

We are satisfied that there was evidence which justified the municipal court in finding that the Haverty Company was guilty of negligence which was a proximate cause of the damage suffered by the plaintiffs. Insufficiency of the evidence was therefore not a ground upon which the municipal court judgments could properly be reversed.

[2] It is further contended that the municipal court erred in overruling objections of the Haverty Company to questions asked of the witness Murphy with respect to a conversation between the witness, who was an employee of the Haverty Company, and Mr. Dickman, an employee of the Zukin Company, and another question relating to a conversation between the witness and Mr. Zukin. Both of these conversations took place when Murphy came down to inspect the premises on the next morning after the repair work had been done. We are inclined to think that the objections to the questions, which related to the cause of the accident, should have been sustained. We have not been able to find in the direct examination any expressions of opinion by Murphy concerning the cause of the leakage of water from the pipes. Apparently the questions were not proper as cross-examination, but that was not a stated ground of the objections. But, inasmuch as the answers of the witness stated substantially nothing more than that he did not know or could not remember, it is reasonably certain that the testimony so admitted had no appreciable influence which could affect the result of the actions.

The judgments of the Superior Court are, and each of them is, reversed.

Mr. Justice YORK dissents from this decision.

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121 Cal.App. 667

ROHNER et al. v. CROSS et al.

Civ. 8167.

District Court of Appeal, First District, Division 2, California.
March 17, 1932.

Rehearing Denied April 16, 1932. Hearing Denied by Supreme Court May 16, 1932.

1. **Negligence** ⚷138(4).

Instruction on presumption of ordinary care by plaintiff was proper, in absence of contrary evidence.

2. **Damages** ⚷216(7).

Instruction as to physical pain or mental suffering in future *held* proper, in action for injuries sustained in automobile collision.

3. **Evidence** ⚷550(2).

Expert witness' testimony in personal injury suit as to history of plaintiff's case *held* admissible as basis for doctor's medical opinion.

4. **Damages** ⚷208(2).

Awards of damages for personal injuries are within jury's province, and duty rests with trial court to see that no unjust burden is imposed on party.

5. **Appeal and error** ⚷1004(1).

Appellate court may interfere with jury's verdict as excessive only where excess appears as matter of law or recovery is so grossly excessive as to shock sense of justice or raise presumption of passion, prejudice, or corruption.

6. Damages ⚷132(5).

Award of $5,416 damages to 19 year old married woman for sacroiliac sprain, retroversion of uterus, injury to knee tendon, and future pain and suffering, *held* not excessive.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Louise Rohner, by Alvin Rohner, her guardian ad litem, and her husband, against Robert Cross and another. Judgment for plaintiffs, and defendants appeal.

Affirmed.

J. Hampton Hoge, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for appellants.

Ingemar E. Hoberg, of San Francisco, for respondents.

NOURSE, P. J.

Plaintiffs sued for damages for personal injuries to Louise Rohner. The jury returned a verdict for plaintiffs in the sum of $5,416 and the defendants appeal upon typewritten transcripts.

The injuries resulted from a collision of an automobile driven by Louise Rohner with one driven by defendant Helen Cross at a street intersection in the city of Palo Alto. The Rohner car was struck on the left rear wheel and spun around twice; the driver was thrown against the steering wheel and suffered minor bruises of the body. Medical examination later disclosed a sacroiliac sprain, a retroversion of the uterus, and an injury to the tendon of the left knee. The patient complained of pain in the muscles of the neck, back, and right leg, but this was relieved in the course of two or three days.

[1-3] The appellants urge that the damages awarded are excessive and that the trial court erred in the admission of certain evidence. Complaint is also made of certain instructions. These points do not require extensive treatment—the negligence of defendant Helen Cross was shown by evidence which is not substantially controverted; the want of contributory negligence on the part of Mrs. Rohner is not open to controversy. Hence it is sufficient to say as to these points that the instruction covering the presumption of ordinary care on her part was proper, there being no evidence to the contrary (Tanaka v. Granelli, 107 Cal. App. 547, 549, 290 P. 515); that the instruction relating to the duty of one operating a motor vehicle was correct in the abstract, applied to both parties, and was not prejudicial; that the instruction relating to physical pain or mental suffering in the future was properly given under respondents' theory of their case and related to an issue upon which some evidence had been offered; and that no prejudicial error arose from the ruling permitting one of the expert witnesses to repeat some of the history of Mrs. Rohner's case. This evidence was admissible as a basis for the medical opinion the doctor was about to give. Davis v. Renton (Cal. App.) 298 P. 834. If appellants desired to have the answers confined to that purpose, they might have requested it at the time.

[4-6] The discussion of the point relating to the amount of the verdict does not present any real question of law. Mrs. Rohner was a girl of 19 who had been married about six weeks prior to the accident. She called two physicians who testified that, after the accident, they found that she had a sprain of the sacroiliac ligaments, and that her uterus was tipped backward and to the right. They expressed the opinion that both of these injuries were the result of the accident. These witnesses also testified that both of these injuries were permanent. Two physicians called by appellants directly contradicted the others on both subjects. The jury was thus confronted with a conflict of evidence, and it cannot be said that there is not sufficient evidence to support the verdict. Awards of this nature are within the province of the jury, and the duty rests with the trial court to see that no unjust burden is imposed upon a party at the trial. The function of the appellate courts is correctly stated in Davis v. Renton (Cal. App.) 298 P. 834, where the court says: "The reviewing court may interfere only in cases where the excess appears as a matter of law, or where the recovery is so grossly disproportionate to any compensation reasonably warranted by the facts as to shock the sense of justice or at first blush raise a presumption that it is the result of passion, prejudice, or corruption rather than honest and sober judgment (Bond v. United Railroads, 159 Cal. 270, 113 P. 366, 48 L. R. A. [N. S.] 687, Ann. Cas. 1912C, 50; Pedrow v. Federoff, 77 Cal. App. 164, 247 P. 212; Horn v. Yellow Cab Co., 88 Cal. App. 678, 263 P. 1025)."

The record in the case at hand does not measure up to the elements made necessary under these decisions. There is no evidence of passion, prejudice, or corruption, and, because there is some evidence of future pain and suffering, it cannot be said that the award is "grossly disproportionate to any compensation reasonably warranted."

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

JOHN A. DUNN CO. v. C. F. WEBER & CO.

Civ. 7162.

District Court of Appeal, Second District, Division 1, California.

March 21, 1932.

Rehearing Denied April 18, 1932. Hearing Denied by Supreme Court May 19, 1932.

1. **Sales** 🔑202(5).

Transactions involving shipment of chairs on order directing chairs be charged to buyer's account, and delivered to consignee designated by buyer, *held* completed "sale," in absence of evidence showing parties intended that seller retain title until price was paid.

[Ed. Note.—For other definitions of "Sale," see Words and Phrases.]

2. **Sales** 🔑324(1).

Burden of proving ownership of chairs delivered to consignee designated by buyer was on seller, who sought possession.

3. **Sales** 🔑202(6).

Where chairs were sent "collect freight" to consignee designated by buyer, ownership vested in consignee when it paid freight and took possession.

4. **Sales** 🔑87(3).

Evidence *held* insufficient to support finding that in correspondence relative to sale of chairs, no mention of method of payment was made, as respects passing of title; buyer's order having directed that goods be charged.

Appeal from Superior Court, Los Angeles County; Dailey S. Stafford, Judge.

Action by the John A. Dunn Company against C. F. Weber & Co. From a judgment in favor of plaintiff, defendant appeals.

Reversed.

Lawler & Degnan, of Los Angeles, for appellant.

Samuel A. Miller and Albert L. Hershman, both of Los Angeles, for respondent.

CONREY, P. J.

In this action to recover possession of 2,000 chairs, bearing the manufacturer's mark of plaintiff, judgment was entered against defendant for possession of said chairs, or $4,990, the value thereof, with costs. From this judgment, defendant appeals.

It is contended by appellant that the judgment should be reversed because the plaintiff did not have title to the goods in question at the time of commencement of this action (that is, on August 22, 1927); and because title to the goods vested finally in the defendant on or about March 19, 1927; and because the evidence is insufficient to support certain specified findings, to wit: (a) "That at all the times mentioned in plaintiff's complaint, the plaintiff exercised control and dominion over all of said chairs, including the chairs not shipped and the chairs delivered to the defendant C. F. Weber & Company at Los Angeles, California." (b) "That it was the intention of the plaintiff John A. Dunn Company and the Standard School Equipment Company that the title to all or any part of said 4000 eighteen-inch teacher's chairs should not pass to said Standard School Equipment Company until the said Standard School Equipment Company accepted same and made payment therefor." (c) "That, subsequent to December 28, 1926, no agreement for the sale of said 1,996 chairs delivered at Los Angeles was made between the plaintiff and the Standard School Equipment Company or C. F. Weber & Company, or both, nor did the plaintiff consent to any alleged sale of said personal property to the defendant by the said Standard School Equipment Company."

The defendant was a furniture dealer at Los Angeles. Standard School Equipment Company was a corporation having its principal place of business at Louisville, Ky., and engaged in the business of selling school furniture to local dealers. Standard School Equipment Company obtained its wares by purchase from manufacturers of school furniture. In July, 1926, appellant entered into a contract with the board of education of the city of Los Angeles to furnish to said board of education 4,000 eighteen-inch chairs, conforming to a certain specification and sample. Appellant then entered into a contract with Standard School Equipment Company by which the company agreed to furnish and sell to appellant the required 4,000 chairs. Next, Standard School Equipment Company entered into a contract with respondent whereby respondent agreed to manufacture 4,000 eighteen-inch chairs known as teachers' chairs, as per sample submitted to appellant and said board of education. Respondent manufactured 4,000 chairs in purported compliance with the order. In accordance with instructions from Standard School Equipment Company, the first shipment (1,996 chairs) was sent by steamship, "collect freight," to appellant at Los Angeles. The bill of lading was made out to appellant as consignee, and was sent by respondent to Standard School Equipment Company, which in turn forwarded same to appellant. Appellant paid the freight and took the chairs into its possession, and then offered delivery of said chairs to the board of education. The board of education rejected the chairs for nonconformity to specifications. Thereupon Weber & Co., "refused the chairs" to Standard School Equipment Company, which in turn "rejected" them to Dunn & Co. Then followed a long series of correspondence and personal negotiations between the several interested parties and their representatives, in an endeavor to adjust the difficulties which arose out of the rejection of the chairs. The failure of these negotiations resulted ultimately in the filing of this action. By claim and delivery proceedings at the commencement of the action, the chairs were taken from appellant and delivered to respondent, by whom they have been sold.

The order sent by Standard School Equipment Company to plaintiff was written in the form of four separate orders, all dated August 11, 1926; each order being for 1,000 chairs (an estimated carload), with separate indicated shipping dates. Each order directed that the goods be shipped according to instructions, "and charge same to our account." Each order directed that bill of lading be made in the name of defendant and be shipped to defendant at Los Angeles. In conformity with these orders, plaintiff manufactured 4,000 chairs, of which those which are the subject of this action constituted the first two and only shipments made. The other 2,000 chairs were never shipped to defendant, but were ultimately sold by Dunn & Co. through other agencies.

It is at once perceived that, if by virtue of the foregoing transactions the manufacturer lost title to the chairs, it did so by passing title to Standard School Equipment Company as purchaser, by delivery of the goods to the consignee designated by the purchaser, and by making such sale and delivery upon credit extended to the purchaser. Respondent, in support of its claim that it retained title to the goods, relies first upon the rule that, in the absence of agreement as to time of payment, or when time of payment is left indefinite, the law implies that it is to be upon the delivery of the goods; next, upon the rule that a sale on credit implies that the purchaser is to have the property on his assuming to pay therefor and before actual payment (it being insisted by respondent that in this instance Standard School Equipment Company did not assume responsibility for payment of the purchase price); next, that a bill of lading does not have the effect of passing title where the evidence clearly shows a contrary intention (it being here insisted that the evidence does clearly show a contrary intention).

[1, 2] We are of the opinion that the transactions which have been herein described establish a completed sale of the 1,996 chairs by plaintiff to Standard School Equipment Company, and by that company to the defendant. They are prima facie sufficient, and necessarily sufficient, to constitute such sale, in the absence of any evidence showing that in filling the order and delivering the goods plaintiff did not intend that title should pass. We think that there is an entire absence of evidence to prove that this was a "cash on delivery" sale, or that plaintiff intended to retain title until the bill was paid. This is a possessory action, and the circumstances are such that the plaintiff was required to prove ownership of the property as a necessary foundation of its claim to the right of possession.

[3] Since we have arrived at the conclusion that ownership of the chairs vested in the defendant at the time when it paid the freight and took the chairs into its possession, it necessarily follows that the plaintiff's action must fail, unless we can find in the evidence some proof of a rescission of the sales, whereby title was revested in the plaintiff. We are unable to discover any such rescission by consent of the parties, or any proof of facts which entitle either of the parties to force a rescission without consent. Equally we are unable to discover any such tender of the goods, or other action on the part of the defendant, as would constitute rescission of the sale, even if the defendant had acquired a right of rescission. We are forced to the conclusion that in bringing this action the plaintiff has mistaken its remedy.

[4] With respect to the findings: We think that the evidence is insufficient to support the finding that at all times mentioned in the complaint the plaintiff exercised control and dominion over the said chairs delivered to the defendant; and is insufficient to support the finding that it was the intention of the plaintiff and of the equipment company that the title to the said chairs should not pass to the equipment company until that company accepted the same and made payment therefor; and is insufficient to support the finding that in all written correspondence between the equipment company and the plaintiff, relative to the sale and purchase of said chairs, no mention of terms or method of payment was made.

There is a further contention on the part of appellant that certain negotiations conducted between the several parties in March, 1927, constituted a settlement of the controversy, and that thereby there was a resale of the chairs to the defendant. If we are right in our decision with reference to the effect of the previous transactions, it is not necessary to enter into a discussion of this question.

The judgment is reversed.

We concur: HOUSER, J.; YORK, J.

122 Cal.App. 79

HERON v. BRAY.

Civ. 7131.

District Court of Appeal, Second District, Division 1, California.

March 23, 1932.

1. Appeal and error 🔑1071(1).

Court's correction of paragraphs of his fact findings, referring to payments by defendant, to conform to pleadings, decision, and counsel's admission in argument on motion for new trial that only one payment was made, *held* not prejudicial to defendant (Code Civ. Proc. § 662).

2. Trial 🔑400(2).

Trial court had jurisdiction to correct his fact findings at hearing on motion for new trial (Code Civ. Proc. § 662).

3. Statutes 🔑267(2).

New statute, dealing with procedure only, applies to both pending and future actions.

Appeal from Superior Court, Los Angeles County; C. E. Beaumont, Judge.

Action by A. R. Heron against R. R. Bray. From a judgment for plaintiff and an order modifying the court's findings of fact on defendant's motion for a new trial, defendant appeals.

Affirmed.

Meserve, Mumper, Hughes & Robertson, of Los Angeles (Timon E. Owens, of Los Angeles, of counsel), for appellant.

James E. Mahon, of Los Angeles, for respondent.

YORK, J.

This is an action to recover on three promissory notes executed by defendant. The answer alleged that the third note was given in full payment and discharge of the first note, and that the second and third notes had been fully paid, and set up as an affirmative defense the fact of payment by defendant of the sum of $2,200 to one Kellogg, the original payee of the notes, which (defendant alleged) was accepted by plaintiff in full settlement, satisfaction, and discharge of the causes of action sued upon.

Upon trial of the cause, the court found against the defendant upon all issues, except that the court gave to defendant credit for said sum of $2,200 as a payment on account. The original findings referring to this payment are:

"V. The court further finds that on the 20th day of December, 1928, the defendant paid to the plaintiff herein the sum of $2,200.00 to apply upon the notes sued on in this action, and that defendant is entitled to a credit in the amount of $2,200.00, together with interest from the 20th day of December. 1928, at the rate of seven (7%) per cent per annum to the 22nd day of July, 1929.

"VI. The court further finds that during the month of December, 1928, the defendant paid to plaintiff, by then and there paying to F. R. Kellogg, the sum of $2,200.00; but the court finds that the payment was not made by defendant and/or accepted by plaintiff as full settlement, satisfaction and/or discharge of the causes of action sued for herein. * * * and the court further finds that the said sum of $2,200.00 was paid upon account of the said notes and not in full payment, accord and satisfaction thereof."

On July 31, 1929, after the filing of said findings, judgment was entered, and on August 26, 1929, after due notice given, defendant's motion for a new trial was heard and submitted. On September 24, 1929, an order was made and entered, ordering, adjudging, and decreeing that paragraph V of the findings be amended to read as follows: "The court further finds that on the 20th day of December, 1928, the defendant paid to F. R. Kellogg for the benefit of the plaintiff herein the sum of $2,200.00 to apply upon the notes sued on in this action, and that defendant is entitled to a credit in the amount of $2,200.00, together with interest from the 20th day of December, 1928, at the rate of seven (7%) per cent per annum to the 22nd day of July, 1929." Said order also decreed that paragraph VI of the findings be amended to read as follows: "The court further finds that during the month of December, 1928, the defendant paid to plaintiff, by then and there paying to F. R. Kellogg, the sum of $2,200.00, as in paragraph V hereinbefore set forth; but the court finds that the payment was not made by defendant and/or accepted by plaintiff as full settlement, satisfaction and/or discharge of the causes of action sued for herein. * * * and the court further finds that the said sum of $2,200.00 was paid upon account of the said notes and not in full payment, accord and satisfaction thereof." The motion for new trial was denied.

On September 20, 1929, defendant appealed from the judgment of July 31st, and on September 26th filed another notice of appeal from the judgment of July 31st and also from the order of September 24th, "attempting and purporting to change and modify and add to the findings of fact of the court heretofore entered herein."

Appellant now maintains that the court erred in assuming jurisdiction to modify and change the findings of fact upon which the judgment was made and entered on July 31, 1929; and that the conclusions of law are contrary to and not supported by the findings of fact in this, to wit: "It was found as a fact that defendant paid plaintiff the sum of $2,200.00 on the 20th day of December, 1928, in paragraph V of said findings; and it is found as a fact, in paragraph VI of said findings, that defendant made another payment of $2,200.00 to plaintiff by then and there paying the same to F. R. Kellogg, whereas the conclusions of law give defendant credit for only one payment of $2,200.00."

In his brief appellant makes the statement that the questions of law involved in this appeal may be reduced to two: "First, did section 662 of the Code of Civil Procedure which was added to that code by the legislature of 1929 and became effective August 14, 1929, confer jurisdiction on the court passing on a motion for a new trial to amend the findings of fact in a case, in which the judgment had been entered prior to said 14th day of August, 1929, and from which an appeal had been taken prior to the time the court made its order making amendments ostensibly pursuant to said section? Second, are the findings of fact in the instant case in their original form sufficient to support a judgment against appellant?"

[1] Nowhere, in the pleadings filed in this case, did the defendant claim that he had made two payments of $2,200 each; his affirmative defense was to the effect that during the month of December, 1928, he paid $2,200 to F. R. Kellogg, in cash, which said sum was paid by him and accepted by plaintiff as full settlement, satisfaction, and discharge of the causes of action herein sued upon. It is true that the findings as originally drawn were somewhat ambiguous, in that paragraphs V and VI both made reference to the payment of $2,200, but we are convinced that no harm resulted to the appellant when the findings were corrected in order to give true expression to the decision of the court and made to conform to the pleadings. The correction, as made, conforms to an admission made by defendant's attorney at the argument on motion for new trial that he did not contend that more than one $2,200 payment was made.

[2, 3] We are of the opinion that the trial court, at the time when it passed on the motion for a new trial, had jurisdiction to make the correction in the findings, and that authority therefor was conferred by section 662 of the Code of Civil Procedure which became effective August 14, 1929. When a new statute deals with procedure only, it applies to all actions—those which are pending, and future actions. 25 R. C. L., p. 791, § 38.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

121 Cal.App. 633

FOXE v. SOUTHERN PAC. CO.

Civ. 7066.

District Court of Appeal, Second District, Division 2, California.
March 15, 1932.

Rehearing Denied April 14, 1932. Hearing Denied by Supreme Court May 12, 1932.

1. Master and servant 🔑285(11).

In action for death of brakeman crushed when train backed onto wrong track over switch improperly set, whether death was proximately caused by negligence of railroad's employees for which deceased brakeman was unaccountable *held* for jury.

2. Appeal and error 🔑930(1).

When different inferences may be drawn from evidence, it must be viewed in light most favorable to support verdict.

3. Appeal and error 🔑996.

When different inferences may be drawn from evidence, jury's conclusion is conclusive.

4. Master and servant 🔑231(1).

Employee may assume master will exercise ordinary care to prevent anything being done which will increase danger incident to employment (Federal Employers' Liability Act [45 USCA §§ 51–59]).

5. Master and servant 🔑288(17).

Whether employee who places himself in position of danger assumes risk of injury from master's want of care is jury question (Federal Employers' Liability Act [45 USCA §§ 51–59]).

6. Appeal and error 🔑1048(2).

Even if discharged engineer was permitted to testify regarding distance required to stop train without sufficient qualification as expert, no prejudice resulted under circumstances.

No prejudice resulted, since circumstances disclosed that engineer's testimony did not differ materially from that of the railroad's witnesses, and that the jury were instructed that they should consider the credibility of the witnesses, their bias or prejudice, if any, the reasonableness or unreasonableness of their statements, and the degree of their intelligence.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Irma Foxe, as administratrix of the estate of Francis F. Slingluff, deceased, against the Southern Pacific Company. Judgment for plaintiff and defendant appeals. Affirmed.

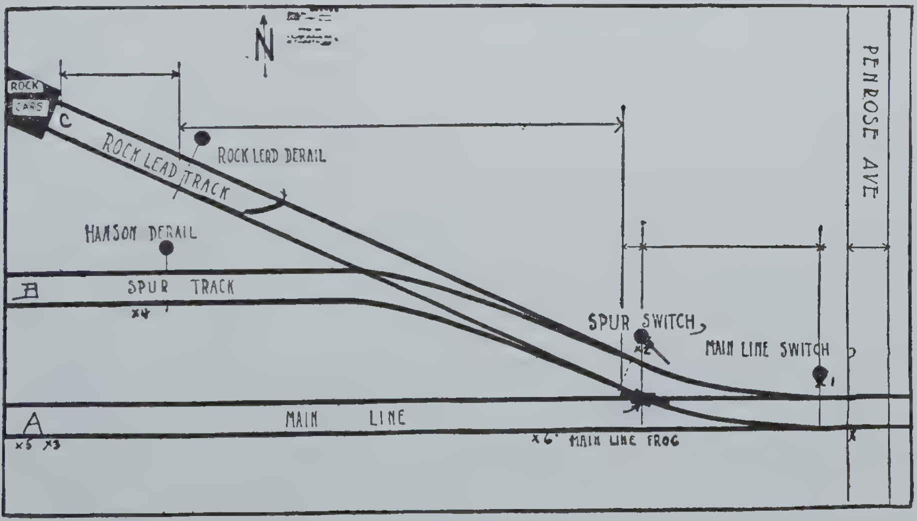
W. I. Gilbert, of Los Angeles, for appellant.

Rosenthal & Rosenthal, of Los Angeles, for respondent.

CRAIG, Acting P. J.

The respondent's intestate was injured while performing the duties of a brakeman upon a freight train operated by the appellant, in Los Angeles county, as a result of which he lost his life. In an action instituted under the Federal Employers' Liability Act by said representative, judgment was rendered upon the verdict of a jury, from which judgment the employer appealed.

During a dark, rainy morning in the fall a crew consisting of an engineer, fireman, conductor, and three brakemen, who had left San Fernando destined to Los Angeles, were ordered to convey a train of empty cars to Roscoe, leave them on a siding near Penrose avenue, obtain a train of loaded rock cars from a branch of said siding, and haul the same to the destination mentioned. The conductor testified as to local conditions, general directions, appliances, and movements of the train from a diagrammatic plat which was introduced in evidence, and is herein reproduced as an aid to an understanding of the conception of this and other witnesses of the occurrence in controversy.



For purposes of the trial it was ordered that on the general diagram "the main line be marked 'A,' the spur track will be marked 'B,' and the rock-spur will be marked 'C.'" A switch from the main line to sidings "B" and "C," designated as "XI," was approximately 75 feet westerly from Penrose avenue; a switch "X2" from the side track to said rock lead "C" was approximately 125 feet westerly from the first; a derail was placed about 50 feet from switch "X2," and the loaded cars stood at the extreme westerly end of the said rock-lead track. A switch light signal on "XI" indicated according to a red or green light whether or not a train proceeding westerly along the main line would be diverted. There was evidence that switch "X2" was not at the time furnished with a light. Rear brakeman Slingluff, from the caboose at the end of the train, and brakeman Moore, signaled with lanterns for the train to move backward upon the opening of the main-line switch, "XI," toward spur track "B," but, for some reason unexplained definitely by the record, it followed the northerly line, with the resulting collision and injury mentioned.

[1-3] Usages of the defendant company, and the respective duties of each brakeman, comprised considerable of the testimony and are afforded extensive discussion by the appellant, toward the ultimate demonstration by processes of exclusion of an insufficiency of the evidence to support the verdict and judgment. In this behalf it is argued that the deceased was injured through hazards which he legally assumed as an employee of the appellant, and from dangerous conditions which were obvious to an ordinary person of prudence and which the deceased fully knew and appreciated; that each brakeman was assigned to a specific duty, and that he was dependent upon the conductor for instructions, under rules and regulations of the company. There was evidence tending to show that the conductor did not know upon arrival at San Fernando the destination of the empty cars, but it also appears that he thereafter examined his instructions, and that the train crew all understood that they were to be deposited on the spur track "B" at Roscoe, and the loaded rock cars removed from track "C" for transfer to Los Angeles. There was substantial positive evi-

dence that, although in theory the brakemen were designated for convenience according to positions on the train, no rule, regulation, custom, or usage classified them or required such distinctions in actual service. According to the conductor, "there were just three things to do, and that was, to spot a train after it passed over the main-line switch to back in, the derail switch on the spur track B was to be turned, the switch-lead to spur-track C should be set, and the main-line switch opened—and there were three men to do that." Each did a part, and was not directed to perform any particular thing. Following an inspection to insure a clear way signals to back were given, Slingluff was on the rear of the train, Moore and Kraus were at different points along the sidings, and the conductor had stepped toward the main line, intending that the cars should be placed on track "B." The train was moving but about six miles per hour, and the air brakes were in perfect condition. Kraus swore: "I saw the caboose hitting this switch No. 2, going wrong—it ought to have gone on the spur track—and the switch evidently wasn't lined or something, and the caboose went on this track C instead of going on the right track. * * * I gave a violent washout signal to stop, but he did not stop; he had about four cars between here—from the time I gave the stop signal and before the impact occurred. * * * I saw two men give the back-up signal. It is true that they were standing between the main-line switch and the switch that afterwards proved to have been thrown wrong. * * * All I can say is that he had time to stop all right if he had used the air." The engineer testified that he had backed about 200 feet when he received signals to stop. The deceased was found between the caboose and the car of the other train. We are not authorized to say as a matter of law that the jury, observant of the witnesses and of the circumstances, were unjustified in concluding that injuries resulting from an unlighted switch, backing a train upon the wrong track, over a switch improperly set, were not proximately caused by negligence of the defendant's employees for which the deceased was unaccountable. When different inferences may be drawn from all of the evidence, it must be viewed in a light most favorable to support the verdict, and the conclusion of the jury is conclusive. Depaoli v. Claus, 110 Cal. App. 145, 293 P. 881.

[4, 5] It is further suggested that the presumption that a man ordinarily takes care of his own concerns should be applied here, in view of the dangers incidental to such service, and the assumption by an employee of the ordinary risks of his duties. It is observed, however, that contributory negligence was not an issue upon the trial, nor does the record tend to disclose the existence of like perils at the Roscoe siding such as might instill precaution against anticipated recurrences of similar dangers. The rule advanced by appellant that evidence merely sufficient to dispel the presumption that the deceased exercised ordinary care can be said to raise no conflict in the absence of further showing by the plaintiff (Larrabee v. Western Pac. Ry. Co., 173 Cal. 743, 161 P. 750; Williams v. Hasshagen, 166 Cal. 386, 137 P. 9) is not in conflict with what has been said. It is overcome by undisputed evidence of safe conditions of employment under customary and usual operations of the same appliances. Under the Federal Employers' Liability Act (45 USCA §§ 51–59), applicable to interstate commerce in such a case, "an employee who places himself in a position of danger does not thereby necessarily assume the risk of injury from the want of care of his employer. He has the right to act upon the presumption that the master will exercise ordinary care in the conduct of his business to prevent anything being done which will increase the danger incident to the employment (Morgan v. J. W. Robinson Co., 157 Cal. 348, 107 P. 695); and the question whether he assumed the risk was one for the jury." McComb v. Atchison, Topeka & Santa Fe Ry. Co., 110 Cal. App. 303, 294 P. 81, 83; Thomas v. Southern Pacific Co. (Cal. App.) 2 P.(2d) 544.

[6] A ruling and exception to the testimony of an engineer, who had been discharged by the defendant after twenty-three years' service, as to the distance within which the train in question could have been stopped, assigns as error a failure to establish the sufficiency of his qualification as an expert witness. However, his evidence did not differ materially in its essentials from that of defendant's witnesses in this respect, and the jury were instructed that they should consider the credibility of the witnesses, their bias or prejudice, if any, the reasonableness or unreasonableness of their statements, and the degree of their intelligence. In the same regard exception was taken to the sufficiency of an hypothetical question propounded to the same witness in that it failed to take into account various details. But since there is no conflict as to the fact that the train could have been stopped before it reached the loaded cars, the appellant fails to show wherein it was prejudiced by his testimony.

A careful perusal of instructions given to the jury upon assumption of risk seems to reveal no misleading or serious deviation from statutes governing in such a case. The rule has repeatedly been announced in this state, and is no longer in dispute. Certain offered instructions which were refused assumed facts not in evidence, and may have been properly refused as not in accord with the facts or the law of the instant case.

From what has been said, minor technical questions raised by the appellant become moot.

The judgment is affirmed.

We concur: IRA F. THOMPSON, J; FRICKE, Justice pro tem.

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122 Cal.App. 170

ROBERTS v. HIGGINS.

Civ. 7035.

District Court of Appeal, Second District,
Division 2, California.
March 26, 1932.

Divorce 🔑247.

Former wife's right to alimony payable monthly terminated on former husband's death.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by Lucy C. Roberts against Edward Robert Higgins, as executor of the last will of Theodore Roberts, deceased. From judgment for defendant, plaintiff appeals.

Affirmed.

Pacht, Pelton & Warne and Paul L. Rolston, all of Los Angeles, for appellant.

Earl D. Killion, of Los Angeles, for respondent.

FRICKE, Justice pro tem.

Appellant, Lucy C. Roberts, was granted a final divorce from the deceased, Theodore Roberts, with alimony fixed at $75 a month, later raised to $100 a month which was paid by the deceased up to the time of his death in December, 1928. Appellant, on February 20, 1929, presented a claim against the estate demanding the alimony payments for the months of January and February. The claim was rejected and this action was commenced to enforce the payment thereof. A demurrer to the complaint was sustained and, appellant having declined to amend the complaint, the court entered judgment in favor of the respondent. The only question involved in the appeal is whether alimony granted to a wife in a decree of divorce terminates upon the death of the husband.

In passing upon a similar claim by a wife in a case where the order for alimony, made pursuant to a stipulation in open court, provided that the husband pay the wife "the sum of fifty dollars on the first day of each and every month during the remainder of her natural life," the decree was interpreted not as an award of permanent alimony, but an award of a life annuity given in lieu of a division of the property of the spouses and not as resting upon the obligation which the law imposes upon the husband to support the wife. Commenting upon the decisions of other jurisdictions wherein it is held that provisions for the support of the wife in divorce decrees cease upon the death of either spouse, the court says: "If the provision in the decree here under consideration were merely the ordinary provision for the payment of permanent alimony, then we might be constrained to follow those decisions, because provisions for the payment of alimony made not upon the consent of the parties, but usually against the opposition of one of the spouses, are founded upon the legal obligation which the law imposes upon the husband to support the wife, and that obligation comes to an end upon the death of either spouse. So, regardless of the language used by a court in making a provision in its decree for the payment of alimony, that provision ceases to be effective upon the death of either spouse." Parker v. Parker, 193 Cal. 478, 225 P. 447, 448. The rule there stated and the reasons given therefor are determinative of the case before us.

The judgment is affirmed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

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121 Cal.App. 654

BROWN et ux. v. ROBERTS et al.

Civ. 8163.

District Court of Appeal, First District,
Division 2, California.
March 16, 1932.

1. Specific performance 🔑121(11).

Evidence established vendor's failure, if any, to fully perform within time, was excused by purchaser's conduct, as regards right to specific performance.

2. Specific performance 🔑94.

Vendor's failure to obtain certificate of title and certificate showing property was free from liens *held* not to defeat right to specific performance (Civ. Code, § 3392).

This was so since there was only partial failure of performance which was immaterial under circumstances.

3. Vendor and purchaser 🔑134(2).

That incumbrance referred to in escrow agreement as "trust deed" was mortgage *held* not to defeat vendors' right to specific performance.

4. Specific performance ⚿25.

Escrow agreement containing necessary elements to constitute valid agreement entitled vendors to specific performance.

5. Specific performance ⚿126(3).

Under complaint for specific performance alleging that both purchasers signed note, court could enter personal judgment on note against purchaser not signing escrow agreement.

> This was so for, although the complaint was entitled a complaint for specific performance, it set forth the entire transaction and contained allegation showing that the note was executed by both purchasers in favor of the vendors, and that the note remained wholly unpaid, and therefore it was proper under the circumstances for the trial court in the exercise of its equity jurisdiction to extend its jurisdiction to matters which were ordinarily of pure legal cognizance, and to make a proper disposition of the entire controversy.

6. Contracts ⚿271.

Mere notice purporting to rescind agreement cannot have that effect unless party giving such notice is entitled to rescind.

7. Specific performance ⚿87.

Where title to property had vested in purchaser, vendors' failure to make further payments on mortgage indebtedness in order to prevent foreclosure *held* not to defeat vendors' right to specific performance.

Appeal from Superior Court, Los Angeles County; Wilber F. Downs, Judge.

Suit by William Edward Brown and wife against C. J. Roberts, C. A. Draper, and the Seaside National Bank of Long Beach. The suit was dismissed as to the Seaside National Bank of Long Beach, and from an adverse judgment, C. J. Roberts and C. A. Draper appeal.

Affirmed.

Doyle, Clark, Thomas & Johnson, of Long Beach, for appellants.

Ray Meacham and Bruce Mason, both of Long Beach, for respondents.

SPENCE, J.

This action was instituted by the sellers to compel specific performance of a contract to purchase certain real property. It was thereafter dismissed as to the defendant bank, which was the escrow holder. From a judgment in favor of plaintiffs and against defendants C. J. Roberts and C. A. Draper, said defendants appeal.

Escrow instructions were signed by plaintiffs and defendant C. J. Roberts on March 1, 1927, and these instructions and accompanying instruments constitute the agreement between the parties. The instructions given by defendant Roberts recite the direct payment of $140 to plaintiffs, the delivery of $400 in cash to the escrow holder, together with a promissory note in favor of plaintiffs in the sum of $2,350, signed by defendants Roberts and Draper and payable sixty days from date with interest at 7 per cent. The escrow holder was instructed to use the money and note provided it could secure a guaranty or certificate of title from any one of several designated title companies showing the title to the property described in defendant C. J. Roberts, free of incumbrances with the usual exceptions, and further excepting a "trust deed of record securing note for $2,500.00 on which there is an unpaid balance of $2,110.00." The escrow holder was further instructed to procure "municipal certificate showing above property free from municipal liens." Time was declared to be of the essence and the escrow holder was instructed to return the money and instruments if unable to comply with the instructions within thirty days. Plaintiffs indorsed on said instructions their approval of "the conditions as above" and their instructions recited the delivery to the escrow holder of their deed conveying the property to defendant C. J. Roberts, said deed to be delivered upon the payment of "the sum of $400.00 and note for $2,350.00 shown above within the time as above provided."

On March 9 the bank informed defendant C. J. Roberts that the title company had stated that there was a judgment against one Charles Roberts and requested sufficient information to satisfy the title company that defendant C. J. Roberts was not the party involved in the judgment. Defendant Roberts called at the bank, stated that there was no judgment against him, and although he expressed a willingness to sign an affidavit as requested by the title company, he did not return to the bank to do so. The title company further reported, in the early part of March, that the property was subject to an assessment bond in the sum of $100.43. The bank notified the parties about this bond and plaintiff William Brown discussed the matter with defendant Roberts and offered to pay the bond off or to let defendant Roberts assume it. Defendant Roberts stated that: "It doesn't make any difference, I don't intend to keep the lot anyway." In the absence of the affidavit above referred to and further instructions regarding the bond, the bank did not consummate the transaction within the thirty days provided in the escrow instructions. On April 2, 1927, defendants notified the bank that the lot described was not the same property shown by the seller and demanded a cancellation of the escrow and the return of all money and papers deposited. The facts stated in this notice were made the basis for the allegations of defendants' cross-complaint herein, but the trial court found the allegations of the cross-complaint to be untrue and further found that, in attempting to rescind, defendants had acted in bad faith. No exception is taken to these findings.

[1, 2] On this appeal appellants take the position that respondents failed to comply with the terms of the agreement within the time specified and are therefore not entitled to specific performance. We find no merit in this contention. Respondents delivered their deed to the escrow holder at the time the escrow instructions were signed, and it appears that the only reasons for the failure of the escrow holder to consummate the transaction were the absence of the affidavit requested and the existence of the assessment bond against the property. Conceding that it was respondents' duty to obtain the certificate of title and the municipal certificate rather than the duty of the escrow holder as agent of both parties, respondents' failure to do so was caused by the conduct of appellants in consenting to produce the affidavit and failing to do so and in failing to definitely state their desires with respect to the assessment bond. In our opinion such failure, if it may be so termed, upon the part of respondents to fully perform within the time specified was excused by the conduct of appellants, and in any event such failure would not defeat specific performance, for it falls within the exception specified in section 3392 of the Civil Code, being only a partial failure to perform, which was entirely immaterial under the circumstances. Pomeroy's Specific Performance of Contracts (3d Ed.) 930.

[3] Appellants further contend that respondents have not at any time complied with all of the terms and conditions of the agreement. Pursuant to the interlocutory judgment rendered by the trial court at the first trial of the cause, respondents did pay the assessment bond, furnished to appellants a municipal certificate, and also furnished a certificate of title issued by one of the approved title companies, showing title vested in appellant C. J. Roberts, as required by the agreement. Thereafter the trial court granted a new trial, and upon the second trial the present judgment was entered. The only basis for the above contention is the fact that the incumbrance referred to in the agreement as a "trust deed of record" was in fact a mortgage. Appellants state that "when they contracted to take the property subject to a trust deed they cannot be compelled to take it subject to a mortgage." We believe this contention is likewise without merit, for it is apparent that the parties were dealing with an incumbrance of record of which they were charged with notice. No claim is made that the amount secured was not as set forth in the agreement nor that the terms of the note were unknown to appellants. The trial court treated as immaterial the fact that the recorded instrument was referred to in the agreement as a "trust deed of record" rather than as a mortgage, and we believe that it was correct in so doing.

[4] Appellants make the further point that the escrow agreement could not be specifically enforced due to its uncertainty, but in our opinion this point may not be sustained. That escrow instructions may be sufficient to constitute an agreement between the parties is well settled. Tuso v. Green, 194 Cal. 574, 229 P. 327; Hansen v. Hevener, 69 Cal. App. 337, 231 P. 361. In the escrow instructions in this case we find all of the necessary elements to constitute a valid agreement set forth with sufficient certainty to entitle the parties to specific performance.

[5] On behalf of appellant C. A. Draper it is urged that the complaint was insufficient and that this demurrer thereto should have been sustained. Said appellant calls to our attention the fact that he did not sign the escrow instructions, the same being signed only by appellant Roberts. The complaint, however set forth the entire transaction and contained allegations showing that the promissory note for $2,350 was executed by both appellants in favor of respondent and that said note remained wholly unpaid. The complaint was therefore sufficient to state a cause of action as to appellant Draper and although the complaint was entitled a complaint for specific performance, it was proper under the circumstances for the trial court in the exercise of its equity jurisdiction to extend its jurisdiction to matters which are ordinarily of purely legal cognizance and to make a proper disposition of the entire controversy. 10 Cal. Jur. 496, § 41. This was done and the judgment as to appellant Draper was limited to his liability under the terms of the promissory note.

[6, 7] Two further contentions are made by appellants. It is argued that as they had rescinded before this action was filed "there was no contract in existence which could be the foundation or basis of this action for specific performance." It is sufficient answer to state that the trial court found against appellants on the facts upon which they claimed the right to rescind and further found that the attempted rescission was made in bad faith. Of course, a mere notice purporting to rescind an agreement cannot have that effect unless the party giving such notice is entitled to rescind. It is further argued that "respondents have not kept the property in such condition that they can de-

liver the same to appellants upon the entry of a final judgment of specific performance." This argument is answered by the fact that after the first trial of the cause title to the property became vested in appellant Roberts as provided by the agreement and appellants could not thereafter require that respondents make further payments on the mortgage indebtedness in order to prevent foreclosure. If, as claimed by appellants, the mortgagee thereafter foreclosed the mortgage, such fact cannot affect the rights of respondents. It may be stated, however, that no reference to foreclosure is found in the evidence except a reference to the fact that respondents had been served with summons in a foreclosure action which was pending at the time of the second trial of the cause.

We find no error in the record.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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121 Cal.App. 554

CRUSE v. GRUBBS et al.

Civ. 4539.

District Court of Appeal, Third District, California.

March 11, 1932.

Damages ⚷141.

Complaint in action to set aside sale of note and mortgage and for damages *held* demurrable because of indefiniteness as to averments of damage.

> Complaint did not allege in what manner or how plaintiff had been damaged in sum specified by sale of the note or mortgage, nor how defendants' acts had impaired plaintiff's health, as alleged, nor to what extent his health was damaged, nor how he had been deprived of food and clothing, nor what costs and expenses he had incurred, nor how injuries as to his health, etc., would continue to increase until the controversy between the parties had terminated.

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by Edward P. Cruse against Edward G. Grubbs and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

Louis Luckel and John A. Whalen, both of Los Angeles, for appellant.

Everett W. Mattoon, County Counsel, S. V. O. Prichard, Deputy County Counsel, Benjamin Lewis, Fairfax Cosby, and Milton Mitchell, all of Los Angeles, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff began this action to obtain a judgment setting aside and declaring void the sale of a certain note and mortgage, and to obtain damages. To this complaint the demurrer of the defendants was sustained, with leave to the plaintiff to amend. The plaintiff having, in writing, declined to amend, judgment was entered in favor of the demurring defendants. From this judgment the plaintiff appeals.

The record shows that the plaintiff Edward P. Cruse and the defendant Cora Cruse were husband and wife. That on or about the 3rd day of July, 1915, the defendant Cora Cruse commenced a separate maintenance action against the plaintiff in this action, to obtain a judgment requiring the plaintiff to pay a certain sum for the support and maintenance of the defendant Cora Cruse, the plaintiff in the action referred to, and the minor children of the plaintiff and defendant in said action. During the course of the action referred to, which was numbered in the trial court as follows, to wit, "B–26529," an order was made requiring the defendant in that action, the plaintiff in this, to pay to the plaintiff in that action, the defendant in this, the sum of $3.75 per week. That thereafter the amount decreed to be paid weekly was fixed at the sum of $5. Said sum not having been paid, an application was made to the trial court to have placed in the hands of a trustee a certain note in the sum of $2,747, secured by trust deed, with directions to collect the monthly installments, provided to be paid thereon, and out of such payments pay to the said Cora Cruse the sum of $10 per month and to Edward P. Cruse the sum of $35 per month until the arrears found to be due to said Cora Cruse in the sum of $985.50 had been paid in full, and also to pay to the attorneys for said Cora Cruse the sum of $50, said attorneys' fees being made payable within twenty-four hours.

The order for the payment of this sum of money and the impounding of the note and trust deed was made and entered in the minutes of said court on the 19th day of June, 1929, and reads as follows, so far as material here: "Order to show cause re modification of certain court order and contempt; order to show cause re modification of certain court order and restraining order; and motion re contempt coming on for hearing; plaintiff present with her attorneys, Fairfax Cosby and Benjamin Lewis, and defendant with his attorney, J. L. Murphey. Plaintiff, Frances Cruse, Erma Cruse, Edward Cruse and P. W.

Croak are sworn and testify. Contempt proceedings dismissed. Court finds the defendant to be in default $989.50; arrearage to be a lien upon the trustee deed and trust deed note. Trustee deed and note to be impounded with court trustee, W. H. Holland, who is to collect payments on trust deed, and pay $10.00 per month to plaintiff, and $35.00 per month to defendant. Order for future support is suspended until arrearage is paid up at the rate of $10.00 per month from trustee deed. $50.00 attorney's fees payable within 24 hours."

Thereafter, and on or about the 1st day of July, 1929, the trial court signed a written order in relation to the impounding of said note and mortgage, the collection of the installments to be paid thereon, which said order is in the words and figures following, to wit (so far as material here): "The court finds that the defendant, Edgar Cruse, also known as Edward P. Cruse, is in arrears in the sum of $989.50, up to the 31st day of May, 1929, which sum is the amount due to the above named plaintiff for moneys ordered paid by said defendant to said plaintiff by the above entitled court. It is further ordered, adjudged and decreed that the note and trust deed executed by Edward S. Grubbs and Mildred T. Grubbs in favor of J. L. Murphey, as trustee, and the defendant, Edgar Cruse, also known as Edward P. Cruse, as beneficiary, which note and trust deed are dated April 23, 1929, and recorded May 4, 1929, in book 9150, page 295, official records of the county recorder's office of Los Angeles county, be impounded with the trustee of the above entitled court for the benefit of plaintiff, to secure the aforementioned sum of $989.50 to the plaintiff. It is further hereby ordered that the defendant forthwith pay to plaintiff, for her attorney's fees in making the aforesaid application herein, the sum of $50.00, in addition to the sum heretofore ordered, to wit, $989.50. Nothing herein set forth is intended to prevent or limit the plaintiff from levying an execution and selling said note and trust deed to satisfy said judgment of $989.50."

Upon the same day the attorneys for Cora Cruse filed an affidavit and obtained from the court an order for the issuance of an execution. The affidavit and order for the issuance of the execution are as follows, to wit: "Benjamin Lewis, being duly sworn, deposes and says: That he is associated with Fairfax Cosby, attorney for plaintiff herein; that upon a hearing duly had the court made an order that there is due and unpaid from the defendant to the plaintiff the sum of $989.50, no part of which has been paid. That the defendant knew of said order and was present in court when same was made. Wherefore, affiant prays that execution issue for the aforesaid sum. (Signed) Benjamin Lewis. Subscribed and sworn to before me this 1st day of July, 1929. (Seal) L. E. Lampton, County Clerk, By E. D. Doyle. 7/1/29. Let execution issue accordingly. (Signed) Elias V. Rosencranz, Judge."

Thereafter, and on the 6th day of July, 1929, said note and mortgage were sold upon execution and purchased by the defendant in this action, Cora Cruse, for the sum of $1,007.72, being the amount found due the said Cora Cruse, heretofore stated, and the costs and expenses of making sale.

Prior to the making of the written order dated July 1, 1929, the plaintiff in this action, the defendant in the action referred to as numbered "B–26529," had given notice of a motion to dismiss said action for want of prosecution, which motion was heard on the 8th day of July, 1929, and the action theretofore begun by Cora Cruse against the said Edward Cruse was dismissed for want of prosecution. Thereafter, the plaintiff in this action sought, by motion, to have vacated the order made by the trial court on the 1st day of July, 1929, and also to vacate and set aside the order of dismissal made and entered in said action on the 8th day of July, 1929. Upon the application of the attorneys for Cora Cruse, any action upon these motions was prohibited by an injunction obtained from the District Court of Appeal. See Cruse v. Superior Court, 102 Cal. App. 290, 283 P. 73.

Appellant herein then began this action to have the written order signed and filed by the judge of the trial court, on the 1st day of July, 1929, in the action numbered "B–26529," vacated and set aside. In this action the complaint sets forth in full all of the proceedings taken and had in the original action, sets forth the orders to which we have referred, and among other things alleges that after the entry of the order of June 19, 1929, providing for the impounding of the note and trust deed in the manner and form set forth in the order, that the attorneys for the said Cora Cruse and the said Cora Cruse conspired and concocted a scheme to obtain, and by trick and device practiced upon the trial court in said action procured, the signature of the judge of the trial court to the order dated July 1, 1929, purporting to be made in open court, which was in truth and in fact made in chambers, to be signed by said judge of said trial court, containing different provisions from the order originally made relating to the impounding of said note and trust deed, and also containing the following paragraph which did not appear in the original order, to wit: "Nothing herein set forth is intended to prevent or limit the plaintiff from levying an execution and selling said note and trust deed to satisfy said judgment of $989.50"; and thereupon to sign an order for the issuance of an execution as hereinbefore set forth.

It is further alleged in the complaint that no notice was ever given to the plaintiff in this action, the defendant in action numbered "B-26529," nor to his attorneys, of the application being made for the written order just referred to; that while it is recited that the matter came on for hearing on June 18, 1929, and was continued to June 19, 1929, at which time the said Edward P. Cruse and his attorneys were in court, the order then made by the trial court was as hereinbefore stated, and that, at the time the second order was made and the application made therefor, neither the said Edward P. Cruse nor any of his counsel were present, nor was any notice given of the application of the signing of said written order, and, further, that the same was done secretly and for the purpose of defrauding the plaintiff in this action.

The complaint in the action before us, after setting forth further proceedings not necessary to be recited herein, contains the following paragraph as to damages, to wit: "That plaintiff has been injured and has suffered damage by the acts of the said defendants Cruse, Cosby and Lewis and Holland in the sum of not less than five thousand dollars ($5,000.00), in addition to the value of the said note and trust deed; that said acts have impaired his health, and caused him great pain and distress of body and mind, and have prevented him from receiving the benefits of his said property, and have prevented him from obtaining food and clothing for his daily needs; that said acts have necessarily required and compelled plaintiff to employ attorneys and counsel to advise him in the premises, and to represent him in court, and have caused him to pay and incur costs and other expenses, in order to protect his said property and to save his rights therein; and that his said expenses, costs, and the deprivation of his rights are of a continuing nature and character, and that his said injuries will continue to increase until the said controversy with the said defendants shall be terminated in the courts of this State."

To this complaint the defendants interposed both a general and special demurrer. The general demurrer alleges that the facts set forth in the complaint are not sufficient to constitute a cause of action. The special grounds of demurrer are as follows: "That the complaint is uncertain, in that it cannot be ascertained therefrom, and particularly from paragraph XLVIII thereof, how or in what manner the plaintiff suffered damages in the sum of $5,000, and how or in what manner the parties Cruse, Cosby and Lewis committed any acts, and if so, what acts, causing said damage." This demurrer was sustained and leave given to the plaintiff to amend. The plaintiff declining to amend, judgment went for the defendants.

By reason of the fact that the special demurrer appears to be well founded, it is unnecessary for us to pass upon the question as to whether the complaint is good as against the general demurrer. The complaint does not show in what manner, or how the plaintiff has been damaged in a sum not less than $5,000, in addition to the value of said note and trust deed, nor how the acts have impaired the health of the plaintiff, or to what extent he has been damaged in his health, or how the plaintiff has been deprived of food and clothing, or what costs and expenses he has incurred, or how the injuries as to his health, or distress or pain, etc., will continue to increase until the controversy between the plaintiffs and defendants shall have been terminated by the courts of this state. There is nothing in the complaint preceding this paragraph upon which to base such allegations of damage, and the paragraph itself does not specify how the acts of the defendants, or what acts of the defendants, have caused such damage. That the complaint might have been made good as against this ground of demurrer is beside the question. Appellant was allowed time in which to amend and declined so to do.

Concluding that the special ground of demurrer is good, it necessarily follows that the judgment of the trial court must be affirmed. And it is so ordered.

We concur: PRESTON, P. J.; R. L. THOMPSON, J.

PRETZER v. PRETZER et al.*

Civ. 762.

District Court of Appeal, Fourth District, California.

March 25, 1932.

Rehearing Denied April 21, 1932. Hearing Granted by Supreme Court May 19, 1932.

1. Appeal and error ⚷1010(1).

Trial court's findings supported by competent evidence are conclusive in appellate court.

2. Husband and wife ⚷264.

In wife's action to quiet title and cancel deed from husband to father, evidence supported finding that property was community property.

3. Appeal and error ⚷931(1).

Appellate court must resolve reasonable inferences to be drawn from evidence in support of judgment.

⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 12 P.2d 429.

4. Appeal and error ⚷880(3).

Where court held deed from husband to father void so that father had no interest in property, he could not complain on appeal that judgment gave wife more than she was entitled to.

5. Limitation of actions ⚷182(5).

Where statute of limitations was not raised by pleadings, defense was waived (Civ. Code, § 172a).

6. Divorce ⚷255.

Error in determining division of property in interlocutory divorce decree could be directly attacked only on motion for new trial, appeal, or under provisions of statute (Code Civ. Proc. § 473).

7. Divorce ⚷255.

Interlocutory divorce decree fixing property rights and decreeing present division of community property which becomes final is final judgment which cannot be collaterally attacked, and is res judicata on questions decided.

8. Divorce ⚷165(4).

Interlocutory divorce decree must be attacked within time prescribed by statute (Civ. Code, § 131; Code Civ. Proc. § 473).

9. Divorce ⚷255.

Where divorce decree decreed that property was community property and disposed of it between parties, judgment in wife's action to quiet title against husband and grantee *held* erroneous in quieting wife's title to all of property.

Appeal from Superior Court, Fresno County; Stanley Murray, Judge.

Action by Margaret Pretzer against Heinrich Pretzer and another. From a judgment for plaintiff, defendants appeal.

Affirmed in part and in part reversed, with directions.

Irvine P. Aten, of Fresno, for appellants.

B. M. Benson, of Fresno, for respondent.

MARKS, J.

This is an action to quiet title to real property and cancel a deed. It was instituted by Margaret Pretzer against Heinrich Pretzer, her husband, and Peter Pretzer, her father-in-law. The deed was executed on July 15, 1926, by Heinrich Pretzer to Peter Pretzer, and conveyed the home of Margaret and Heinrich Pretzer. It was recorded on August 25, 1926. It is admitted by the pleadings that Heinrich Pretzer refused to join with his wife as a plaintiff in the action, and that he was made defendant for that reason.

Heinrich Pretzer and Margaret Pretzer were married on June 1, 1921, and separated on December 4, 1928. It is alleged in appellants' answer that on April 11, 1922, C. R. Puckhaber and W. O. Miles conveyed the real property in question to Heinrich Pretzer, and that a dwelling house was built thereon in April, 1923. Respondent testified that the property and improvements were fully paid for during the following December.

In January, 1929, respondent instituted an action against Heinrich Pretzer for divorce, the custody of Irene Pretzer, the minor daughter of the parties, then of the age of five years, support for herself and the minor, a division of the property, consisting of the real estate in question here and some personal property, all of which was alleged to be community property of the parties. After a trial of the action the court found in favor of the plaintiff, granted her an interlocutory decree of divorce, gave her the custody of the minor child, with $25 per month for the support of the child, decreed that the property was the community property of the parties, and disposed of it between them. As to the real property involved here, the decree contained the following provisions: "It is further ordered and decreed that plaintiff and defendant each be, and they hereby are, awarded an undivided one-half interest in and to the following real property, situated in the county of Fresno, State of California, to-wit: Lots twenty-five (25) and twenty-six (26) in block three (3) of Dales Addition, according to map or plat thereof on file in the office of the county recorder of Fresno county, California; and each of said parties is hereby decreed to be the owner of an undivided one-half interest in said property and it is further ordered that the half interest of the defendant in and to said property be, and the same hereby is, impressed with a lien for the payment of the aforesaid sum of $25 per month by the defendant to the plaintiff for the care and support of the minor child, Irene Pretzer, and the obligation of the defendant to pay said sums to the plaintiff is hereby decreed to be a lien upon the interest of the defendant in the above described real property." The interlocutory decree was rendered on June 12, 1929, and no motion for new trial was made and no appeal was taken therefrom.

The instant case was filed on October 19, 1929, and tried on February 20, 1930. In the first cause of action, which is to quiet title, it is alleged that Margaret Pretzer and Heinrich Pretzer are the owners of the property in question, and it is sought to quiet their title against the estate or interest in the property asserted by Peter Pretzer. The second cause of action alleged that the property was acquired by Margaret and Heinrich Pretzer during coverture as community property;

that the deed from Heinrich Pretzer to Peter Pretzer was made without the knowledge or consent of Margaret Pretzer and without her joining therein, and without any consideration therefor and for the purpose of defrauding her out of her interest in the property.

Appellants filed a joint answer, in which they denied that either Margaret or Heinrich Pretzer owned or had any interest in the real property; that it was originally the separate property of Heinrich Pretzer, having been acquired by him during coverture by means of a gift of money from Peter Pretzer; that Peter Pretzer owned the property in fee free from any claim of either of the other parties by reason of the deed to him from Heinrich; that the deed conveyed the separate property of Heinrich to Peter and vested title in him; denied all allegations of fraud. The answer neither denied that there was no consideration paid by Peter Pretzer nor alleged any consideration for the deed and conveyance of the property. It should be observed that this answer practically amounted to a disclaimer of any interest in the property by Heinrich. Of course, Peter Pretzer knew his son was married at the time of the execution of the deed of July 15, 1926.

The trial court found that Heinrich Pretzer claimed no interest in the property; that it was originally acquired by Margaret and Heinrich Pretzer by their joint earnings during coverture, and not by means of a gift from Peter Pretzer to his son; that the deed from Heinrich Pretzer to his father was without consideration, fraudulent, and therefore void. The judgment canceled the deed of July 15, 1926, from Heinrich to Peter Pretzer and quieted title to the property in respondent against both appellants.

[1, 2] Appellants urge that the finding that the property in question was the community property of Margaret and Heinrich Pretzer, and was not purchased by Heinrich with money given him by his father, and therefore his separate property, is not supported by the evidence and is contrary to the evidence. Appellants presented evidence which, if accepted by the trial court as true, would have clearly supported a finding that the gift was made and the property acquired by Heinrich with the money so given him. On the other hand, respondent testified positively to the source and amount of the earnings of both herself and her husband and that these earnings were used to purchase the vacant lot in question and build thereon the dwelling, and that no other money was used in this enterprise. This created a conflict in the evidence which the trial judge resolved in favor of respondent. He is made the judge of the weight and sufficiency of the evidence and the credibility of the witnesses, and his findings are final and conclusive in this court when there is material and competent evidence supporting them, even though we might feel that the greater weight of the evidence should lead to a different conclusion. This finding is therefore supported by the evidence. Witherow v. United American Ins. Co., 101 Cal. App. 334, 281 P. 668.

[3] The finding that the deed from Heinrich Pretzer to his father was fraudulently made for the purpose of defrauding respondent out of her community interest in the property is supported by reasonable inferences to be drawn from the evidence, which we must resolve in support of the judgment. Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 213 P. 42, 26 A. L. R. 123.

[4] Appellants next complain that the judgment went far beyond the allegations of the complaint and the relief sought by respondent when the trial court quieted her title to the entire property and all the estate therein, thereby disregarding her allegations that the property belonged to her and her husband. As each appellant is affected somewhat differently by the results of this argument, we will first consider it in connection with the defense of Peter Pretzer.

Whether or not Peter Pretzer had any interest in the property depended solely upon the force and effect of the deed from his son attempting to convey the property to him. The trial court held this deed void, and we have concluded that this portion of the judgment is supported by the findings and the evidence. It follows, therefore, that as Peter Pretzer has no interest in the property, title to which was quieted in the respondent, he cannot complain of, nor is he injured by, a judgment giving her more than that to which she might be entitled. Tripp v. Duane, 74 Cal. 85, 15 P. 439; Gottstein v. Kelly, 206 Cal. 742, 276 P. 347; Weyse v. Biedebach, 86 Cal. App. 736, 261 P. 1092.

[5] Section 172a of the Civil Code, as in force at the time of the acquisition of the real property in question here, provided in part as follows: "Provided, however, that the sole lease, contract, mortgage or deed of the husband, holding the record title to community real property, to a lessee, purchaser or encumbrancer, in good faith without knowledge of the marriage relation, shall be presumed to be valid; but no action to avoid such instrument shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate." If we assume, but not hold, for the purpose of this decision that the last clause of the section just quoted established a general limitation of one year within which all suits must be brought by the wife to avoid a conveyance of community property by the husband alone, we conclude that in the instant case, as the question was not raised by the pleadings, the defense must be held to be waived by appellants. The rule is thus clear-

ly stated in 16 Cal. Jur. 603: "Since, as between persons acting in their own right, the statute of limitations is a personal privilege, to be asserted or waived at the option of the one entitled to assert it, the statute must be affirmatively pleaded, either by demurrer or by answer, or its benefits are waived. This is true whether the action is one upon a demand which is governed by the general statute of limitations or one which is governed by a statute relating to a particular proceeding."

[6-8] In considering the correctness of the decree of the court below in quieting the respondent's title to all of the property in question here against Heinrich Pretzer, we are immediately confronted with the provisions of the interlocutory decree of divorce in the divorce action of Margaret Pretzer v. Heinrich Pretzer, from which we have quoted the pertinent paragraph. It clearly appears that this decree, instead of determining what division of the property should be made, leaving to the final decree the actual adjudication of such division, made a definite, final, and positive present division of the community property of the parties, which was permitted to become final. That this was error is established by the cases of Remley v. Remley, 49 Cal. App. 489, 193 P. 604, and Strupelle v. Strupelle, 59 Cal. App. 526, 211 P. 248. That it was error that could be directly attacked only on motion for new trial, appeal, or under the provisions of section 473 of the Code of Civil Procedure is also well established in the cases of Abbott v. Superior Court, 69 Cal. App. 660, 232 P. 154, 156; Sullivan v. Superior Court, 72 Cal. App. 531, 237 P. 782, and Lopes v. Bruns, 92 Cal. App. 691, 268 P. 928. These cases establish the rule, which must be controlling here, that where an interlocutory decree of divorce, which becomes final, amounts to a present judgment determining and fixing the property rights of the parties and decreeing a present division of their community property, it is a final judgment in those respects which cannot be collaterally attacked, and is res adjudicata between the parties on the questions decided. In the Abbott Case it was said: "As to all matters contained in the interlocutory decree, every attack can be made that can be made on a final decree in any other kind of a suit. Civ. Code, § 131. But each and every such attack must be made within the time prescribed by the statute. Suttman v. Superior Court, 174 Cal. 243, 162 P. 1032. Nevertheless, as a decree adjudging the status of the parties, the interlocutory decree is not operative because the statute is so written. Civ. Code, § 132; Estate of Dargie, 162 Cal. 51, 53, 121 P. 320. But when each and every period has expired within which an attack could have been made by motion or by appeal, then and in that event the so-called interlocutory decree, in so far as it adjudges the property rights of the parties, becomes a conclusive decree."

[9] From what we have said, it follows that the portion of the judgment canceling the deed dated July 15, 1926, and recorded August 20, 1926, in volume 702, at page 353, official records of Fresno county, whereby Heinrich Pretzer attempted to convey the real estate hereinbefore described to Peter Pretzer, should be affirmed, and that portion of the judgment quieting respondent's title to all of said property should be reversed, with directions to the trial court to modify its findings and judgment in accordance with the views here expressed and the portion of the interlocutory decree of divorce in the case of Margaret Pretzer v. Heinrich Pretzer hereinbefore quoted, and enter judgment in accordance therewith. Each party should pay his own costs on this appeal. It is so ordered.

We concur: BARNARD, P. J.; THOMSON, Justice pro tem.

CONSOLIDATED RESERVOIR & POWER COMPANY (a Corporation), Plaintiff and Appellant, v. William M. BOWEN, Executor of the Estate of James G. Scarborough, Deceased; John E. Coffin et al., Defendants and Respondents.*

Civ. 4489.

District Court of Appeal, Third District, California.

March 11, 1932.

Rehearing Denied April 9, 1932. Hearing Granted by Supreme Court May 9, 1932.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

James Farraher, of Los Angeles, for appellant.

Scarborough & Bowen, of Los Angeles, for respondents.

Mr. Justice pro tem. MILLER delivered the opinion of the court.

A rehearing was granted in this case to the end that we might further consider the question as to whether the trial court abused its discretion in making the order appealed from. However, as the case can be more conveniently dealt with as a whole, we will disregard our former opinion, reported in 7 P. (2d) 756, and treat the case anew.

This is an appeal from an order sustaining two demurrers to plaintiff's complaint without leave to amend.

The facts involved and the complaint and demurrers are, in all essential respects, sim-

*For subsequent opinion see 16 P.2d 271.

ilar to those involved in the case of Consolidated Reservoir & Power Company v. Robert R. Scarborough et al. (Cal. App.) 9 P. (2d) 304, this day decided on a rehearing, except that there is one less defendant and one less demurrer, and for the same reasons set forth in that case it is ordered that the judgment appealed from be and it is affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

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122 Cal.App. 130

PEOPLE v. CHAVEZ et al.

Cr. 2156.

District Court of Appeal, Second District, Division 1, California.

March 24, 1932.

Rehearing Denied April 27, 1932.

Criminal law ⚷743.

When evidence tending to establish defendant's guilt is legally sufficient, credibility of defendant's evidence is solely for jury or trial court.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Manuel Chavez and Jesus Espinosa were convicted of robbery, and they appeal.

Affirmed.

Theodore Gottsdanker, of Los Angeles, for appellants.

U. S. Webb, Atty Gen., and John D. Richer, Deputy Atty. Gen., for the People.

HOUSER, J.

Defendants appeal from judgments of conviction of the crime of robbery, as well as from an order by which their motion for a new trial was denied.

Considered together, the effect of the two points which are urged by appellants as a sufficient reason for a reversal of the judgments is that the evidence introduced on the trial of the action was insufficient to support the judgments, and that the "alibi" of defendants was so strong that necessarily it should have created a reasonable doubt as to their guilt.

Without access by this court to anything more than appears in the record of the proceedings in the lower court, it might not seem to us that the evidence of the guilt of defendants was of that satisfactory character which is greatly to be desired in a criminal action. It rested solely on an identification by the victim of the robbery of the defendants as the persons who committed the crime in question. This identification was somewhat weakened by the cross-examination. Nevertheless, taken as a whole, it was sufficient to support the judgments. On the other hand, the evidence by which the "alibi" of defendants was sought to be established appeared to be very strong. Notwithstanding such situation, as in effect is decided by numerous authorities of this state, and recently restated in the case of People v. Yeoman, 1 P.(2d) 993, this court is powerless to interfere. When it appears that the evidence which tends to establish the guilt of a defendant is legally sufficient, the credibility to be attached to evidence introduced for the purpose of proving the innocence of the defendant, or of raising a reasonable doubt as to his guilt, is a question which for its solution rests solely with the jury, or (as in the instant case) with the trial court.

It follows that the judgments, as well as the order denying the motion for a new trial, should be affirmed. It is so ordered.

We concur: CONREY, P. J.; YORK, J.

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122 Cal.App. 186

MARGOLIS v. LOS ANGELES-FIRST NAT. TRUST & SAVINGS BANK.

Civ. 4540.

District Court of Appeal, Third District, California.

March 28, 1932.

Rehearing Denied April 27, 1932. Hearing Denied by Supreme Court May 26, 1932.

1. **Brokers** ⚷75.

Where broker's contract provided for payment of commissions from purchasers' installment payments, and purchasers defaulted after down payment, compelling vendor to bid in property for balance due at trust deed foreclosure sale, such repurchase *held* not to constitute payment of balance due on contract; hence broker was not entitled to balance of commissions.

> Under contract which provided that broker's commission was payable by paying broker 50 per cent. of each installment payment on principal due from each purchaser until full commission had been paid, unpaid portion of commission was clearly dependent on future payment of installments, and it could not be said that parties intended to consider foreclosure of trust deed as equivalent to payment of cash installments by purchasers. Since deferred installments were not paid, and since, because of default on part of pur-

chasers, vendor was compelled to repossess property, it required application of unjust fiction to assume that necessary purchase of lots at foreclosure sale by vendor constituted payment of installments which would make vendor liable for balance of commission.

2. Contracts ⚷235.

Where contract terms reasonably require discharge of obligation by payment of money, it may not be satisfied otherwise except by mutual consent.

3. Contracts ⚷235.

When reasonable construction of contract authorizes it to be done, obligation may be satisfied by means other than payment of money.

Appeal from Superior Court, Los Angeles County; W. A. Anderson, Judge.

Action by Paul Margolis against the Los Angeles-First National Trust & Savings Bank. From a judgment in favor of defendant, plaintiff appeals.

Affirmed.

Paul Loewenthal, of Los Angeles (William Berger, of Los Angeles, of counsel), for appellant.

O'Melveny, Tuller & Myers and Pierce Works, all of Los Angeles, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from a judgment against the plaintiff in an action upon an assigned contract for the payment of broker's commissions for the sale of real estate.

The defendant owned 312 lots in tracts 5320 and 5344 of Los Angeles. O. B. Smith was a duly licensed real estate agent. He was employed to sell these lots at specified prices. The contract provides for the payment of broker's commissions in the following language: "Said Smith shall receive as his sole commission that portion of the price obtained for each lot which is in excess of the list price, * * * (in the following amounts and manner): Fifty per cent. (50%) of the down payment received from each purchaser of lots, and fifty per cent. (50%) of each installment payment on the principal due from each purchaser, until the full commission of said Smith has been paid." The contract authorizes the payment of purchase price of the lots as follows: "One-fourth (¼) of the total price payable in cash as the down payment, and * * * the balance due under each of such sales shall be secured by a trust deed under which the principal shall be payable in equal quarterly, semi-annual or annual installments, all to mature within three years from the date of sale."

Many of these lots were sold by the broker and conveyed to the purchasers pursuant to contract. A portion of the purchase price was paid in each instance. The unpaid portion was secured by trust deeds. Upon all cash payments for lots, the agent was promptly paid his full proportion of commissions earned as provided by the contract. The balance of his commissions was to be paid from "each installment payment due from each purchaser." This balance of the commissions was conditioned and dependent upon the future payment of the remaining portion of the installments of purchase price of the lots by the purchasers thereof. These purchasers defaulted in all payments which were secured by the trust deeds. The bank was required to foreclose these trust deeds and repossess the land. At the trustee's sale of the lots no bidders appeared except the broker and the defendant. The broker bid "upon each of the lots as the same was offered for sale, an amount equal to twice the amount of the balance due appellant as commissions." It is apparent these were not bona fide bids. The bank was compelled to bid in the property. It did so for the amounts of the balance of the obligations which remained unpaid. The defendant thus found itself repossessed of the lots which it had employed the broker to sell. The balance of the broker's claim for commissions was assigned to the plaintiff. This suit was then commenced. The trial court found that the broker had been fully paid for all commissions which he had earned pursuant to the terms of the contract, and rendered judgment accordingly.

[1] The appellant contends that the purchase of the lots by the respondent at the trustee's sale constituted a payment of the balance due on the contracts of sale which entitles the broker to the remainder of his commissions.

We are satisfied from a construction of the language of the contract for broker's commissions that it was the intention of the parties that the broker was to receive one-half of that portion of the selling price in excess of the listed prices. This proportion of the commissions was due upon payment of the first cash installment. The contract provides that this first cash payment should equal one-fourth of the total selling price. There is no controversy over this part of the contract. The broker received all of this portion of his commissions. The contract then provides that the broker shall receive the remaining half of his commissions from "each installment payment due from each purchaser." No installment payments were subsequently made by any purchaser. Each of them defaulted. The language of the contract seems to preclude the theory that the parties intended to consider the foreclosure of a trust deed as equivalent to the payment of cash installments by the purchasers. It seems quite evident from the contract that the defendant merely agreed to pay broker's commissions dependent upon the exchange of its lots for cash. The construction of the contract above suggested seems reasonable and just. The broker obtained one-half of his commissions from the "down payment received." The balance was to be paid only from the cash installments which were to be subsequently made. The contract specifically recites that this balance was to be paid from "each installment payment." Clearly the unpaid portion of these commissions was dependent upon the future payment of installments. None of these installments was paid. It seems unreasonable and unjust to construe the necessary repossession of the lots by the defendant upon foreclosure of the trust deeds as the payment of installments by the purchasers so as to entitle the broker to the balance of his commissions. Without doubt, that construction of the language is contrary to the evident intention of the parties. Under such construction, the defendant would be compelled to pay the entire commissions based upon full payment by the purchasers in cash, in spite of the fact that the bank still finds itself with the lots on its hands. If the lots had been sold to independent purchasers on foreclosure of the trust deeds, and the bank had received the balance of the purchase price in cash, then it might reasonably be said the deferred installments were paid, even though the payment was accomplished by means of foreclosure. But, since they were not paid, and, because of the default on the part of the purchasers, the defendant was compelled to repossess the property, it requires the application of an unjust fiction to assume that the necessary purchase of the lots at the foreclosure sale by the original owner constituted a payment of installments which would make the defendant liable for the balance of the commissions. This construction does violence to the language of the contract and to the evident intention of the parties.

[2, 3] Where the terms of a contract reasonably require the discharge of an obligation by the "payment of money," it may not be satisfied otherwise, except by consent of the parties. Borland v. Nevada Bank of San Francisco, 99 Cal. 89, 33 P. 737, 37 Am. St. Rep. 32; 20 Cal. Jur. 909, § 8. Upon the contrary it is true that, when a reasonable construction of the contract authorizes it to be done, an obligation may be satisfied by means other than the payment of money. In the present case, the language of the contract will not justify a construction which will imply the fulfillment of the "payment of installments," by the necessary repossessing of the land on the foreclosure of trust deeds.

One case from another jurisdiction, upon which the appellant relies, appears to support his contention that the repossessing of land by the original owner upon foreclosure of a trust deed for the balance of the purchase price is the equivalent of "payments" which entitles a broker to his commissions "to be paid out of the purchase money." This is the case of Crane v. Eddy, 191 Ill. 645, 61 N. E. 431, 85 Am. St. Rep. 284. In that case it does not appear as it does in the present case that the broker had been partially paid for his services out of down payments made by the purchaser. The court there says: "If * * * any other person entitled, had redeemed from the sale, clearly Crane would have been liable to Eddy for the balance unpaid upon this instrument. We fail to see why the fact that Crane chose to bid for the farm the full amount of the purchase money remaining unpaid and the costs, and that no one raised his bid, and no one redeemed from the sale, should produce a different result as to Crane's liability upon the instrument sued upon. Jernberg's notes and the purchase-money debt they evidenced are fully paid, satisfied, and discharged by the decree and sale to Crane. They have been satisfied in one of the ways Crane and Jernberg contracted they might be discharged."

We are not in accord with the foregoing conclusions of that court as applied to the present case. We do see quite a distinction between that result and the final disposition of the land contracted to be sold for cash. In the first place, under the facts of this case, it may not be said the defendant bank "chose to bid" for the property. Upon the contrary, it appears the bank was compelled to do so to protect its interests. There were no other bona fide bidders. Moreover, there is a wide distinction between selling land for cash, and finding, upon the default of the purchaser thereof, that the seller is compelled to retake the property instead of securing the cash for which he contracted to sell it. The result is entirely different from a foreclosure sale to an independent bidder who pays cash therefor. In one case the seller has his money. In the other case he still holds the land he may have been anxious to get rid of.

The case of Cannon v. Selmser, 85 Cal. App. 783, 260 P. 332, furnishes authority in support of the judgment in the present case. The facts in that case show that the defendant agreed to pay Cannon a broker's commission for the sale of a ranch. The balance of his commission was to be paid when the purchaser "makes his first payment of $2,000." As part payment the purchaser did convey to the defendant his five-acre lemon orchard at the agreed valuation of $6,000. A trust deed was executed to the defendant to secure the balance of the purchase price, including the $2,000 payment above mentioned. This first payment of $2,000 was not made. The purchaser defaulted. The trust deed was foreclosed and the defendant repossessed his ranch. In affirming the judgment, the appellate court said: "Foreclosure cannot be held the equivalent of payment of the first $2,000 installment, with accrued interest, which was the particular contingency upon which the parties contracted the commission should be earned."

This language is pertinent to the situation in the present case.

The judgment is affirmed.

We concur: PRESTON, P. J.; PLUMMER, J.

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122 Cal.App. 125

GRIFFITH v. LIST.

Civ. 8247.

District Court of Appeal, First District, Division 2, California.

March 24, 1932.

Rehearing Denied April 23, 1932. Hearing Denied by Supreme Court May 23, 1932.

1. **Trusts** 🔑372(3).

In action to impress constructive trust on realty, facts *held* to show plaintiff's assignor lost his lien on realty and lien on proceeds of sale in foreclosure proceeding (Code Civ. Proc. § 674).

> Facts disclosed that debtor conveyed realty by deed absolute in form; that property was then subject to mortgage in favor of title company, and to deed of trust; that debtor filed action to have deed absolute in form declared a mortgage; that plaintiff's assignor was joined as party defendant; that all defendants except assignor joined in cross-complaint seeking to foreclose deed as mortgage, and judgment was so entered; that subsequently judgment was entered in favor of title company foreclosing its mortgage, and under judgment property was sold; that plaintiff's assignor was joined as defendant in foreclosure proceeding, his default entered and judgment entered against him foreclosing his general right to redeem; that, after title company's judgment had been satisfied, balance of purchase price was deposited in court; that defendant purchased judgment creditors' rights in first suit, and on order of court drew sum so deposited, from which defendant satisfied deed of trust, and with balance and own money paid holders of judgments against debtor, and then redeemed property from foreclosure sale under title company's judgment; that judgment was entered in favor of assignor, but he did not offer to join with defendant in redeeming property; and that assignor failed to reduce his claim to judgment until after sum deposited was disposed of.

2. **Judgment** 🔑217.

Order of court made after final judgment in full compliance with judgment is final.

3. **Trusts** 🔑365(5).

In action to impress constructive trust on real property, facts *held* to show plaintiff's assignor was guilty of laches in asserting lien on property (Civ. Code, § 3527).

Appeals from Superior Court, Los Angeles County; George W. McDill, Judge.

Action by Fred D. Griffith against Ruth E. List. From the judgment, both parties appeal.

Reversed, with direction.

John W. Carrigan, of Los Angeles, for appellant Ruth E. List.

E. A. Miller, Williams & Parks, and Benj. S. Parks, all of Los Angeles, for plaintiff and respondent Fred D. Griffith.

NOURSE, P. J.

Plaintiff sued to impress a trust upon real property. The cause was tried upon an agreed statement of facts, and judgment was entered for plaintiff decreeing that he had a 47.4 per cent. interest in the real property and in the money deposited in court under a judgment in a prior action, and that he should have an accounting from defendant. A motion for a new trial was made by defendant and denied, but the trial court modified the judgment and awarded plaintiff $17,986.20, and decreed that he had no interest in the real property, and was not entitled to an accounting. Both parties have appealed from this judgment and, to avoid confusion, we will hereafter refer to them as plaintiff and defendant.

In this opinion, we will consider the points raised on defendant's appeal only, as our conclusion on that appeal is that the judgment must be reversed; hence plaintiff's criticisms of the modifications of the judgment are of no moment.

On September 14, 1924, one Marcher, while indebted to a number of individuals, conveyed the real property in suit to McLaughlin and Vermille, as trustees, by deed absolute in form. The property was then subject to a mortgage in favor of Title Insurance & Trust Company for $24,000, and to a deed of trust in favor of Earnest for $8,000. The deed to McLaughlin and Vermille was given as security for payment of the claims of special creditors, and was recorded. At the same time McLaughlin and Vermille executed a declaration of trust, which was not recorded. On November 3, 1924, Marcher filed an action against these named creditors to have it declared that the deed to McLaughlin and Vermille was in fact a mortgage. In that ac-

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

tion plaintiff's assignor, one Hale, was joined as a party defendant. In that action all the defendants except Hale joined in a cross-complaint seeking to foreclose said deed as a mortgage. Judgment was entered in favor of these cross-complainants on July 3, 1925, for $53,469.65. On July 22, 1926, judgment was entered in favor of the Title Insurance & Trust Company foreclosing its mortgage, and, under this judgment, the property was sold to one Pinney on August 30, 1926, for the sum of $75,000. After the title company's judgment had been satisfied, the balance of the purchase price, $45,484.97, was deposited in court. The defendant purchased all the rights of the judgment creditors in the suit first mentioned, and, on September 14, 1926, upon an order of court made for that purpose, drew the sum so deposited. From this fund she paid the sum of $7,539.40, in satisfaction of the deed of trust held by Earnest, and used the balance, with $16,000 of her own money, to pay the holders of the judgments against Marcher. On November 10, 1926, defendant redeemed the property from the foreclosure sale under the title company's judgment, paying therefor $82,053.

The acts of plaintiff's assignor become important when we bear in mind the dates when they occurred. He filed a demurrer in the Marcher suit on December 5, 1924; he filed his answer on September 26, 1926, more than one year after his codefendants had obtained judgment on their cross-complaint. This answer also came after the property had been sold under the title company's judgment, after that judgment had been fully satisfied, and after the excess had been paid to defendant as assignee of the McLaughlin judgments. On October 14, 1926, judgment was entered in favor of plaintiff's assignor to run concurrently with the McLaughlin judgments, but he did not attempt to redeem, and did not offer to join with defendant in redeeming the property within the period when the property could be redeemed. In this connection, however, these facts must be borne in mind: Plaintiff's assignor was joined as a defendant in the foreclosure proceeding brought by the title company, his default was entered, and judgment was entered against him foreclosing his general right to redeem.

Upon these facts the defendant argues that plaintiff's assignor, by his default, lost any lien he may have had on the property, that he had no lien upon the money deposited in court, and that, if he had any equitable claim to this fund, he lost it by his failure to assert it. We are in accord with defendant upon each of these propositions, and for those reasons the judgment must be reversed.

[1] If plaintiff's assignor had any lien on the real property by reason of the deed which was held to be a mortgage, he lost that lien when he defaulted in the foreclosure suit and judgment of foreclosure was entered against him. From this judgment no appeal was taken—and it has become a final adjudication adverse to plaintiff's assignor. The property having been sold under the foreclosure decree, he would, of course, be entitled to assert a claim against the excess proceeds of the sale. But he had no lien upon this fund until he reduced his claim to judgment which he failed to do until after the fund was disposed of. The lien of the McLaughlin judgments, being prior in point of time to the decree of foreclosure, attached immediately to this excess upon its payment into court. There were then two valid liens against this fund—that of the McLaughlin judgments because of section 674, Code of Civil Procedure, and that of the Earnest mortgage which was transferred from the property to the excess by reason of the sale under the title company's mortgage.

[2] If plaintiff's assignor claimed a lien upon the real property or upon the excess, he should have asserted that claim while the property was in the debtor, or in the custody of the court as the debtor's representative. But the real property having been disposed of by sale, no lien could be asserted there, and, the money having left the custody of the court, no lien could be asserted there. This is so because the McLaughlin judgments were valid and enforceable liens upon that fund which were closed in due course and the money paid under order of court at a time when there were no other existing liens against the fund. This order of court was an order made after final judgment in full compliance with the terms of the judgment, and has become final. See, generally, Sullivan v. Superior Court, 185 Cal. 133, 195 P. 1061; Standard Livestock Co. v. Bank of California, 67 Cal. App. 381, 393, 394, 227 P. 962.

[3] But the appeal is really controlled by the well-settled principle found in section 3527, Civil Code: "The law helps the vigilant, before those who sleep on their rights." The laches of plaintiff's assignor cannot be denied, in view of the evident lack of diligence appearing in the agreed statement of facts. When plaintiff's assignor was summoned to prove his claim and assert his interest, he delayed twenty-three months before making answer. In the meantime the other parties answered, and the cause went to judgment. When he was summoned in the foreclosure suit, he failed to answer, and suffered his default to be entered. The other parties appeared in that suit, and protected their interests under their judgment liens. He waited until after the property was sold in due course and until after the money deposited in court was again paid out before answering in the first suit. He failed to establish any claim against either the property or the proceeds of the sale until both had been disposed of. He had notice of all these transactions and of the conflicting claim of his

associates. By his failure to act he led them to believe that he had no claim to enforce against the fund. He led the court to believe the same when the order for the payment of the excess was made. And he led this defendant to so believe when she purchased the McLaughlin judgments and, later, when she paid out her own funds to redeem the property. Thus, though he obtained judgment on October 14, 1926, he waited until November 4, 1927, before apprizing defendant of his claim or offering to contribute to the redemption which had already been effected. Hence the laches of plaintiff's assignor is not that of mere delay, but delay which worked to the disadvantage of the defendant. These elements appear affirmatively in the agreed statement of facts. This subject is fully covered in Akley v. Bassett, 68 Cal. App. 270, 228 P. 1057.

The case is a simple action to impress a constructive trust upon real property. Every element essential to that cause of action is lacking. The money which plaintiff claims an interest in was used in the purchase of the McLaughlin judgments—not in the purchase or redemption of the real property. There is no evidence of fraud, concealment, or breach of confidential relation.

Because of the agreed statement of facts, findings are not necessary.

The judgment is reversed, with direction to enter judgment for defendant.

We concur: STURTEVANT, J.; SPENCE, J.

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121 Cal.App. 523

HOLLAND v. SUPERIOR COURT IN AND FOR FRESNO COUNTY et al.

Civ. 771.

District Court of Appeal, Fourth District, California.

March 10, 1932.

1. Prohibition 🔑10(1).

Writ of prohibition is only issued where inferior tribunal has acted without or in excess of its jurisdiction (Code Civ. Proc. § 1102).

2. Prohibition 🔑3(2).

Errors of law are not reviewable on petition for writ of prohibition.

3. Prohibition 🔑27.

Party seeking writ of prohibition must affirmatively establish that respondent court acted without or in excess of its jurisdiction (Code Civ. Proc. § 1102).

4. Prohibition 🔑27.

In original proceeding in appellate court for writ of prohibition, all presumptions are in favor of regularity of action taken by respondent court (Code Civ. Proc. § 1963).

5. Prohibition 🔑27.

Evidence in proceeding for writ of prohibition *held* insufficient to establish that order of respondent court modifying original findings and judgment was not signed by respondent judge.

6. Prohibition 🔑3(2).

Error, if any, of court in holding session in back room of county clerk's office, rather than in its courtroom, *held* one of law which could be reached only on direct attack on appeal, and not in prohibition proceeding (Code Civ. Proc. §§ 73, 142).

7. Judgment 🔑328.

Amended findings and judgment made on motion for rehearing need not be signed and filed within 60 days after motion was made (Code Civ. Proc. §§ 660, 662).

> This was so, notwithstanding Code Civ. Proc. § 660 provides that power of court to pass on motion for a new trial shall expire 60 days from and after service on moving party of written notice of entry of judgment, since the word "thereafter," as used in section 662, providing in part that any judgment thereafter entered shall be subject to the provisions of sections 657 and 659, refers to the time after the order, granting application or modifying findings, and judgment should be made, and, if the trial judge had 60 days within which to make such an order, it was evident that he might thereafter sign and file an amended judgment.

8. Appeal and error 🔑113(5).

Appeal lies from new or amended judgment entered after hearing on motion for new trial (Code Civ. Proc. § 963).

Original prohibition proceeding by Clarence D. Holland against the Superior Court of the State of California, in and for the County of Fresno, and the honorable T. R. Thomson, as Judge thereof.

Petition for writ of prohibition denied, and alternative writ discharged.

Conley, Conley & Conley, of Fresno, for petitioner.

Lawrence W. Young, of Fresno, for respondents.

MARKS, J.

The petitioner instituted an original proceeding in this court seeking to prohibit the respondent court and judge from taking any further proceedings in the case of Doolittle v. Schaffner et al., bearing No. 47505 in the records of the county clerk of Fresno county, alleging the respondents had no jurisdiction to enter an order hereinafter set forth. Respondents filed a general demurrer and answer to the petition, both of which have been submitted to this court after argument of counsel and evidence taken. The demurrer is overruled, and we will consider the cause upon its merits.

On January 20, 1931, Ivan H. Doolittle filed his action in the respondent court to recover damages against Orville L. Schaffner, Peter Schaffner, Tola Schaffner, and Clarence D. Holland for damages arising out of an automobile accident. The defendants filed their answers and the case was tried by the court without a jury in March, 1931. Findings were made and judgment rendered in favor of the plaintiff and against the defendants Orville L. Schaffner, Peter Schaffner, and Tola Schaffner in the sum of $5,000. The court rendered judgment in favor of Clarence D. Holland. The judgment was entered in the judgment book on the 29th day of September, 1931, and the defendant Holland gave the plaintiff notice of the entry thereof on the same day. On October 1, 1931, the plaintiff filed his notice of motion to move for new trial against defendant Holland. The motion was argued on November 27, 1931, and submitted to the trial judge and taken under advisement by him on that day. On November 28, 1931, he made an order which appears in the minutes of his court as follows:

"Fresno, Calif. Nov. 28, 1931.

"Court convened; Present: Hon. T. R. Thomson, Judge.

"Louis Manfredo, Deputy Sheriff

"E. W. Eiland, Deputy Clerk.

"47505 Ivan H. Doolittle v. Orville L. Schaffner et al.

"It is ordered that the motion of the defendants Schaffners for a new trial herein be and it is hereby denied. It is further ordered that the Findings of Fact heretofore entered are modified under the provisions of Sec. 662 of the C. C. P. as follows: That the gross negligence of defendant Orville L. Schaffner and the negligence of defendant Clarence D. Holland was the concurrent and proximate cause of the collision and of the death of Morse Doolittle, and that plaintiff suffered damages on account thereof as against all defendants in the sum of $5,000.00.

"Let the judgment heretofore entered be modified accordingly."

The record before us discloses that the foregoing order was written out in longhand either by the trial judge or the attorney for plaintiff, or perhaps in part by both; that this was done on the morning of Saturday, November 28, 1931, in the office of the county clerk in the county courthouse in Fresno county; that there was present, beside the judge and the attorney for plaintiff, the deputy clerk assigned to the department of the respondent judge; that the order when written was handed to the deputy clerk by the judge with instructions to enter the same upon the minutes of the court and file it in the office of the county clerk. The order was entered upon the minutes, but was not filed, and apparently has been lost. It is not certain whether or not the order was signed by the respondent judge.

The petitioner seeks to restrain the respondents from taking any further proceedings in accordance with the directions in the foregoing order.

[1, 2] A writ of prohibition is only issued where an inferior tribunal has acted without or in excess of its jurisdiction. Errors of law are not reviewable on a petition for a writ of prohibition. Section 1102, Code Civ. Proc.; 21 Cal. Jur. 579 to 583, and cases cited.

Two questions are presented upon which our decision in this case must turn. First, was the order signed by the respondent judge? Second, was there a session of the respondent court held in the county clerk's office on November 28, 1931, at the time the foregoing order was made?

[3, 4] In discussing these questions we must bear in mind two principles of law that are firmly established in California. The first is that we cannot presume that error was committed by a court of record and that it is incumbent on the petitioner to show affirmatively that the respondent court acted "without or in excess of its jurisdiction." Section 1102, Code Civ. Proc.; Platner v. Vincent, 194 Cal. 436, 229 P. 24; Bank of Italy v. Bettencourt (Cal. Sup.) 7 P.(2d) 174. The second is that in this court all presumptions are in favor of the regularity of the action taken by the respondent court. Section 1963, Code Civ. Proc.; Scott v. Hollywood Park Co., 176 Cal. 680, 169 P. 379; Platner v. Vincent, supra; Bank of Italy v. Bettencourt, supra.

[5] In considering the first of the two questions before us, we find there is no satisfactory evidence in the record that the order was not signed by the respondent judge. He testified as follows:

"We went into the back room of the county clerk's office and I summoned the clerk to come there, and he did come there with his minute book. I am not sure whether I completed that order on paper that I had started writing in chambers, or whether the order was worked out by Mr. Young at my dictation right then and there and signed by me, but I do know that the clerk was there and entered the order that was written out at that time in the minutes.

"Q. And entered it incorrectly in certain particulars? A. One word.

"Q. And you afterwards made an order changing it to conform to your ideas as to what the order was? A. Yes, sir.

"Q. Was that order written out in long hand? A. In hand writing.

"Q. You never directed it to be filed? A. Yes, I told the clerk to file it with the papers. * * *

"Q. You have no recollection of signing that order? A. I have not any independent recollection of whether I signed it or not. * * *

"Q. You know of course that the order can't be found? A. I am simply taking your word for it, except that the clerk can't find it. I made no investigation. * * *

"Mr. Young: Judge, just state again who was present in the clerk's office when this order there was written out by yourself or by myself? A. Mr. E. W. Eiland.

"Q. Is he your clerk? A. He is the clerk in department 4 of the Superior Court of this county. You were present, I was present, and some other people were in the room, but I did not notice particularly who they were.

"Q. After this the order was written either by yourself or by myself, and if I wrote it it was done under your direction? A. Yes, sir.

"Q. And in your presence? A. Yes, sir, then and there while sitting at the table together.

"Q. Did you read the order over? A. I did.

"Q. And you were satisfied that it contained facts that you wanted in it? A. Yes, sir.

"Q. Did you file it with Mr. Eiland? A. I handed it to him right then and there.

"Q. And you instructed him to spread it on the minutes? A. Yes, sir.

"Q. Which was done? A. Yes, with the exception of one word in which he made a mistake.

"Q. Judge, do you know whether you signed that order? A. I believe I signed it, but I have no independent recollection, my belief is based on my custom."

[6] In determining the second question, namely, of whether or not a session of the respondent court was held at the time of making the order, it should be remembered that the minutes of the court recite that there was such a session. Petitioner points out that there were no formalities used in opening the court, if it was ever opened. It is a custom in some courts of this state to have the bailiff, acting as a crier, announce the presence of the judge and declare the court in session. This is not a universal custom and we cannot conclude that the failure to observe it can have any effect upon the legality of a session of the Superior Court. As the records of the respondent court recite that a session of the court was held at the time in question, and this is impeached only by the place where the session was held, the one question left for us to consider it whether or not the court could convene in a room in the courthouse other than the courtroom in which its sessions were usually held. It is practically conceded by both parties, and we think correctly so, that, had the order in question been announced by the respondent judge from his place on the bench in his courtroom, it could not be successfully argued that it was not made during a session of court.

Superior courts are required by law to hold their sessions at the county seats of their respective counties. Section 73, Code Civ. Proc. Provision is also made for the holding of court in other places when made necessary by any of the calamities specified in section 142 of the Code of Civil Procedure.

The weight of authority in California which receives support in other jurisdictions seems to support the conclusion that, if it be assumed that it is error for a court to hold its session at a place other than in its courtroom, the error, if any, is one of law to be reached only on direct attack and not one resulting from a lack of jurisdiction or an act in excess of jurisdiction that can be successfully attacked collaterally.

Authorities from other jurisdictions are collected and cited in 43 A. L. R. at page 1516, et seq. It is there stated (pages 1525, 1526) that "the conduct of a trial or the examination of witnesses in a room other than the court room, but in the same building, is generally held not to affect the validity of the proceedings."

In the case of Block v. Kearney, 6 Cal. Unrep. Cas. 660, 64 P. 267, 268, it is said: "The judgment purports to have been rendered in open court; but it is stated in the affidavit of plaintiff's counsel, in the bill of exceptions, that it was in fact rendered in the judge's chambers, adjoining the court room,—the door being open between the rooms. I do not think, however, that the judgment can be attacked in this way. Nor is there any reason why the court may not hold its sessions, when it has been so ordered, in any room of the court house, or elsewhere, provided it conforms to the requirements of the law. Code Civ. Proc. §§ 73, 142, 144."

Block v. Kearney was cited with approval in the case of People v. Pompa, 192 Cal. 412, 221 P. 198, 202, where it is said: "The appellant next contends that the trial court, in its direction for the view of the premises, and in its instruction to the selected shower as to the specific duties he was to perform, limited the proceedings during such view strictly to an inspection of the premises during the course of which no testimony of any kind was to be taken; but that during said proceedings and while upon said premises these limitations were transgressed and considerable important evidence was presented to the jury out of court. It is true that at the outset of said proceedings the trial court did attempt to restrict them to certain specific limits embodied in its instructions to the shower selected by it; and it is also true that when the court, the jury, the defendant, the shower, together with the court attachés and the counsel for the respective parties, reached the premises to be thus viewed, the procedure there was much broader than its earlier limitations imposed by the court, and that considerable testimony was taken and evidence received by the jury upon the scene of the alleged crime. But the record expressly discloses that during the entire proceedings attending and embracing the view of the premises the court in its completeness, including the judge, the clerk, the bailiff, the reporter, the interpreter, the jury, the defendant, and the respective counsel was at all times present; the only element absent being the walls and fittings of the courtroom wherein the court is usually convened. There is no special sacredness in the atmosphere of a courthouse or the walls or furnishings of a courtroom which requires that sessions of the court shall be held there and not elsewhere, if otherwise the forms of law governing the trial of causes are observed, which appears to have been done, though with some absence of formality, in the instant case."

The reasoning in the case of Hamblin v. Superior Court, 195 Cal. 364, 233 P. 337, 339, 43 A. L. R. 1509, is of considerable assistance to us. In a contempt proceeding, the court was considering the validity of an interlocutory decree of divorce rendered by a department of the superior court of Los Angeles county sitting in the city of Long Beach under the authority of an unconstitutional statute. In its opinion the Supreme Court said: "It is to be noted that in the case here under consideration the only thing that was done by the court at an unauthorized place was the hearing of testimony. The complaint was duly filed at the clerk's office at the county seat. The summons was issued therefrom, was personally served, and was returned with proof of service thereto and filed therein. The default of the defendant was duly entered and noted by the clerk at his office at the county seat. The case was set for hearing by the presiding judge sitting at the county seat and by him assigned to the department sitting at Long Beach. The decision, consisting of the findings, conclusions, and judgment signed by the judge, was filed in the clerk's office at the county seat, and there entered in the judgment record. The only defect in the proceeding, therefore, consists in the taking of evidence at an unauthorized place. While this constitutes error redressible by means of a direct attack by motion or appeal, it is not usually regarded as rendering the proceedings absolutely void so as to be vulnerable to a collateral attack. * * * This court in its early decisions applied with great strictness the rule which requires the concurrence of the elements of time, place, and judicial officers to render valid a judgment or order which under the law could be made only by the court. * * * It may be that the strictness with which the rule was applied in those early cases was one of the considerations which moved the framers of the Constitution of 1879 to abolish terms of court and to provide that the superior court 'shall always be open (legal holidays and nonjudicial days excepted) * * *.' Article 6, § 5. However this may be, the strictness of the early rule was abrogated and the early cases above cited (though not mentioned therein) were in effect overruled in 1872 in the case of Ex parte Bennett, 44 Cal. 84. This case is very nearly on all fours with the case at bar. It also involved a contempt proceeding, the object of which was the enforcement of a decree of divorce. It, however, was not a default case, but one in which an answer had been filed raising issues of fact. By consent of the parties it was set for hearing before the judge at chambers in vacation between terms of court, and was so heard and decided, and judgment was rendered in vacation and entered nunc pro tunc as of the preceding term of court. There, as here, the defendant having failed to make the payments provided for in the decree, was cited in a contempt proceeding, and there made the point that the judgment, being based upon a trial had at a time and at a place not authorized by law, was void. The contention was rejected by this court, and the following language from the opinion is especially pertinent to the present situation: 'The principal objection made for the petitioner, as we understand it, is that the cause was tried at chambers, and not in open court; and it is said that there is no authority to try a cause except in open court. But, even if this be so, we do not see that it would follow that a judgment rendered in a cause which had been tried at chambers would for that reason necessarily be void in the absolute sense. The district court in Sonoma unquestionably had jurisdiction of the subject-matter and of the parties litigant. Had the court itself rendered the judgment in question in open session at a regular term, without trial, without proof, and even without submission of the cause for decision, such judgment, however erroneous, would not be held void upon a mere collateral attack. To maintain that it would, would be to ignore the obvious distinction between a total want of authority upon the one hand and the erroneous exercise of conceded authority upon the other. * * * The hearing of proofs, the argument of counsel—in other words, the trial had, or the absence of any or all of these—neither confer jurisdiction in the first instance, nor take it away after it has once fully attached.' The cases of Johnston v. San Francisco Sav. Union, 75 Cal. 134, 139, 7 Am. St. Rep. 129, 16 P. 753; Beaulieu Vineyard v. Superior Court, 6 Cal. App. 242, 248, 250, 91 P. 1015; Dahlgren v. Superior Court, 8 Cal. App. 622, 626, 97 P. 681; People v. Maljan, 34 Cal. App. 384, 167 P. 547; and McGrath v. Langford, 35 Cal. App. 215, 169 P. 424, also lend support to the conclusions there reached. The case last cited is quite in point here. In that case a demurrer to the complaint filed in the justice's court was set for hearing at 3 o'clock p. m. on a Saturday, which was a nonjudicial day. Code Civ. Proc. §§ 10, 133, 134. The demurrer was heard and overruled at that time in the absence of the defendant. It was held that this action was erroneous but not void, and that the judgment based thereon was invulnerable upon collateral attack."

We have reached the conclusion that, if the action of the trial court in holding its "session" on November 28, 1931, was error (which we do not hold), it was one of law which cannot be reached in these proceedings. If error, it must be attacked directly upon appeal.

[7] Petitioner seriously urges that, under the provisions of section 662 of the Code of Civil Procedure as it now reads, while the trial court may have the authority to amend its findings and judgment where a motion for a new trial is made, the amended findings and judgment must be reduced to writing, signed by the judge and filed with the clerk within the 60-day period provided by law. While we express no opinion on the question of whether or not it correctly states the law as it now exists, we are met by strong reasons why we cannot adopt this argument of counsel.

Section 660 of the Code of Civil Procedure contains the following: "The power of the court to pass on motion for a new trial shall expire sixty (60) days from and after service on the moving party of written notice of the entry of the judgment, or if such notice has not theretofore been served, then sixty (60) days after filing of the notice of intention to move for a new trial. If such motion is not determined within said sixty (60) days, the effect shall be a denial of the motion without further order of the court." A motion for new trial, if not expressly granted or denied within the 60-day period, is denied by operation of law.

The findings and judgment of the court below, as originally made, are not before us. We cannot determine whether or not the findings, if amended by the order of November 28, 1931, would support a judgment against the petitioner here. As we have observed, there is no evidence in the record that the order was not in fact signed by the respondent judge.

From the language of section 662 of the Code of Civil Procedure it is apparent that the Legislature contemplated that at least an amended judgment might be filed after the 60-day period. Certainly the trial judge would have the entire 60 days within which to make any of the various rulings contemplated by this section, the last sentence of which provides as follows: "Any judgment thereafter entered shall be subject to the provisions of sections 657 and 659 of this code." The word "thereafter" thus used must refer to a time after the order be made. If the trial judge has sixty days within which to make such an order, it is evident that he may "thereafter" sign and file an amended judgment.

[8] An appeal lies from a new or an amended judgment. Section 963, Code Civ. Proc.; Barcroft & Sons Co. v. Cullen (Cal. Sup.) 2 P.(2d) 353. Petitioner may, therefore, have the order and judgment reviewed on appeal and has a remedy in the ordinary course of law. The issues here presented are questions of law to be decided upon appeal rather than questions of jurisdiction that can be reached by prohibition.

We have not considered the effect of the recent amendments to section 166 of the Code of Civil Procedure, argued at length by counsel, as we do not think them controlling.

The petition for the writ of prohibition is denied, and the alternative writ is discharged.

We concur: BARNARD, P. J.; JENNINGS, J.

121 Cal.App. 698

MESSER v. TAITS, Inc.

Civ. 7920.

District Court of Appeal, First District, Division 2, California.

March 18, 1932.

1. Compromise and settlement 🔑5(2).

Disputed claim is not discharged by retention of check for smaller amount, unless it unequivocally appears check is offered on condition that it be accepted as full satisfaction.

2. Accord and satisfaction 🔑27.
Compromise and settlement 🔑24.

Whether there was accord and satisfaction where debtor sent checks for balances shown by debtor's statement, with letter stating that, according to debtor's books, checks balanced all accounts, *held* fact question for court trying case.

3. Payment 🔑38(1).

Debtor could direct that payments be applied to specific current items of open accounts (Civ. Code, § 1479).

4. Payment 🔑38(4).

Debtor's direction to apply payments to specific current items did not destroy character of accounts as open book accounts (Civ. Code, § 1479).

5. Limitation of actions 🔑53(1).

Statute of limitations did not commence to run until date of last entry in open account.

6. Appeal and error 🔑901.

Defendant failed to affirmatively show that trial court, in action for goods sold, erred in allowing certain items of account.

The record brought up to appellate court contained only summary of contents of various accounts introduced as exhibits, and the summary did not show specific items, and the original accounts, although introduced in evidence, were not brought up as exhibits, so that it was impossible for appellate court to follow argument and testimony respecting specific items.

Appeal from Superior Court, City and County of San Francisco; T. H. Selvage, Judge.

Action by D. M. Messer against Taits, Inc. From a judgment for plaintiff, defendant appeals.

Affirmed.

Louis E. Goodman and Louis H. Brownstone, both of San Francisco, for appellant.

Heller, Ehrman, White & McAuliffe, Lloyd W. Dinkelspiel, and F. Whitney Tenney, all of San Francisco, for respondent.

SPENCE, J.

This is an appeal by defendant from a judgment in favor of plaintiff in the sum of $2,402.87.

We need only consider the count of the complaint alleging the indebtedness of defendant upon an open book account for goods sold and delivered to defendant by plaintiff's assignors. By way of defense defendant pleaded the statute of limitations. Upon the trial, defendant further urged the defense of accord and satisfaction, although this defense was not pleaded. The trial court found against the defendant upon both defenses, except that it found that the statute of limitations had run against the small amount claimed to be due upon the account with defendant's restaurant in Stockton.

The evidence showed that the eight restaurants conducted by defendant did business with the various "Dohrmann Companies" through which plaintiff claims as assignee. Each of these companies kept its own accounts, and a separate book account was kept by each of the companies with respect to each of defendant's restaurants with which it did business. The extensive business dealings between defendant's restaurants and the companies continued over a period of many years. Owing to the view we take of the questions presented on this appeal, we deem it unnecessary to go into detail concerning the history of the "Dohrmann Companies" or concerning each of the separate accounts referred to above.

It is appellant's contention that the major portion of the amount awarded to respondent was improperly awarded because of an alleged accord and satisfaction in 1925, and, in any event, because of the bar of the statute of limitations. We find no merit in these contentions. Although the defense of accord and satisfaction was not pleaded, we may assume that the issue was properly before the court. Nevertheless the trial court found against the appellant on this issue, and it cannot be said as a matter of law that the trial court erred in so doing. The evidence was conflicting as to whether there was any oral agreement adjusting the various accounts as contended by appellant. A payment was made by appellant on March 19, 1925, accompanied by a letter addressed to Dohrmann Hotel Supply Company, being one of the "Dohrmann Companies." It read in part:

"We are enclosing checks as follows:

Turk Street	$ 8.72
Turk Street	93.96
Ellis Street	16.20
O'Farrell St.	83.79
Oakland	37.05

"According to our books the above balances all our accounts, including Los Angeles."

The checks referred to were cashed, but thereafter the "Dohrmann Companies" continued to send to appellant monthly statements regarding each store showing the current transactions, together with the balance carried forward at the beginning of the month and the balance remaining due at the end of the month. Appellant admitted receiving these statements, but from 1925 on paid only the amounts due upon current transactions. There was considerable correspondence between the parties, and numerous conferences were had from time to time between the representatives of the "Dohrmann Companies" and representatives of appellant regarding the balances claimed to be due upon these various accounts. The complaint herein was filed on January 25, 1929.

[1, 2] In view of the conflict in the evidence regarding the existence of an oral agreement adjusting the accounts in 1925 and the finding of the trial court against the existence of such agreement, appellant's position is untenable, unless the acceptance of the checks accompanying appellant's letter of March 19, 1925, may be said to constitute an accord and satisfaction as a matter of law. The general rule is well settled with respect to the circumstances giving rise to an accord and satisfaction of a disputed claim by the acceptance of a check for an amount smaller than that claimed by the creditor (1 Cal. Jur. 134), and such disputed claim is not discharged by the retention of a check for a smaller amount, unless the check is tendered with an explicit statement or pursuant to an explicit understanding that it is offered as full payment. Lapp-Gifford Co. v. Muscoy Water Co., 166 Cal. 25, 134 P. 989; Meyer v. Henry Cowell Lime, etc., Co., 21 Cal. App. 602, 132 P. 611; Ann. Cas. 1915A. 954, note and cases cited. In other words, it must unequivocally appear that the check is offered only upon condition that it be accepted, if accepted at all, as full satisfaction of the disputed claim. The letter in the present case merely stated that "according to our books the above balances all our accounts, including Los Angeles." A somewhat similar situation was before the court in Meyer v. Henry Cowell, etc., Co., supra, where the debtor prepared a statement showing its version of all debits and credits involved in the account and accompanied the statement with check to cover the balance due according to the statement. The court there said at page 605 of 21 Cal. App. 132 P. 611: "In the case at bar the debtor simply sent a statement and a check for the balance shown by such statement, and the creditor gave a receipt for the amount of the check. Nowhere upon the check nor upon the statement, nor upon the receipt, was it stated that the check was offered upon condition that it be accepted in full payment. No case has been called to our attention where it has been held that the acceptance of a check corresponding in amount with the balance shown by the statement sent with the check, by the creditor, constituted as a matter of law an accord and satisfaction, unless the check upon its face contained a statement that it was in full payment, or unless the offer was clearly in some unequivocal way made upon such condition." We are satisfied that it cannot be said as a matter of law in the present case that the letter accompanying the checks standing alone was sufficiently explicit and unequivocal in its terms as to impose the condition that it could be accepted only as payment in full and not otherwise.

[3-5] Referring now to appellant's claim relating to the statute of limitations, it is not disputed that the accounts originally constituted open book accounts and in form continued to be so kept by the "Dohrmann Companies" at all times. From 1925 on appellant continued to do business with the companies, and said companies continued to make entries on said accounts, but appellant made remittances which the companies were directed to apply to specific current items. Appellant unquestionably had the right to so direct (Civ. Code, § 1479), but this did not destroy the character of the accounts as open book accounts (1 Cor. Jur. 673, § 223). The statute of limitations did not commence to run as to each account until the date of the last entry of that account (Furlow Pressed Brick Company v. Balboa Land & Water Company, 186 Cal. 754, 200 P. 625), which in most instances was as late as the latter part of 1928. The last entry in the account with the restaurant at 24 Turk street was March 1, 1926, which was well within the four-year period. The account with the Stockton restaurant had no entries thereon within the four-year period, and the trial court found the action to be barred as to that account. It may be noted further that, even if appellant were correct in its theory that the current dealings from the early part of 1925 on did not serve to keep the original accounts "alive" as open book accounts, still the entries showing appellant's admitted payments on the various accounts on March 19, 1925, were within the four-year period prior to the commencement of the action.

[6] Appellant further contends that "items totaling $296.99 were incorrect and not proved and should not have been allowed by the trial court." We have reviewed appellant's argument in support of this contention and examined the portions of the record cited by appellant as referring to the specific items making up this sum. The record brought to this court contains only a summary of the contents of the various accounts introduced as exhibits. The summary as to each account shows the location of the restaurant and the name of the one of the Dohrmann Companies involved; a statement that the account contained debit and credit entries covering a period from one specified date to another, the latter being the date of last entry; and a statement of the final balance due according to the account. No specific items are shown. The original accounts were introduced in evidence, but, as they were not brought up as exhibits, we find it impossible to follow the argument and testimony relating to the specific items. It is apparent from the record that certain items were disallowed by the trial court, but, assuming that the items complained of were allowed, their allowance seems to be satisfactorily explained in respondent's brief. In any event, we are forced to the conclusion upon the record before us that appellant has failed to affirmatively show that the trial court erred as contended.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

122 Cal.App. 213

THOMAS v. HOFFMAN.

Civ. 722.

District Court of Appeal, Fourth District, California.

March 29, 1932.

1. Fraudulent conveyances 🔑299(12).

Evidence sustained finding that husband transferred interest in realty to wife while insolvent and in fraud of creditor.

2. Evidence 🔑271(14).

Declarations of spouses that land was bought for wife as her separate property *held* inadmissible, because self-serving.

3. Husband and wife 🔑264.

Change from community to separate property can be proved only by showing definite present agreement.

4. Husband and wife 🔑264.

Offer that each spouse took respective share of money belonging to community *held* technically insufficient to show change from community to separate property.

> Offer was technically not sufficient, since it disclosed no present positive agreement to make change from community to separate property, nor was it offered to be proved that husband had such intent.

5. Appeal and error 🔑1056(1).

Excluding evidence that spouses divided money belonging to community and that wife purchased property in suit with her share *held* not reversible error under circumstances.

> Circumstances disclosed that offer of proof was technically insufficient in not showing present agreement to make such change from community to separate property and that court stated, in refusing offer, that it had been stipulated that property purchased was community property until husband assigned his interest to wife, which was not denied by wife.

6. Appeal and error 🔑883.

In unsuccessful quiet title action against execution purchaser, plaintiff *held* not in position to complain of judgment provision, which she permitted, quieting her title if she repaid defendant within six months.

> Plaintiff could not complain, since such provision was not only entirely equitable and in plaintiff's favor, but it appeared that provision was inserted in judgment upon plaintiff's stipulation that it might be done.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by Louise A. Thomas against Hugo H. Hoffman. From an adverse judgment, plaintiff appeals.

Affirmed.

Leland J. Allen, of Los Angeles, for appellant.

Victor Ford Collins and Arnold M. Cannan, both of Los Angeles, for respondent.

BARNARD, P. J.

This is an action to quiet title. On July 21, 1923, the plaintiff and her husband, F. A. Thomas, as vendees, entered into a contract to purchase the real property in question. On January 9, 1925, her husband assigned his interest in this contract to the plaintiff, and she subsequently received a deed to the property. Some time after January 9, 1925, this defendant recovered a judgment against the husband, F. A. Thomas, and, after sale of this property under execution, received a sheriff's certificate of sale. In this action, which followed, the defendant set up his claim under the certificate of sale, pleading a fraudulent transfer from his judgment debtor to the plaintiff, and that this transfer was made while the judgment debtor was insolvent. The trial court found in all respects for the defendant, finding that the judgment debtor was insolvent and that the transfer was fraudulent. The plaintiff has appealed from the ensuing judgment upon the following grounds: (1) That there is no evidence of insolvency on the part of her husband. (2) That there is no evidence of fraud or of an intent to defraud. (3) That the court erred in refusing to admit certain evidence. (4) That the court erred in the form of the judgment.

[1] The claims of insufficiency of the evidence are without merit; nothing more favorable to the appellant appearing than the usual conflict. In relation to the solvency of the judgment debtor after the transfer which is here questioned, there is evidence that all of the property he had left consisted of an account in a bank, the amount of which he did not know, but which, as near as he could remember, was from $100 to $150; a Chevrolet automobile which he had purchased two years before for $700 and which he sold two years later for $50, but the value of which at the time of the transfer is in no way shown; and the sum of $500 which was owed to him by his son as the purchase price of a mortgage and a farm, if the testimony in favor of the appellant is accepted as true. However, the surrounding circumstances shown by the evidence were such that the court may well have refused to believe that this last asset existed. In any event, these assets were entirely insufficient to cover the claim of the respondent, which was over $1,800.

Upon the question of fraud and fraudulent intent, there is evidence to show that on December 15, 1924, the respondent and F. A. Thomas held a conference in an attempt to settle differences that had arisen between them in a previous business deal. At this conference Thomas offered to settle for $50, and the respondent offered to settle for $100. Nothing was done, and two days later the respondent told Thomas that he would withdraw his offer to settle for $100 and would file suit for the purpose of going into the entire matter. On January 6, 1925, a letter from the respondent's attorney was mailed to Thomas demanding an immediate adjustment of the matter. Subsequently a suit was brought resulting in the judgment against Thomas. In the meantime, on January 9, 1925, Thomas and his wife, the appellant, went to an attorney and had papers prepared transferring practically all of the husband's property. His interest in the real property here in question was transferred to the appellant by the assignment above referred to; the appellant testifying that she paid nothing. At the same time, Thomas transferred to the appellant the sum of $670.43 which he and the appellant had in a joint bank account, and a new account for this amount was opened in this bank in the name of the appellant alone. At the same time, a ranch which was owned by the parties and a mortgage for $3,000, which they also owned, were transferred to their son. It appears that these parties had a very substantial equity in this ranch, and that the $3,000 mortgage was good and was later paid. Yet appellant and her husband both testified that both of these properties were sold to their son for the sum of $500, which amount was to be later paid to them, and which was paid within twenty-one months. In this connection, it appears that the attorney who drew the papers transferring these properties to the son prepared no agreement whereby the son was to pay the $500, or any other sum, to his parents. But Thomas testified that he himself prepared a written agreement to that effect which the son signed, but which was not produced; Thomas stating that he had destroyed it after the $500 was paid. About the same time, another pair of lots which the parties owned and which they had bought for $157.50, was, according to the appellant's testimony, transferred to a sister of Thomas; there being no testimony of any consideration therefor. It thus appears that almost immediately after Thomas was treatened with suit, practically all of his property was transferred, including the real property here involved, for an entirely inadequate consideration, and leaving him with assets which, viewed in the most favorable light possible, were worth only a small proportion of the amount of the judgment against him. In this connection, it is interesting to note the reason given by the appellant in her testimony as to why these properties were transferred by her husband; the explanation being that her husband was "in poor health and wished to go into some kind of business and I was absolutely willing that he should go into business and so I helped him." It would hardly seem that the transfer of this property for nothing, the selling of a ranch and a $3,000 mortgage for $500, even that to be paid in installments, the transfer of a lot to his sister, which, if paid for at all, was paid for twenty-one months later, and the transfer of $670.43 in the bank to the appellant, could have facilitated his going into business, or been necessary thereto. While there was some evidence which, with the possible inferences pointed out by appellant, created some conflict, not only are the findings amply sustained, but this record presents an unusually plain case of a transfer of property to avoid an anticipated judgment.

[2-5] It is urged that the court erred in refusing to admit certain evidence which was offered. The offer was to prove by a certain witness that, at the time the land here involved was purchased, statements were made by the appellant and her husband to the effect that the land was being bought for her as her separate property, and that prior thereto, when another property was sold, the proceeds were so divided that Mr. Thomas took his share and Mrs. Thomas took her share, and that she bought this property with the intent that it was to be her separate property. The first part of the offered proof was a self-serving declaration, and such a change from community to separate property is to be proved only by showing a definite present agreement to that effect. As to the second portion of the offer it was technically not suf-

ficient, as no present positive agreement to that effect was offered to be proved, nor was it offered to be proved that the husband had any such intent. However, considering the offer on its merits, it appears that in ruling on this offer the court stated that it was refused because it had been stipulated that this property was the community property of the parties up until the assignment of the contract on January 9, 1925. This statement was not denied by the appellant, and we must accept it as true. In addition, it may be pointed out that when the property was first purchased, it was taken in the name of the appellant and her husband as joint tenants, which is inconsistent with the claim that it was purchased as her separate property. The husband also testified that this property was a part of the assets he had on January 5, 1925, and that he had paid installments on the purchase price prior to that time. In view of the state of the record and the form of the offer, we are unable to see any reversible error in the rejection of this evidence.

[6] The last contention made is that the form of the judgment was erroneous, in that the judgment included a provision to the effect that if the appellant paid to the respondent within six months the amount paid by him for the sheriff's certificate of sale, then and in that event the appellant's title to the property should be quieted. Not only was this provision entirely equitable and in favor of the appellant, but it appears that this provision was entered in the judgment upon her stipulation that the same might be done, and she is therefore in no position to complain.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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122 Cal.App. 121

BANK OF BALBOA v. BENNESON.

Civ. 8216.

District Court of Appeal, First District, Division 2, California.

March 24, 1932.

Rehearing Denied April 23, 1932. Hearing Denied by Supreme Court May 23, 1932.

1. **Bills and notes ⟹167.**
   Statutes ⟹48.

Statute defining negotiable note, with provision relating to negotiability of secured notes, *held* controlling on subject, and not void as self-contradictory (Civ. Code, § 3265).

2. **Statutes ⟹194.**

Special statutory definition and exception controls general provisions.

3. **Constitutional law ⟹208(3).**

Statute defining negotiable promissory notes, with exception extending definition to secured notes, *held* not unconstitutional as applying to special class (Civ. Code, § 3265).

4. **Bills and notes ⟹339.**

Purchaser of negotiable paper is not required to make inquiry of makers as to consideration and circumstances leading to execution.

5. **Bills and notes ⟹375.**

Fact that consideration for note was corporate stock issued in violation of Corporate Securities Act *held* not to render note void in hands of innocent purchaser for value (St. 1917, p. 673, as amended).

Appeal from Superior Court, Los Angeles County; Edward W. Engs, Judge.

Action by the Bank of Balboa against Myrtie B. Benneson. Judgment for the plaintiff, and the defendant appeals.

Affirmed.

Edwin J. Miller and Wier Casady, both of Los Angeles, and Robert M. Cordill, of Omaha, Neb., for appellant.

Goudge, Robinson & Hughes, of Los Angeles, for respondent.

NOURSE, P. J.

Plaintiff sued to foreclose a mortgage upon real property, and had judgment. Defendant has appealed upon typewritten transcripts.

The facts are simple. The defendant executed and delivered the note and mortgage to one Mathews in the sum of $5,000. Before maturity, Mathews sold the note and mortgage to plaintiff, and, after maturity, plaintiff commenced this action. The defendant defended the action on the ground that the note and mortgage were procured from her by Mathews through fraud—that the only consideration was $5,000 par value of stock in a corporation which was issued in violation of the Corporate Securities Act (St. 1917, p. 673, as amended), and which was of no value. Defendant also claimed that plaintiff was not an innocent purchaser for value. The trial court found that plaintiff was an innocent purchaser for value and without notice of any of the infirmities of the note.

[1, 2] In reference to the facts, it is sufficient to say that there is no substantial conflict in the evidence, that the note and mortgage were procured through the fraud of Mathews, and that the consideration was stock in a corporation which was illegally issued may be conceded. But the evidence unmistakably supports the findings that re-

spondent was an innocent purchaser for value, and that it took the note and mortgage without notice of any of the infirmities.

The findings are, of course, of legal value only in the event that the note which was secured by a mortgage is a negotiable instrument under the terms of section 3265, Civil Code.

It is not necessary to go into the history of the litigation and legislation covering this debated subject; it is sufficient that the existing statute now provides that such a note shall not lose its negotiability because secured by a mortgage. But appellant insists that the statute is unconstitutional because it is self-contradictory and repugnant to other statutes relating to negotiable instruments. Section 3265, Civil Code, reads: "*Promissory Note Defined.* A negotiable promissory note within the meaning of this title is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer but the negotiability of a promissory note otherwise negotiable in form, secured by a mortgage or deed of trust upon real or personal property shall not be affected or abridged by reason of a statement therein that it is so secured * * * nor by any conditions contained in the mortgage or deed of trust securing the same. Where a note is drawn to the maker's own order it is not complete until indorsed by him." We find nothing contradictory in the section. It defines a negotiable promissory note as an unconditional promise to pay, and then states an exception to this general definition when the note is secured by a mortgage or deed of trust containing conditions. Exceptions of this character are common in statutes, and appellant does not cite any authorities holding that they affect their constitutionality. The fact that some of the provisions of this section are repugnant to other statutes does not touch the question of the constitutionality of the section; the single question is, Are they effective or do the other statutes control?

Appellant concedes that this section is later in enactment and later in the order of numbering of Code sections than are those to which she claims this section is repugnant. For such reason section 3265 controls over the others, if, in fact, there be any repugnancy—a question we need not consider. Manifestly the Legislature has the constitutional power to declare what is and what is not a negotiable instrument, and it may likewise provide exceptions to any general definition of such an instrument. Upon the well-settled doctrine that a special definition and an exception controls the general, we must hold that section 3265 is the controlling section in this case. That it was enacted for the express purpose of making such notes negotiable and of repealing prior statutes to the contrary is not open to question. Fair Oaks Bank v. Johnson, 198 Cal. 196, 200, 244 P. 335; Witty v. Clinch, 207 Cal. 779, 785, 279 P. 797.

[3] The argument that the section is unconstitutional because it applies to a special class is not impressive, in view of the general knowledge of men as to the size of the class affected by secured paper.

[4] At considerable length appellant argues four points relating to the duty of a purchaser of nonnegotiable paper to make inquiry as to defenses and infirmities. Any consideration of these points would be purely academic, because the paper in suit was negotiable. It is the settled rule that a purchaser of negotiable paper is not required to make inquiry of the makers as to the consideration and circumstances leading to its execution. 19 Cal. Jur. p. 866; Witty v. Clinch, 207 Cal. 779, 785, 279 P. 797. In so far as the good faith of the respondent is concerned, all the evidence was in accord with the trial court's finding.

[5] It is argued that the note is void because the consideration for it was corporate stock issued in violation of the Corporate Securities Act. This is just another way of saying that a negotiable note is void in the hands of an innocent purchaser for value if the consideration fails. Except in those cases where the note is void on its face or is declared void by statute, the authorities are to the contrary. 19 Cal. Jur. p. 1107.

The case was fairly tried. The trial court was more than patient and liberal with appellant in the presentation of her case, and no assignments of error during the trial are made now. The judgment is sound, and is fully supported by the evidence and the findings. The questions of law raised on the appeal are more academic than real. The material issues have been rightly adjudged, and, for these reasons, the judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

122 Cal.App. 176

PEOPLE v. RADOVICH.

Cr. 2147.

District Court of Appeal, Second District, Division 2, California.

March 28, 1932.

1. Criminal law 🔑560.
Evidence identifying a defendant as perpetrator of crime charged need not be positive and uncontradicted.

2. Robbery 🔑24(3).
In robbery prosecution, evidence *held* sufficient to justify jury's conclusion that defendant was one of bandits.

3. Criminal law 🔑1160.
Where evidence sustained jury's verdict of guilty, jury's conclusion sustained by trial court's denial of new trial was final.

4. Criminal law 🔑404(3).
In robbery prosecution, evidence that pistol found in defendant's trunk resembled gun used in holdup by defendant *held* sufficient to render exhibit admissible in evidence.

5. Criminal law 🔑404(3).
Possession by defendant of means such as were used to commit crime charged renders same admissible, even though not identified by eyewitnesses to offense.

6. Criminal law 🔑1169(2).
In robbery prosecution, admitting in evidence gun found in defendant's trunk *held* harmless, where jury saw gun when shown to deputy sheriff testifying.

7. Witnesses 🔑406.
Where state's witness on cross-examination stated he had the stolen checks and securities some day in May, evidence that he showed them to certain person on or about May 7th *held* properly excluded as impeaching evidence.

> On direct examination, the state's witness testified that he had possession of the stolen checks and securities in the latter part of May, but, on cross-examination, he testified that he could not fix date any closer than that it was some day in May, so that there was no basis for assumption that alleged incident of his showing the stolen checks and securities to certain person on or about May 7th took place before time when, according to his testimony, witness received property from defendant.

8. Criminal law 🔑419, 420(1).
In robbery prosecution, testimony of investigator that express company's agent compared numbers of travelers checks investigator received from defendant with list stolen from bank *held* admissible.

9. Criminal law 🔑1036(1).
Objections to evidence cannot be made for first time on appeal.

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Nick Radovich was convicted of robbery in the first degree, and he appeals.

Affirmed.

Joseph L. Fainer and R. E. Parsons, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Tracy C. Becker, Deputy Dist. Atty., both of Los Angeles, for the People.

FRICKE, Justice pro tem.

Appellant was found guilty of robbery in the first degree by the verdict of a jury, and, having previously been convicted of manslaughter and having served a term of imprisonment therefor, which fact was charged in the information and admitted by appellant, he was sentenced to Folson state penitentiary.

On April 23, 1931, at about 3 o'clock in the afternoon, three men masked with handkerchiefs entered the San Gabriel branch of the California Bank. One of the men, armed with a pistol and identified as appellant, forced C. C. Pearson, the manager, to go to the rear of the bank, and ordered that the curtains on the front of the establishment be drawn. Mr. Pearson and the other employees were driven into the vault, where they were lined up facing the wall, and one of them, W. W. Spencer, was compelled to open the safe. Some $4,000 in cash, a quantity of securities belonging to clients of the bank, and a quantity of American Express Company travelers' checks were stolen in the robbery.

[1-3] Appellant contends that the evidence is insufficient to justify the conclusion that he was one of the bandits. Jean Durand, one of the tellers, testified that appellant was one of the robbers, and that he first saw him as he was entering the vault, at which time appellant was holding his handkerchief to his face; that appellant gave him orders what to do, and at that time dropped the handkerchief down below his chin; that he had a good look at him, and was sure that appellant was the man he saw that day. This witness was unable to describe the handkerchief other than to say it was light in color, and did not notice the color of the bandit's overcoat or hat. On cross-examination he stated that from the day of the robbery until he saw appellant several months later in the county jail he did not see anybody that he thought was the robber in question. The witness also testified that he saw a picture of appellant in a news-

paper, but also stated that, when he went to the county jail, he did not expect to see there any man who had been in the bank and did not expect to see appellant; that at the jail he was shown two groups of seven men each; and that appellant was in one of the groups. Another bank employee, Walter W. Spencer, identified appellant as one of the men who participated in the holdup, also testifying that he saw that portion of appellant's face from the edge of his hat to the lower part of his upper lip. On cross-examination this witness stated that he was unable to identify either of the other two bandits, but that appellant was distinctly taller than the other two; that appellant took down his handkerchief, which he had been holding between his teeth, when he told the witness to turn around and not look at him; that he got a full view of appellant's nose and the lower part of his upper lip and of his eyes, and noticed that he had prominent "red veins" under his eyes. The witness also stated that this robber did not have a mustache, but, in addition, testified that he did not get a full view of the upper lip. Other testimony tended to show that on the day of the robbery appellant had a mustache, but the record does not disclose the size, shape, location, or visibility of the hirsute appendage on his upper lip. The point, therefore, that the witness saw no mustache upon the robber whom he identifies as appellant is of little value, especially since the witness only saw "just the lower part of the upper lip," a description not necessarily inconsistent with the presence of a mustache on the upper part of the lip. It may be noted as rather significant that this witness on cross-examination also testified that during his experience as a bank teller he had not to his knowledge seen any other person who looked like the appellant, a statement which would indicate that the latter's appearance is distinctive and unusual. The evidence identifying a defendant as the perpetrator of the crime charged need not be positive and uncontradicted. As stated in People v. Farrington (Cal. Sup.) 2 P. (2d) 814, 815: "The strength or weakness of the identification, the incompatibility of and discrepancies in the testimony, if there were any, and the uncertainties of witnesses in giving their testimony were matters solely for the observation and consideration of the jurors in the first instance, and for the consideration of the trial court on motion for a new trial. It has approved the finding of the jury, and on appeal this court may not disturb such finding and the action of the trial court unless we can say, as a matter of law, that there was no evidence to support the conviction." See, also, People v. Griggs (Cal. App.) 299 P. 555; People v. Madsen, 93 Cal. App. 711, 270 P. 237; People v. Bealey, 81 Cal. App. 648, 254 P. 628; People v. North, 81 Cal. App. 113, 252 P. 1063; People v. Wilson, 76 Cal. App. 688, 245 P. 781; People v. Seawright, 72 Cal. App. 414, 237 P. 796; People v. Oakleaf, 66 Cal. App. 314, 226 P. 24; People v. Franklin, 46 Cal. App. 1, 188 P. 607, and cases cited. The evidence was amply sufficient to sustain the verdict of the jury, and their conclusion, sustained by the denial of the trial court of the motion for a new trial, is final.

[4-6] Appellant assigns as prejudicial error the admission in evidence of a .38 caliber automatic pistol belonging to him, and which was found in a wardrobe trunk in his apartment, with loaded shells in the magazine. The pistol was shown to the witness C. C. Pearson, but he was unable to make any identification of it as the one held by appellant, except that "it might have been that but it looked to me like a .45." The witness Jean Durand, shown the same pistol, testified that the gun he saw held by appellant was black, but he could not tell whether it was "an automatic or a straight barreled revolver," but also said that it resembled and had the general appearance of the gun shown him at the trial. The witness Walter W. Spencer testified that the gun held by appellant was an automatic, the same color, and "somewhat like" the .38 caliber automatic of appellant which was shown to him at the trial, and that the description of that gun and the one held by appellant in the robbery was in general the same. This witness also said that he did not know whether he could distinguish between a .38 and a .45 caliber gun. As between two automatic pistols, identical except for a difference of 7/100 of an inch in the diameters of the inside of the barrels, there is so little difference that an inability to identify the caliber of one of them in the absence of the other is not at all remarkable. The effect of the evidence that the .38 automatic found in appellant's trunk resembled and had the general appearance of the gun used in the holdup by appellant, that it was somewhat like that gun, and that the description of the two guns was in general the same, was sufficient to render the exhibit admissible in evidence. The law of evidence does not require that, in a case such as we have here, the gun offered in evidence be positively identified as the weapon used in the perpetration of the crime, but considers the proffered exhibit admissible when the testimony shows that the gun offered at the trial is similar in appearance or answers the same general description. People v. Cotton (Cal. App.) 4 P.(2d) 247; People v. Elliott, 104 Cal. App. 107, 285 P. 401; People v. Sampsell, 104 Cal. App. 431, 286 P. 434; People v. Hale, 81 Cal. App. 734, 254 P. 639; People v. Stoerkel, 87 Cal. App. 336, 262 P. 825, and cases cited; People v. Ferdinand, 194 Cal. 555, 229 P. 341. The case of People v. Mullen, 69 Cal. App. 548, 231 P. 588, relied upon by appellant, is not in point, as in that case there was absolutely no evidence which would sustain the inference that the gun received in evidence was the same or in any respect similar to the gun used in the robbery, and, furthermore, the

gun was not found in the possession of Mullen, but was found in the possession of one Logue, who was not connected with the crime by any evidence, but who was in the company of the defendant at the time of the arrest, and the admission of the gun in evidence was held erroneous, for the reason that there was no evidence connecting the defendant with it in any way. In the case at bar, the pistol was found in appellant's possession, and he admitted its ownership. Possession by a defendant of means such as were used to commit the crime charged render the same admissible, even though not identified in any way by the eyewitnesses to the offense. People v. Potigian, 69 Cal. App. 257, 231 P. 593; People v. Wilkins, 158 Cal. 530, 111 P. 612; People v. Stoerkel, supra; People v. Hale, supra; People v. Mar Gin Suie, 11 Cal. App. 42, 103 P. 951. In the case of Sorenson v. United States (C. C. A.) 168 F. 785, cited by appellant, the statement of the court that "there was nothing to connect the employment of the revolvers and other articles with the burglary" readily distinguishes that case from the one before us. The other case cited by appellant, People v. Smith, 55 Cal. App. 324, 203 P. 816, involving a homicide by means of cyanide, held erroneous the admission in evidence of a can of cyanide of soda and potash on the premises of defendant's employer because there was no proof that the defendant knew of the existence thereof, was not in any way connected therewith, and because of evidence tending to show that the can had not been disturbed for a considerable period of time. In another poisoning case, poison such as caused the death was found in some jars of vinegar grape juice in the basement of the house where the defendant had lived for several years, it also being shown that she frequently "put up" grape juice, and the court there held that, as these jars were found where a housekeeper would naturally have placed and kept the grape juice, the exhibits were properly received in evidence. People v. Potigian, supra. See, also, People v. Wilkins, supra, That case, like the one before us, differs from the Smith Case because of the presence of proof, absent in the Smith Case, tending to connect the accused with the exhibits. We see no error in the admission of the gun in evidence. Furthermore, appellant was not prejudiced by the reception in evidence of the weapon. The deputy sheriff who found the pistol in appellant's trunk testified without objection to the fact and circumstances of its discovery, and during his examination the weapon was shown to him and prior to that to other witnesses, and was seen by the jury. The admission of the weapon in evidence, therefore, added little or nothing to the impression already in the minds of the jurors.

[7] Appellant's third point is that the trial court erred in sustaining objections to questions which would have tended to impeach the testimony of the witness Charles Malaby. This witness testified that he was an investigator for the sheriff's office, and was introduced to appellant by the latter's codefendant, Tony Deus, some time in May following the robbery; that appellant told him he had a lot of American Express checks and stock certificates and "other stuff," and asked Malaby if he could sell it; that thereafter appellant brought to Malaby a book of ten $10 American Express checks, three stock certificates, and a list of what appellant had to sell: that thereafter Malaby was requested to and did return to appellant the book of express orders; that later Malaby said he thought he had a deal on the express orders, and arranged to meet appellant on the following day; that he met appellant on the following day, handed the three certificates back to him, and a few minutes later an officer came up and made the arrest. On cross-examination Malaby admitted that he had previously been convicted of a felony, and that he was not working for the sheriff's office when he first met appellant. It also appears that while he had the book of travelers' checks in his possession Malaby showed it to a Mr. Purcell, an agent of the express company, who wrote down the numbers of the checks which were shown to be a part of the property stolen in the robbery. On cross-examination Malaby was asked whether he had ever had any of the stolen checks of $20 denomination, and he answered in the negative. We may here interject that the subject of checks in denominations of $20 could not be made the basis of impeachment or cross-examination, because Malaby at no time claimed to have received any such checks from appellant. It may be noted here that while, when first asked as to when he met appellant, Malaby fixed the time as the latter part of May, upon further questioning he testified that he could not fix the time any more definitely than that it was some time in May; that he was not sure that it was after May 15th, but that it was not in April. The court sustained an objection to a question as to whether on or about May 7, 1931, at the home of Miss Dinwiddie, Malaby had asked a Mr. McGregor whether he knew anybody who would loan money on the stock certificates, exhibits 1 and 2 (part of the property stolen in the robbery), and whether Miss Dinwiddie had not asked Malaby whether the transaction was legitimate. The sustaining of these objections and the striking of the answers relating to the $20 travelers' checks heretofore referred to is assigned as error; it being appellant's contention that they were proper as laying a foundation for impeachment upon a material matter. In this connection appellant contends that, had he been allowed to pursue his plan of impeaching the witness, the evidence would have tended to show that Malaby had the checks and securities prior to

the time when he claimed he received them from appellant.

The law is well settled that a witness may be impeached by evidence that he has previously made statements inconsistent with his testimony at the trial as to a material matter. Appellant's theory is that a discussion or showing by Malaby of the stolen checks and securities to Mr. McGregor prior to the time when he claimed to have received them from appellant would tend to impeach him. The infirmity of this contention lies in the fact that there is no basis for the assumption that the alleged incident at the home of Miss Dinwiddie "on or about the night of May 7, 1931," "near the 7th of May, 1931," "on the evening of on or about May 7th of this year," or "on the evening of May, 1931, or about that date," took place prior to the time when, according to his testimony, Malaby received the property from appellant. Had the latter been content with the original answer of Malaby on direct examination, that he made the acquaintance of appellant some time in the latter part of May, that answer would have been favorable to his present contention. But he was not satisfied, and on cross-examination further pursued the matter, with the result that the witness testified that he could not fix the date any closer than that it was some day in May. As the receipt of the checks and certificates from appellant some day in May is not inconsistent with his showing this property to a third person at a time fixed by the elastic and indefinite phrase "on or about" the 7th of May, the ruling of the court was correct. Unless there was proof that the incident of "on or about" May 7th was prior to the transaction with appellant, there would be no inconsistency, and consequently no right to pursue the proposed impeachment. Generally, the date of a prior inconsistent statement of a witness is not of much importance, but where, as here, the alleged inconsistency lies in the priority of one transaction over another, such priority must be established. In the record before us the priority of the one incident over the other is left a matter of pure conjecture. It might also be added that, notwithstanding the lack of foundation, Miss Dinwiddie testified to the incident of seeing Malaby with the stock certificates about May 7th, so that appellant had the advantage thereof without meeting the requirements of the rules governing impeaching testimony.

[8, 9] Appellant's final point is that the court committed error in the reception of hearsay evidence. The witness Malaby testified that the day after receiving them from appellant he took the book of travelers' checks to a Mr. Purcell of the American Express Company, and that Mr. Purcell took the checks to his office and wrote down some numbers. There was no objection to this line of testimony by appellant except to the preliminary question, "When you showed these travelers' checks to Mr. Purcell of the American Express Company did you see Mr. Purcell do anything?" The objection was made by a motion "to strike that on the ground that it is hearsay, incompetent, irrelevant and immaterial, not proper redirect examination." After a statement by the prosecutor as to the purpose of the question, appellant's counsel stated: "We might as well let the witness testify if the district attorney is going to say what he did," and the court then overruled the objection. The answer to the question quoted was never given, for the prosecutor, following the court's ruling, propounded the question: "Did you see Mr. Purcell do anything at the time you exhibited the travelers' checks to him?" which question and the ensuing questions concerning the writing down of the number were put to the witness and answered without objection. Counsel did move to strike out one answer of the witness to the effect that "he was writing the number," on the ground that the witness did not know what Mr. Purcell wrote, but, upon the witness stating in response to a question from the court that "I seen him writing the number down," this motion was denied. It appears, therefore, that the testimony here complained of was received without objection. The testimony was, however, not objectionable when its relationship to other testimony is taken into consideration. W. J. Purcell, special agent for the American Express Company, testified that he was shown a book of $10 travelers' checks of his company, and that he made a memorandum of the numbers. Defense counsel requested the witness upon his return to court to bring with him the record of the travelers' checks that were sent to the bank and the record of the report of the loss of those checks. Later the witness was again put upon the witness stand, and he then produced a list which he described, without objection, as a list of the checks taken in the robbery, and then, without objection (an objection was made but withdrawn before the answer), testified that he compared the list with the checks shown him by Malaby, and that the latter checks appeared on said list. The testimony of Malaby that Mr. Purcell had compared the numbers of the checks with a list of those stolen from the bank was in no sense hearsay testimony, and was admissible for the purpose of showing that the checks which were shown to Purcell were the very ones which Malaby had received from appellant, and was part of a chain of evidentiary facts, including those in the testimony of Mr. Purcell, leading to the conclusion that the checks received by Malaby from appellant and found on the list of stolen checks were a part of the checks stolen in the robbery. The argument that the list of checks was hearsay is unavailable here, because, as noted above, the testimony of Purcell as to the nature of the list

was received without objection, and it is elementary that objection cannot be made for the first time on appeal, and, furthermore, because Malaby did not testify to the contents of Purcell's list. If we have misunderstood counsel, and their argument is directed to the list of securities in the possession of Malaby, the argument is equally inapplicable, in view of the testimony that this list was handed to Malaby by appellant as a list of the securities he desired to sell. We have not been referred to any testimony given by the witness Malaby as to the contents of that list, and it appears that, as exhibit 10, the list itself was received in evidence, thus eliminating any possible prejudice to appellant by reason of any secondary evidence of its contents. The point is without merit.

The judgment and order denying a new trial is affirmed.

We concur: WORKS, P. J.; CRAIG, J.

121 Cal.App. 719

CARLSON v. SUN-MAID RAISIN GROWERS' ASS'N et al.

Civ. 398.

District Court of Appeal, Fourth District, California.

March 18, 1932.

Rehearing Denied April 13, 1932. Hearing Denied by Supreme Court May 16, 1932.

1. Master and servant 🔑332(1).

Evidence, in action for injuries to independent contractor while unloading machinery from truck at defendant's plant, *held* sufficient to take to jury question of negligence of defendant's servants assisting him.

> There was evidence that one of defendant's employees pushed heavy side frame with his feet, notwithstanding plaintiff's warning, after release of fastenings, by which it was lashed to machine loaded on truck, and that other employees of defendant relinquished their support thereof after seeing that it was slipping.

2. Master and servant 🔑330(3).

Evidence of negligence of defendant's servants, assisting plaintiff to unload machinery from his truck at defendant's plant, *held* sufficient to support verdict for plaintiff in action for injuries sustained.

3. Master and servant 🔑301(4).

Servant may be loaned by master to another, so as to relieve general master from responsibility for his negligent acts.

4. Master and servant 🔑301(4).

Application of respondeat superior doctrine depends on superior's power of control.

5. Master and servant 🔑301(4).

Servant's act is that of master, to whom loaned by general master, only where special master has power of control.

6. Master and servant 🔑301(4).

Master having no voice in selection or retention of employee loaned to him by another has no power of control over such employee.

7. Master and servant 🔑301(4).

Hauling contractor *held* without full power of control necessary to relieve hirer from responsibility for negligence of servants furnished by latter to assist contractor in unloading machinery.

> The evidence showed that such servants were paid by company furnishing them, that contractor did not hire or select them and could not discharge them, but acquiesced in their selection, and that they were under his direction only as to details of work.

8. Master and servant 🔑332(4).

Instruction to find for defendant in action for injuries to hauling contractor, if laborers furnished him by defendant were under his sole control and direction as to manner of unloading machinery, *held* properly refused.

9. Appeal and error 🔑1053(2).

Error, if any, in question to plaintiff as to what his family consisted of, was cured by court's prompt instruction to disregard it.

10. Damages 🔑132(3).

Verdict awarding $50,000 damages for injuries causing total paralysis of legs and all organs below first and second lumbar vertebræ of 49 year old man, earning between $5,000 and $6,000 per year, *held* not excessive.

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

Action by H. A. Carlson against the Sun-Maid Raisin Growers' Association, a corporation, and others. From a judgment against named defendant, it appeals.

Affirmed.

Ray W. Hays and Sutherland, Dearing & Jertberg, all of Fresno, for appellant.

B. M. Benson and Walter Stammer, both of Fresno, for respondent.

JENNINGS, J.

This is an action by plaintiff to recover damages for personal injuries sustained by him. Plaintiff's complaint set out a cause of action against the following defendants: Sun-Maid Raisin Growers' Association, a corporation, Sun-Maid Raisin Growers of California, a corporation, and Henry Krum. At the conclusion of plaintiff's case, motions for nonsuit were granted as to the two last-named defendants, and a like motion was denied as to the remaining defendant. The trial resulted in a verdict of $51,000 being returned in favor of plaintiff against the remaining defendant, Sun-Maid Raisin Growers' Association, a corporation, upon which a judgment for the amount specified in the verdict was rendered. Defendant contends that the judgment should be reversed, for the following reasons: (1) Refusal of the court to grant defendant's motion for a nonsuit; (2) failure of plaintiff's evidence to establish negligence for which defendant is liable; (3) prejudicial error committed by plaintiff's counsel in asking a certain question; (4) refusal of the trial court to give certain instructions requested by defendant and the giving of certain instructions claimed to be erroneous; (5) excessiveness of the verdict. Proper consideration of the above-stated contentions necessitates a recital of the facts presented by the record.

During the month of May, 1930, respondent was engaged in the business of hauling machinery, and for a period of two years prior thereto had been engaged in such business in the city of Fresno, owning a truck especially equipped for the hauling of heavy machinery. He had been employed in doing the sort of work comprehended in the business of hauling heavy machinery for a much longer period, and the conclusion is warranted that by training and long experience he was fitted to carry on the business in which he was engaged. Some time during May, 1930, respondent was requested to call at the plant of appellant in the city of Fresno. He complied with the request, and met the plant superintendent, who told him that certain machines were to be moved from plants of appellant located in various towns in Fresno county to its plant No. 4 in the city of Fresno. After some conversation between respondent and the plant superintendent in regard to the price to be charged for the work, it was orally agreed that respondent should move the machines, using his special truck and equipment, and that he would be compensated therefor at the rate of $4 per hour. In addition to his own services and the use of his equipment, he was also to furnish the services of his sixteen year old son, who had been working with his father for some period of time, and had acquired considerable experience in the business in which the father was engaged. It was agreed that appellant would furnish additional men to assist in the loading and unloading of the machinery that was to be moved. Pursuant to the oral agreement thus made, respondent entered upon the performance of the work contemplated. A number of machines were successfully moved from various plants of appellant to its plant No. 4, in the city of Fresno.

On May 29, 1930, respondent, accompanied by his son, went to a plant in Dinuba for the purpose of moving a machine known as a stem picker from the Dinuba plant to appellant's No. 4 plant in the city of Fresno. The stem picker consisted of a frame constructed of lumber, and its dimensions were 11 feet 11 inches in height, 10 feet in length, and 6 feet in width. In the upper front part of the frame there was a cylindrical steel fan or blower. This fan was attached to the top of the frame. A steel shaft passed through the center of the fan, and extended for a distance of about 1½ to 2 feet beyond each side of the frame. The weight of the stem picker was between three and four tons. The evidence showed that not only a stem picker but also two side frames, parts of another stem picker, were loaded on respondent's truck at Dinuba. Each side frame weighed from 600 to 700 pounds. The stem picker was placed on the bed of the truck, and a side frame was lashed to each side of the frame of the stem picker, with the horizontal center brace of each side frame resting upon the steel shaft which protruded from each side of the frame of the machine. Respondent's truck, loaded with the stem picker having the side frames lashed to it in the manner described, arrived at appellant's plant No. 4 late in the afternoon of May 29, 1930. The plant foreman thereupon instructed certain laborers who were employed at the plant to unload the stem picker. Four men appeared and assisted in the unloading of the machine from the truck. It was stipulated that these four men were laborers paid by appellant, and were furnished by appellant to assist in unloading the stem picker in accordance with the oral agreement entered into between appellant and respondent. During the process of unloading, three of these men were stationed on the ground. One of the three held the rope of a block and tackle by means of which the side frame was to be lowered to the ground. The two other men were at the rear of the load to hold the side frame firm on the shaft until it was cleared and then to steady it as it was lowered by means of the block and tackle. The fourth man took a place in the upper part of the frame of the stem picker above the shaft which extended through the fan and protruded beyond the sides of the machine. This fourth man released some of the fastenings by means of which the side frame then being unloaded was lashed to the stem picker. After the various fastenings were removed, respondent's evidence indicated that this fourth man, disobeying a warning shouted to him by respondent, pushed with his feet the side frame whose horizontal center brace rested on the steel shaft. The side frame being released from the fastenings that held it in place, and resting solely upon the smooth steel shaft, yielded to the force thus given and began to slip. The three other employees of appellant, who were on the ground and were supporting the side frame in the manner described, perceiving the danger that threatened, relinquished this support and moved away. The side frame then fell upon respondent, inflicting injuries of a most serious and permanent character.

The physician who furnished the necessary medical care and attention to respondent testified that there was a crushing of the first and second lumbar vertebræ, with practically a complete severance of the spinal cord, and that respondent thereby suffered a complete paralysis of both limbs and all organs below the injured area. This witness testified that, although respondent had recovered some motion in one of his legs, and had regained partial control of his bladder and rectum, it was his opinion that respondent would never again be able to walk. This evidence was not disputed by appellant. The evidence also showed that at the time of the accident respondent was a very strong, robust man 49 years of age. It was stipulated that, according to the American tables of mortality, a man 49 years of age has a probable expectancy of 21.63 years. Respondent testified that, at the time he was injured his earning power was between five and six thousand dollars per year.

[1, 2] Appellant's contention that there was no showing of negligence may be disposed of briefly. In so far as it pertains to the error claimed to have been committed by the trial court in refusing to grant the motion for a nonsuit, the statement of facts herein contained shows that the evidence presented by respondent was amply sufficient to justify the conclusion that the proximate cause of the accident and the resulting injuries sustained by appellant was the pushing of the side frame by appellant's employee who was stationed on the upper part of the frame of the stem picker. This took place after the various fastenings holding the side frame in place had been removed, and when, other than the support furnished by the three employees of appellant who were on the ground, there remained no support for the heavy frame except that its horizontal center brace rested upon the smooth steel shaft. The conclusion is irresistible that the application of sufficient force to the side frame would cause it to slip from the smooth shaft, and respondent's evidence shows that it did slip immediately after it was pushed by appellant's employee. When there is added to this evidence, the evidence that the three other employees of appellant who were on the ground, and who furnished the only possible remaining support for the side frame, seeing that it was slipping from the shaft, relinquished this support, it is apparent that the contention that the motion for nonsuit should have been granted on the ground that there was no showing of negligence is entirely untenable. Nor do we think the contention that the verdict and judgment of the court are unsupported by sufficient showing of negligence is sustainable. It is true that the evidence produced by appellant was to the effect that the employee on the machine did not push the side frame, and that it tended to place the blame for the accident solely on respondent. This had no effect other than to create a conflict of evidence on the feature of negligence, which the jury was at liberty to resolve as it did in respondent's favor. It is unnecessary to cite authorities respecting the duty of an appellate court where the record presents a conflict in evidence.

[3-7] The chief contention made by appellant and the one that forms the real basis for its claim that the court erred in denying a nonsuit and for its objections to various instructions given by the court and its complaint that the court refused to give certain instructions offered by appellant rests upon the hypothesis that the employees of appellant who assisted respondent in unloading the stem picker were, at the time such assistance was being rendered, servants of respondent, and that therefore, conceding that negligence was shown, such negligence is not imputable to appellant, and no liability attaches to appellant for injuries resulting from an accident caused by such negligence. Appellant's argument in support of the contention thus presented may be stated as follows: The work of unloading the machinery was respondent's work, for which he was being compensated; it was work of a sort that required special skill and training; respondent was especially skilled and experienced in the performance of such work; the moving of heavy machinery requires special equipment; respondent owned such equipment; appellant's employees who assisted in unloading the machinery were laborers unskilled and inexperienced in such work; the work was done under the direction and supervision of respondent; appellant's employees at the time the work of unloading was being done were under respondent's control; such employees were, therefore, at the time of the accident, not the servants of appellant, but were servants of respondent, and the doctrine of respondeat superior does not apply to fasten liability upon appellant.

In attacking the problem which is thus presented, it may be conceded at the outset that the evidence indicates that, during the work of unloading, appellant's employees were under the direction of respondent so far as the details of the work were concerned. It may also be conceded that the work then being performed was respondent's work. However, it was work in which appellant was so interested that it had agreed to furnish men to assist in its accomplishment. "It is, of course, well recognized in this state that a servant may be loaned by his master to another so that the act done by the servant becomes the act of the master to whom he has been loaned and for the time being the general master is not responsible for his acts." Moss v. Chronicle Pub. Co., 201 Cal. 610, 616, 258 P. 88, 90, 55 A. L. R. 1258. "In such a situation, however, it is obvious that it is necessary to ascertain who was the master at the very time of the negligent act complained of." Billig v. Southern Pacific Co., 189 Cal. 477, 483, 209 P. 241, 243. "The application of the doctrine of respondeat superior in any given case depends upon the power of control which the superior possesses. * * *" Billig v. Southern Pacific Co., supra. "Consequently the doctrine has application only in cases where the power of control exists, and such power does not exist in a situation where the special employer has no voice in the selection or retention of the negligent subordinate. Du Pratt v. Lick, 38 Cal. 691; Higham v. Waterman, 32 R. I. 578, 80 A. 178; Quinn v. Complete Electric Const. Co. (C. C.) 46 F. 506." Billig v. Southern Pac. Co., supra. As was said in Valdick v. LeClair, 106 Cal. App. 489, 495, 289 P. 673, 676: "The rule is recognized in this state that a servant may be loaned by his master to another so that the act done by the servant becomes the act of the master to whom he has been loaned, and for the time being the general master is not responsible for his acts. Burns v. Jackson, 59 Cal. App. 662, 211 P. 821; Pruitt v. Industrial Accident Commission, 189 Cal. 459, 209 P. 31; Billig v. Southern Pac. Co., 189 Cal. 477–483, 209 P. 241; Moss v. Chronicle Publishing Co., 201 Cal. 610–616, 55 A. L. R. 1258, 258 P. 88, 91. This rule, however, is only applicable in cases where the power of control exists in the special master; that is, where the original master resigns full control over the servant for the time being. Moss v. Chronicle Pub. Co., supra; Flori v. Dolph (Mo. Sup.) 192 S. W. 949; Billig v. Southern Pac. Co., supra. The power of control does not exist in a situation where the special employer has no voice in the selection or retention of the negligent employee, nor where the negligent employee is partially under the control of the special master. Billig v. Southern Pac. Co., supra; Du Pratt v. Lick, 38 Cal. 691; Higham v. Waterman, 32 R. I. 578, 80 A. 178; Quinn v. Complete Electric Const. Co. (C. C.) 46 F. 506. In 39 Corpus Juris, page 1275, § 1462, the rule is stated as follows: 'To escape liability the original master must resign full control of the servant for the time being, it not being sufficient that the servant is partially under the control of a third person; and it is necessary to distinguish between authoritative direction and control and mere suggestions as to details or the necessary cooperation where the work furnished is part of a larger operation.' "

The evidence presented by the record herein shows that appellant's servants who were furnished to respondent to assist in the unloading of the stem picker were paid by appellant; that respondent did not hire them; that respondent did not select them; that respondent could not discharge them; that respondent acquiesced in their selection; that they were under respondent's direction only so far as the details of the work were concerned. Under such circumstances, applying the principles so clearly enunciated in the foregoing quotations from the cases cited, we believe that it may not be successfully argued that respondent possessed the full power of control which is necessary if the rule of nonresponsibility of the general master for negligent acts of his servants loaned to another is to apply. Appellant contends that the work of unloading the machinery was respondent's work, and it may be inferred from the argument made that the accomplishment of the work was a matter of no concern to appellant. Such an argument does violence to the plain facts. Appellant was obviously interested in the accomplishment of the work, for the oral agreement provided that the compensation to respondent should be, not a lump sum, but at the rate of $4 per hour, and the very fact that appellant agreed to furnish men who would assist in loading and unloading the machinery indicates that appellant was interested in the dispatch of the work. The situation in this regard is very similar to that which is presented in Moss v. Chronicle Pub. Co., supra, where the publishing company loaned a servant, one Miotti, to assist Mowry, an independent contractor who was under contract to haul newspapers from the mailroom of the publishing company to ferries, depots, and post offices. In commenting upon the feature of the interest of the publishing company in the doing of the work by the independent contractor, the Supreme Court remarked: "Certain it is that appellant"—the publishing company—"was so vitally interested in the dispatch of the work that the jury could have found that appellant's servant and Mowry's servant were at the time of the accident jointly engaged in a work of mutual interest to the parties, and this is true even if it be conceded that Miotti, after being ordered to this service, thereafter took his orders as to the details thereof from the servant of Mowry."

[8] Complaint is made that the court erred in giving to the jury certain specified instructions offered by respondent and in refusing to give two instructions offered by appellant. The instructions that were given to which appellant objects embodied the principles of law recognized in the decisions heretofore cited, and in effect advised the jury that, while it is recognized that a servant may be loaned by his master to another so that responsibility for the servant's acts may rest upon the temporary or special master, yet

the application of the principle depends upon the power of control possessed by the superior, and that such power of control does not exist where the special employer has no voice in the selection or retention of the negligent subordinate. Since, in our opinion, the principles of law contained in the instructions have received the sanction of the courts of California, it follows that the instructions wherein they are contained were proper to be given. For like reason, we entertain the view that the court did not err in refusing to give the specified instructions offered by appellant. One of these instructions directed the jury to return a verdict in appellant's favor. The second instruction advised the jury, in effect, that, if it should find from the evidence that, at the time respondent was injured, the laborers furnished by appellant were under the sole control and direction of respondent as to the method and manner of unloading the machinery, it was obligatory upon the jury to return a verdict in appellant's favor. The latter instruction incorrectly stated the law applicable to the circumstances, for, even though the servants loaned to respondent were under his sole control so far as the details of unloading the machinery were concerned, this alone is not sufficient to relieve appellant from liability. The former instruction was manifestly improper, in view of the evidence presented.

[9] Complaint is also made that respondent's counsel committed prejudicial error in asking the following question when respondent was testifying: "What does your family consist of, Mr. Carlson?" Objection was immediately interposed to the question, and respondent's counsel stated that, as he was not certain of its propriety, he would withdraw it. The court thereupon permitted the question to be withdrawn, and at the request of appellant's counsel instructed the jury to disregard it. Assuming that the inquiry was improper, since no answer was given to it and it was withdrawn and the jury then and there instructed to disregard it, the contention that appellant was prejudiced thereby is not persuasive. Whatever error may have occurred was cured by the court's prompt instruction, which it must be assumed the jury followed.

[10] The final contention made by appellant is that the verdict was excessive. In view of the facts developed during the trial regarding the severity and permanency of the injuries sustained by respondent and his physical condition at the time of the accident, this contention is manifestly lacking in force. An award of $50,000 for injuries so serious as to have caused total paralysis of the legs and of all organs below the first and second lumbar vertebræ, a condition which, in the opinion of the physician who cared for him, will render it impossible for respondent ever to walk again, bearing in mind that, immediately prior to the accident, he was a strong, robust man, having at the time an earning capacity of between five and six thousand dollars per year, and a probable expectancy of approximately twenty-one and a half years, is not so excessive as to be shocking to the sense of justice and to raise a presumption that it was the result of passion, prejudice, or corruption. Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513.

The judgment is affirmed.

We concur: MARKS, Acting P. J.; LAMBERT, Justice pro tem.

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121 Cal.App. 560

RASIC v. SCHULTHEISS.

Civ. 716.

District Court of Appeal, Fourth District, California.

March 11, 1932.

1. Negligence ⚿83.

"Last clear chance" doctrine stated.

Last clear chance rule presupposes that plaintiff has been negligent; that, as result thereof, he is in situation of danger, from which he cannot escape by exercise of ordinary care, or of which he is obviously unaware, that defendant is aware of plaintiff's dangerous situation under such circumstances that he realized, or ought to have realized, such inability on plaintiff's part to escape from such situation of danger; that defendant then has clear chance to avoid injuring plaintiff by exercise of ordinary care; and that defendant failed to use such care and thereby causes injury.

[Ed. Note.—For other definitions of "Last Clear Chance," see Words and Phrases.]

2. Evidence ⚿594.

Uncontradicted testimony may be disregarded if inherently improbable or there are circumstances in evidence satisfying jury of its inaccuracy.

3. Appeal and error ⚿1003.

Reviewing court cannot disturb verdict denying credence to uncontradicted evidence, unless it appears there are no matters impairing its accuracy.

4. Evidence ⚿588.

Jurors were not obliged to accept testimony of motorist that, during all time he was approaching, person struck was standing to rear of truck working at ice, if it appeared unreasonable or not in accordance with physical facts.

> In order to believe defendant's testimony referred to, it was necessary for the jury to believe that, in short time required for front of defendant's automobile to pass him, plaintiff could have put down his cutting tool, obtained his tongs, placed 50-pound cake of ice on his shoulder, turned to left, and walked into rear portion of defendant's automobile, which was 11 or 12 feet long.

5. **Negligence** 🔑83.

Under last clear chance doctrine, plaintiff's inability to escape need not be due to situation rendering it physically impossible; it is sufficient that he is unaware of danger.

6. **Negligence** 🔑136(32).

Under last clear chance doctrine, any evidence of discovered peril will usually make case for jury.

7. **Automobiles** 🔑246(58).

Where motorist approaching ice truck from rear struck iceman with ice on shoulder stepping out to look for traffic from opposite direction before crossing street, last clear chance instruction *held* proper.

8. **Appeal and error** 🔑930(1).

All reasonable inferences must be drawn from evidence in favor of jury's conclusion, and conflict must be resolved in respondent's favor on appeal.

9. **Trial** 🔑253(4).

Mere giving of instruction on last clear chance rule did not preclude jury's considering question of contributory negligence of plaintiff.

10. **Trial** 🔑253(4).

Where last clear chance instruction was applicable if jury found certain facts, instruction was not misleading and did not deprive defendant of defense of contributory negligence.

11. **Negligence** 🔑136(32).

Whether facts and circumstances are such that last clear chance rule applies is ordinarily question of fact for jury.

12. **Automobiles** 🔑245(72).

Contributory negligence of iceman with ice on shoulder, struck by automobile when stepping out from truck, *held* for jury.

13. **Automobiles** 🔑245(72).

That pedestrian struck by automobile assumed risk in stepping out from rear of truck did not make him negligent as matter of law.

Appeal from Superior Court, Los Angeles County; Raglan Tuttle, Judge.

Action by Vid Rasic against William F. Schultheiss. From the judgment for plaintiff and an order denying a motion for a new trial, defendant appeals.

Affirmed.

Wm. J. Claassen, of San Diego, Stanley A. Phipps and Kidd, Schell & Delamer, all of Los Angeles, for appellant.

Richard A. Dunnigan, of Los Angeles, for respondent.

THOMSON, Justice pro tem.

This is an action to recover damages for personal injuries sustained by plaintiff arising out of a collision which occurred on July 5, 1927, between an automobile driven by defendant and plaintiff, who was a pedestrian. A jury returned a verdict for the plaintiff, and the defendant appeals from the judgment entered thereon and from an order denying his motion for a new trial. The complaint alleged negligence on the part of defendant. The answer denied generally the allegations of the complaint, and alleged affirmatively contributory negligence on the part of the plaintiff.

Respondent, an iceman, while engaged in the delivery of ice, parked his truck facing east on Thirty-Eighth street, between San Pedro street and Avalon boulevard, in Los Angeles, to the left of, and close to, a car parked parallel to the south curb. It was stipulated that this was a residential district at the time of the injury. The evidence as to the distance between the north side of respondent's truck and the north curb of Twenty-Eighth street varied from 19½ feet to 22 feet. This space between the north side of respondent's truck and the north curb was unobstructed. Appellant was operating a Studebaker brougham automobile in an easterly direction on Thirty-Eighth street, and was approaching the ice truck from its rear. Appellant testified that he first saw the truck and the respondent standing to the rear of his truck, working on the ice, when appellant was 150 feet to the rear of the truck; that he continued to observe respondent until the front of appellant's car passed respondent, at which time he was still standing at the rear of the truck, and that, as his car got almost past respondent, he heard a thud. He stopped his car and found respondent lying on the ground beside the truck and a cake of ice and tongs were lying near him. The evidence showed that respondent was knocked down by an ornamental bracket on the top part of defendant's car, on the right side, above the rear wheel, which bracket struck the cake of ice which the respondent was carrying on his left shoulder, or the ice tongs with which respondent was holding the ice, the force of the impact throwing respondent to the ground. Respondent testified that he lifted to his left shoulder a 50-pound cake of ice, about 12 inches thick and 22 inches long, and took a step out from the rear of the north side of his truck, and, while standing in that position, he first looked in an easterly direction, toward the front of his truck, for traffic coming in a westerly direction, and, while standing there, started to turn to look to the rear in a westerly direction, and, while in the act of turning, he was struck or "sideswiped" by appellant's automobile. Appellant testified that he sounded his horn when about 25 feet to the rear of respondent, but respondent gave no indication of hearing it. Appellant drove his car from 3 to 4½ feet north of the truck while passing it. Appellant also testified that, when he first saw respondent's truck, he (appellant) was traveling about 22 miles per hour, and he slowed down and was going 10 to 12 miles per hour in passing respondent's truck. Witnesses for respondent estimated defendant's speed at 25 to 30 miles per hour at the time of the impact, and these witnesses, who were near the point of impact at the time, and respondent said they did not hear appellant sound the horn.

Appellant contends that the verdict and judgment thereon are erroneous upon the following grounds: (1) That there is entirely lacking any evidence whatever to justify the giving to the jury of an instruction upon the doctrine of the last clear chance, that it is entirely without the issues of the case, and that the verdict is not supported by the evidence; (2) that respondent and plaintiff was guilty of contributory negligence as a matter of law, and that the trial court erred in denying appellant's motion for a nonsuit based upon said ground.

No complaint is made by appellant as to the form or language of the instruction on the doctrine of last clear chance, but he contends that such an instruction is not applicable to the facts shown by the evidence.

[1] With reference to appellant's first contention, if the evidence was not sufficient to justify submitting an instruction on the last clear chance rule to the jury, then the giving of such an instruction by the trial court is error, and error of this character is sometimes prejudicial. Wallis v. Southern Pacific Co., 184 Cal. 662, 672, 195 P. 408, 15 A. L. R. 117; Imperial Livestock, etc., Co. v. Tracy, 208 Cal. 205, 214, 281 P. 50; Griffith v. Oak Ridge Oil Co., 190 Cal. 389, 393, 212 P. 913. It becomes important, therefore, to determine whether or not the instruction on that subject was applicable. In support of his first contention, appellant cites numerous authorities which explain the various elements involved in the doctrine of last clear chance, from which it may be said that the last clear chance rule presupposes: (1) That the plaintiff has been negligent; (2) that, as a result thereof, he is in a situation of danger, from which he cannot escape by the exercise of ordinary care, or of which he is obviously unaware; (3) that the defendant is aware of plaintiff's dangerous situation under such circumstances that he realized, or ought to have realized, such inability on plaintiff's part to escape from such situation of danger; (4) that defendant then has a clear chance to avoid injuring plaintiff by the exercise of ordinary care; and (5) that defendant fails to use such care, and thereby causes the injury. If all these elements are present, the rule applies and enables the plaintiff to recover, notwithstanding plaintiff's own negligence. However, if any of these elements is absent, the last clear chance rule does not apply, and the case is governed by the ordinary rules of negligence and contributory negligence. Palmer v. Tschudy, 191 Cal. 696, at page 700, 218 P. 36; 19 Cal. Jur. p. 651 et seq.

To sustain his contention that the doctrine of last clear chance is not applicable, appellant claims that he never at any time observed respondent in the position where he was struck, but only while respondent was standing behind the ice truck, and that, if respondent had remained there, he would not have been injured, and therefore appellant never had actual knowledge of any dangerous situation of respondent. Appellant further contends that it was impossible for respondent to have been in the position where he was struck until after he passed from the range of vision of appellant who was in the driver's seat in the front of the automobile, otherwise respondent would have been hit by the front of the automobile. The last conclusion is not necessarily true. The evidence indicates that no part of the respondent's body was struck by the automobile, but that a projecting ornamental bracket on the top of the car and above the rear wheel struck the cake of ice on respondent's left shoulder, or the ice tongs with which respondent was carrying the ice, throwing him to the ground. It is apparent from the evidence that, if this bracket had not extended out beyond the upper portion of the body of the car, the car would have passed respondent without causing any injury.

[2, 3] Appellant contends that it is apparent that he did not have actual knowledge of any dangerous situation of respondent, for the reason that his (appellant's) own testimony to the contrary "is the only evidence concerning that issue," and that the uncontradicted testimony of a witness to a particular fact cannot be arbitrarily rejected. But such uncontradicted evidence may be disregarded if it is inherently improbable, or if there are circumstances in evidence in connection with the matter which satisfied the jury of its inaccuracy. It is within the province of the

jury to determine what credit and weight shall be given to the testimony of any witness, and the reviewing court cannot disturb a verdict which denies credence to such testimony, unless it appears that there are no matters or circumstances which at all impair its accuracy. Cowan v. Hill, 109 Cal. App. 656, 658, 293 P. 871.

[4] In the light of this rule, let us examine the evidence to ascertain if there are no circumstances which impair the accuracy of appellant's testimony touching upon that particular fact. Appellant testified in substance that, from a point 150 feet to the rear of the truck, until he was passing the rear of the truck, he continually observed respondent, and that during all of that time respondent was standing to the rear of the truck, cutting ice or working at the ice. It does not seem physically possible that in the short time that it required for the front part of appellant's car to pass him respondent could have put down his cutting tool, obtained his tongs, placed the 50-pound cake of ice on his shoulder, turned to the left, and walked into the rear portion of appellant's car, which car, appellant testified, was 11 or 12 feet long. These circumstances might have rendered the testimony of appellant inherently improbable in the minds of the jurors. The physical facts were before the jury, and, even if there had been no other testimony than appellant's on this particular matter before the jury, still the jurors were not obliged to accept this testimony of appellant as accurate if it appeared to them unreasonable or not in accordance with the physical facts. Cowan v. Hill, supra.

[5-8] Respondent testified, in substance, that, just before the impact, he was standing at the rear of his truck just far enough to the north to enable him to see up the street in the direction his truck was facing; that he had a 50-pound cake of ice on his shoulder which obscured his vision in the direction from which appellant was approaching, and he was unaware of the appellant's approaching car. If the jurors believed this testimony, they might well have regarded respondent's position under all the circumstances of the case as a position of peril from which respondent could not escape. It is not essential that the inability of a plaintiff to escape must be due to a situation which renders it physically impossible for him to do so; it is sufficient that he is unaware of the danger and for that reason unable to escape it. 19 Cal. Jur. p. 654; Palmer v. Tschudy, supra. Appellant testified that he observed respondent during the last 150 feet of his course toward respondent. There is a conflict in the evidence as to the speed at which appellant was traveling, and the jurors may have concluded that appellant was exceeding the speed limit which at that time was 20 miles per hour in a residential district. The jurors would have been justified in concluding that respondent was standing at the rear and close to the north side of his truck, with the ice on his shoulder obscuring his view toward appellant, during the last 150 feet of appellant's approach to respondent. Respondent testified that he was standing in that position. This was a position of danger.

Appellant testified that he saw respondent from the time respondent first came into view, when appellant was 150 feet to the rear of respondent, up to the time the front part of appellant's car passed respondent. The jury evidently concluded, and under the evidence was justified in concluding, that appellant saw respondent in a position of danger, and, as respondent's head was turned away from the direction from which appellant was approaching, and respondent's view was obscured by the ice on his left shoulder, appellant must have known that respondent was unable to escape from such dangerous situation. "Any evidence of discovered peril will usually make the case for the jury." 20 R. C. L. p. 114; Starck v. Pacific Electric Railway Co., 172 Cal. 277, at page 281, 156 P. 51, L. R. A. 1916E, 58. The jury was justified also in concluding from the evidence, particularly the testimony of appellant that he observed respondent during the last 150 feet of his approach to respondent, not only that appellant knew that respondent was in such position of danger and was unable to escape from it, but, also that appellant still had ample opportunity, by the exercise of ordinary care, to stop his car before reaching respondent, or to turn his car far enough to the left to avoid the collision; but that he failed to do so. In this condition of the evidence, the trial court was justified in giving the instruction on the doctrine of last clear chance. All reasonable inferences are to be drawn from the evidence in favor of the conclusion of the jury and conflicts are to be resolved in favor of respondent.

[9-11] Appellant contends that the giving of the instruction on the doctrine of last clear chance in this case deprived the appellant of his defense of contributory negligence. But a reviewing court cannot assume, under the condition of the evidence in this case, that the verdict of the jury was based upon that doctrine. The jury might have considered the question of contributory negligence and found against defendant on that issue. The mere giving of such an instruction on the last clear chance rule does not preclude the jury from considering the question of contributory negligence on the part of plaintiff. Where the evidence is such that the doctrine of last clear chance is not relevant or applicable, such an instruction might be confusing to a jury, but where, as in this case, such an instruction is applicable if the jury found cer-

tain facts to be true, it cannot be said that the jurors were misled to the injury of the defendant and appellant. The trial court did not instruct the jury that the doctrine of last clear chance did in fact apply to the case. Nor did the trial court instruct the jury to find for plaintiff and against defendant if the jury believed from the evidence that the defendant had the last clear chance to avoid the injury. The court merely explained the different elements that must be present to make the doctrine applicable, and further stated to the jury that "if any of these five elements is lacking the plaintiff cannot recover on the principle of the last clear chance." Thus the court left it for the jury to determine from the evidence whether or not this doctrine should be applied. The trial court instructed the jury fully on the subjects of negligence, contributory negligence, and proximate cause, and also gave the following instruction: "In order, therefore, to find a verdict for the plaintiff you must not only find from a preponderance of all of the evidence that the defendant was negligent, but also that such negligence was the proximate cause of the injury to the plaintiff; and you must further find that the evidence fails to show by a preponderance thereof that the plaintiff was guilty of negligence contributing proximately thereto; otherwise your verdict must be for the defendant." Whether or not the facts and circumstances are such that the last clear chance rule is applicable is ordinarily a question of fact for the determination of the jury. 19 Cal. Jur. p. 653.

[12] Appellant next contends that respondent and plaintiff was guilty of contributory negligence as a matter of law, and that the trial court erred in denying appellant's motion for a nonsuit on that ground.

Appellant's citations in support of this contention are readily distinguishable from the present case by reason of the facts and circumstances shown by the evidence. In Schooley v. Fresno Traction Co., 56 Cal. App. 705, 206 P. 481, the evidence showed that plaintiff was walking diagonally across a busy street in the business district of the city of Fresno, apparently heedless of traffic, and walked directly in front of an approaching street car, and was struck by the street car the instant he stepped on the track. The appellate court held that plaintiff's negligence barred a recovery, stating at page 713 of 56 Cal. App., 206 P. 481, 484: "There can be no recovery in the present case where the street car was being operated at a legal rate of speed." In the case of Brkljaca v. Ross, 60 Cal. App. 431, 213 P. 290, cited by appellant, the facts as outlined in the court's opinion showed that plaintiff, at night, was crossing a street in the city of Ft. Bragg, in a northwesterly direction, pushing a cart. He was accompanied by another man at the time. While they were so crossing the street, defendant drove his car into the street which plaintiff was so crossing, approximately 200 feet easterly from plaintiff and his companion. The street was otherwise unoccupied and unobstructed. The car with its lights shining was visible to plaintiff and his companion had they looked in that direction. Defendant sounded his horn several times, and up to the time he was within a few feet of plaintiff, and, as he approached plaintiff, he was proceeding at a speed not to exceed 3 miles per hour. When defendant's car was about 20 or 25 feet from plaintiff and his companion, the latter stopped walking and was in a place of safety. But plaintiff went ahead, and then turned back, and then, when too late for an impact to be avoided, went ahead again, immediately in front of the car, and was struck. The reviewing court held that, under the circumstances of the case, it was the duty of plaintiff, as he approached and passed the center line of the street, to have looked to the right in the direction from which danger could be expected.

The evidence in the case of Mayer v. Anderson, 36 Cal. App. 740, 173 P. 174, cited by appellant, showed that plaintiff, having proceeded about half way across Market street in San Francisco, without looking in either direction, collided with defendant's automobile. The appellate court pointed out that the place where the accident happened was one of the most heavily traveled streets in San Francisco, and that, despite that fact, plaintiff, in crossing the street, neglected to take the most ordinary precaution to avoid being injured, and walked into the front left end of the automobile.

The evidence in the case of Atkins v. Bouchet, 65 Cal. App. 94, 223 P. 87, relied upon by appellant, discloses that plaintiff, a pedestrian, was crossing East Fourteenth street in Oakland, carrying an umbrella down over her head as low as her waistline, without even once looking up after leaving the sidewalk, and in consequence thereof she was struck by defendant's automobile.

The case of Finkle v. Tait, 55 Cal. App. 425, 203 P. 1031, also cited by appellant, at first glance seems similar to the case at bar, in that the decedent was carrying a box of raisins on his shoulder, which obscured his view in the direction from which defendant's car was approaching. The collision happened at night, and defendant's headlights were shining, the reflection from which could easily have been seen by plaintiff. The decedent was crossing Hollywood boulevard in the city of Los Angeles while "considerable traffic" was passing on each side of the street, and decedent was out toward the center of the street when struck. The evidence in the case indicated that he neglected to take any precaution to avoid the collision. The trial court directed a verdict in favor of defendant.

The appellate court, in reviewing the case, at page 431 of 55 Cal. App., 203 P. 1031, 1034, quoted with approval the language contained in Lacey v. Porter, 103 Cal. 597, 37 P. 635, as follows: "To justify the court in directing a verdict it is not necessary that there should be no conflict in the evidence; but where the evidence is such that it is clearly insufficient to support a verdict in favor of the party against whom the direction is given, the instruction is proper. * * *"

Some other cases are cited by appellant in support of his contention that respondent was guilty of negligence as a matter of law, but they are cases like the ones above reviewed in which the plaintiff heedlessly and without taking ordinary care for his own safety attempted to cross a street in the midst of traffic.

But the evidence in the case at bar shows that respondent was not crossing the street, but was in the act of taking precautions for his safety before attempting to cross the street, when he was struck by defendant's car. Plaintiff testified that he had been working in the rear of his car, concealed from any traffic approaching in a westerly direction; that he took one step out from the rear of his truck in order that he could see any traffic that might be approaching from the east, for, as he explained it, he did not believe any one would hit him from the rear, and, while standing there, close to his truck, endeavoring to see if it would be safe for him to cross the street, and unaware of the approach of defendant's car from the west, he was struck down and injured by defendant's car. If respondent had been actually crossing the street, without having looked to the west, he might have been guilty of contributory negligence as a matter of law, but, under the facts and circumstances of the case as shown by the evidence, it cannot be said that respondent was guilty of negligence as a matter of law.

[13] Even if we believe that respondent did assume a certain amount of risk in stepping out from the rear of his truck, that would not make him guilty of negligence as a matter of law. As stated in the opinion of the court in the case of Commonwealth Bonding & Casualty Ins. Co. v. Pacific Electric Ry. Co., 42 Cal. App. 573, at page 577, 184 P. 29, 31: "The fact that one voluntarily assumes a certain degree of risk is not conclusive of negligence. In these days of rapid transit and congested traffic, every man who crosses a busy street, or drives an automobile, takes chances, and serious ones. The question is, are they greater than is reasonably necessary to meet the ordinary requirements of business, or even pleasure? Where the precise facts under consideration are such as to give rise to an honest difference of opinion between intelligent men, the question is one for the jury."

The case at bar falls within that classification, and we believe that plaintiff was not guilty of contributory negligence as a matter of law. The trial court, therefore, was justified in denying defendant's motion for a nonsuit. Fraher v. Eisenmann, 94 Cal. App. 48, 51, 270 P. 704; Erdevig v. Market Street Railway Co., 203 Cal. 367, 373, 264 P. 252.

The order denying appellant's motion for a new trial not being an appealable order, the appeal from that order is dismissed.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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122 Cal.App. 113

COOK et ux. v. GENTRY et ux.

Civ. 758.

District Court of Appeal, Fourth District, California.

March 23, 1932.

1. Appeal and error ⊶1011(1).

Judgment and findings supported by competent evidence cannot be reversed because of conflict in evidence.

2. Vendor and purchaser ⊶296.

Vendor *held* entitled to repossess realty, where cash payment was not made, and checks aggregating amount of purchase price were devoted to obligations to be assumed by purchasers.

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Action by C. F. Cook and his wife against D. L. Gentry and his wife. From an adverse judgment, defendants appeal.

Affirmed.

Harris, Willey, Griffith & Harris, of Fresno, for appellants.

Carl E. Lindsay and Lindsay & Gearhart, all of Fresno, for respondents.

MARKS, J.

Respondents were the owners of a house and lot and a bakery business in Coalinga, Cal., which was their community property. On or about November 7, 1928, they entered into a verbal contract with appellants whereby respondents agreed to sell and appellants agreed to buy the property upon the following terms: Payment to respondents of $1,000 cash and the payment of a bill of $160 owed by respondents to W. D. Bennett, these sums equaling respondents' equity in the house and lot; assumption and payment of an incumbrance on the house and lot; assumption and payment of all debts of the bakery business amounting to about $1,250; payment of a $500 note and interest thereon to a Coalinga bank upon which C. F. Cook was one of the two makers. The sales contract was divided into two parts; the $1,000, together with the payment of the Bennett bill and the incumbrance was to be payment in full for the real estate. The assumption and payment of the other obligations was to be payment for the bakery business. C. F. Cook, but not his wife, executed a deed to the real property to appellants and delivered possession to them on November 7, 1928.

Respondents instituted this action to cancel the deed and recover possession of the real property together with $150 rental value of the property and $500 damages. The trial court gave judgment canceling the deed and restoring possession to respondents, but did not give them anything for the rental value or any damages.

[1] Appellants alleged they had fully paid for the real estate. They urge as their sole ground for a reversal of the judgment that the finding of the trial court to the effect that the house and lot was not fully paid for by them is not supported by the evidence and is contrary to the evidence. It should not be necessary to have to call to the attention of members of the bar the elementary principle that where there is any competent and material evidence in the record to support the findings and judgment, a reversal cannot be had because of a conflict in the evidence.

[2] The finding that the $1,000 was not paid to respondents is amply supported by the evidence. On or about November 7, 1928, Mrs. Gentry gave Cook a check for $500. There was present a representative of the Sperry Flour Company, one of the creditors of the bakery business. Cook gave the following account of the disposition of this check:

"A. This, Fresna, and I owed them an account and he happened to come over there when we were transacting the deal.

"Q. You say 'he.' Who was 'he'? A. Mr. Kelley, I think the gentleman is present. So Mr. Kelley said he would have to have a substantial payment on this account before he would extend credit to the Gentrys, and Mrs. Gentry asked him how much he would have to have and he said $500.00. She says, 'Well, Curt, you endorse this check over to him and I will give you another one on the tenth, when we get our money from the oil company to take care of this one.' So I endorsed it over to the Sperry Flour Company and give it to Mr. Kelley.

"Q. You never did get any money on that check then? A. No, sir."

Several days later Mrs. Gentry gave Cook another check for $500, but appellants had failed to pay the bank note and Cook was compelled to use this money to pay it besides paying the interest himself. It is true that appellants did make some payments to Bennett and also paid a small amount in installments on the incumbrance on the house and lot. The trial judge did not give respondents any rental or damages for the withholding of their property by appellants. He apparently let these items balance each other.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

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122 Cal.App. 61

MOORE v. McDONALD et al.

Civ. 741.

District Court of Appeal, Fourth District, California.

March 22, 1932.

Rehearing Denied April 13, 1932. Hearing Denied by Supreme Court May 19, 1932.

1. **Creditors' suit** ⟹46.

In action to subject realty to levy, evidence sustained finding that debtor, not legal title holder, paid for property.

2. **Creditors' suit** ⟹46.

In action to subject realty to levy, evidence sustained finding that deed originally named debtor grantee, and debtor substituted legal title holder's name before recording deed.

3. **Evidence** ⟹595.

Where facts of transaction are entirely within adverse parties' knowledge, and plaintiff cannot secure direct testimony, court may base judgment upon reasonable inferences from evidence.

4. **Evidence** ⟹588.

Court may reject some of witness' testimony as false without rejecting all.

> While it is true that the evidence for witness, false in one particular, must be regarded with suspicion in others, if the trial judge can glean flashes of truth from the evidence of a witness whom he concludes has been false in other portions of his testimony, he may base his findings and judgment upon the portions of such evidence which he can accept as true.

5. **Appeal and error** ⟹994(3), 1012(1).

Trial court is judge of weight and sufficiency of evidence, and witnesses' credibility.

6. New trial ⚷102(3).

In action to subject realty to levy, defendants *held* not entitled to new trial for newly discovered evidence regarding deed from debtor to legal title holder.

Existence of deed could not be newly discovered evidence to defendants when one of them, as grantor, was supposed to have executed it to other as grantee, nor could it be contended that the defendants used any diligence to produce the deed or its recorded copy at the time of the trial, since defendants did not request a continuance to secure the missing record, and did not call the trial court's attention to the fact of the supposed existence of the deed, or that the original had been lost, if it were lost, or that the book containing the copy was not available.

7. Appeal and error ⚷1170(3).

In action to subject realty to levy, that plaintiff's pleadings admitted execution of deed to legal title holder, whereas court found that deed originally named debtor grantee, and debtor substituted legal title holder's name, *held* not reversible error (Const. art. 6, § 4½).

Evidence supporting court's finding was admitted without objection, and the case was tried upon this theory, and the finding was supported by admissions of defendants, so that a retrial of the case would achieve the same result, therefore, a reversal of the judgment was not required, since Const. art. 6, § 4½, providing that the judgment shall not be reversed for any error as to any matter of pleading unless the court shall be of the opinion that the error complained of resulted in a miscarriage of justice, was applicable.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by William H. Moore, Jr., trustee of the estate of El Dora Oil Company, a bankrupt, against Ronald McDonald and another. From part of the judgment defendants appeal.

Affirmed.

Raymond Benjamin, of Washington, D. C. (Rowen, Irwin, J. O. Reavis, and Claflin & Claflin, all of Bakersfield, and Paul W. Schenck, of Los Angeles, of counsel), for appellants.

A. H. Swallow, of Los Angeles, and Harvey & Heard, of Bakersfield, for respondent.

MARKS, J.

This action was instituted by respondent to subject certain property in the city of Bakersfield to a levy of an execution in an action whereby the El Dora Oil Company recovered judgment against Ronald McDonald and three others in the sum of $35,000. Two pieces of property were involved which we will hereafter refer to as the "Hermitage property" and the "Opera Market property." The trial court held that the Hermitage property belonged to Ronald McDonald and was subject to the lien of the judgment and the levy of the execution, and that the Opera Market property belonged to Jennie McDonald and was free therefrom. Appellants appeal from that portion of the judgment subjecting the Hermitage property to the judgment and execution.

After the recovery of its judgment against McDonald and others, the El Dora Oil Company became bankrupt, and respondent was duly and regularly appointed its trustee in bankruptcy and as such maintained this action. The abstract of the judgment for $35,000 was duly recorded in the county of Kern and execution levied upon the property by the sheriff, record title to which stood in the name of Jennie McDonald. The judgment has not been paid, and Ronald McDonald has no other property out of which it can be satisfied. The complaint was drawn upon the theory that the Hermitage property was purchased by Ronald McDonald with his own money and title placed by him in the name of Jennie McDonald, she holding title for him. The answer was drawn upon the theory that the property was purchased by Jennie McDonald with her own money, and that she held the title in fee free from any interest therein or claim thereupon by Ronald McDonald. It was alleged by the plaintiff that on or about the 22d of March, 1910, Thomas Alton, who was the owner of the Hermitage property, conveyed it to Jennie McDonald by a good and sufficient deed of conveyance, the purchase price being paid by Ronald McDonald, and title taken by him in the name of Jennie McDonald for his use and benefit. The answer admitted and alleged that Alton conveyed the Hermitage property to Jennie McDonald by a good and sufficient deed of conveyance. The case was tried upon a somewhat different theory without an amendment to the pleadings, and the findings followed the theory adopted by the parties on the trial rather than the allegations of the complaint and answer to which we have just referred.

The San Francisco Breweries Limited was a corporation controlled by London interests. In 1910 Thomas Alton was its managing agent for California, with offices in San Francisco. Ronald McDonald was its Kern county agent and representative. In that year the corporation decided to acquire control of the title to the Hermitage property in order to insure its use as a saloon for the sale of beer manufactured by it. There was an account in one of the Bakersfield banks in the name of the company, which account was under the control of McDonald. For some reason the corporation could not own real property in California. The sale of the Hermitage property was negotiated by Ronald McDonald and the company funds used to pay the purchase price of $24,000. Title was taken in the name of Thomas Alton. Almost immediately thereafter Ronald McDonald started negotiations for the purchase of this property, which was consummated the same year, and the purchase price paid by an exchange of credits between himself and the San Francisco Breweries Limited through the account in the Bakersfield bank. The deed was delivered to Ronald McDonald and, when recorded, the grantee named was Jennie McDonald.

The sole evidence for the plaintiff consisted of the testimony of Ronald McDonald called by the respondent under the provisions of section 2055 of the Code of Civil Procedure, and the deposition of Jennie McDonald introduced under the same section, together with a photostatic copy of a notarial record of a San Francisco notary, deceased at the time of the trial, showing that the deed acknowledged by him was from Thomas Alton to Ronald McDonald.

Jennie McDonald was the sister of Ronald McDonald. She testified that she lived in San Francisco up to the time of the great fire in 1906, immediately after which she and her father removed to Bakersfield, where she has since resided. Her mother died in 1895 or 1896, having been an invalid for almost ten years prior to her death. Miss McDonald testified that her mother had saved four or five thousand dollars in cash and United States government bonds in the sum of two or three thousand dollars, and that she herself had saved about $1,000 during her residence in San Francisco. The money was all in $20 gold pieces, and according to Miss McDonald's testimony was kept in a knitted purse which was about six inches in length and was stored in an old trunk in the basement of their San Francisco residence. The mother was of a very secretive nature and no one knew of her savings except the two women. Miss McDonald testified that during the fire she and her father escaped to Oakland, taking with them a few of their personal effects with Miss McDonald carrying their securities, together with the gold in the small knitted purse. She further testified that following the fire she and her father were taken to Bakersfield by Ronald McDonald, and that she and her father carried the gold and securities with them in their pockets; that upon their arrival in Bakersfield she turned her hoardings over to her brother, who invested them for her, she having no further knowledge of the money, securities, or investments made except that furnished her by her brother.

The estate of the mother was never probated. Miss McDonald testified that her mother told her she wished her daughter to have all her property after her death, and gave the securities to her prior to death. Ronald McDonald testified that the estate consisted of the gold, United States government bonds and Spring Valley Water stock, and that the total value of the money and securities turned over to him did not equal the sum of $10,000; that he sold the stocks and bonds and successfully invested and speculated with the sister's money so that in 1910 he had increased her holdings to the value of about $18,000. Both the appellants testified that Ronald McDonald purchased the Hermitage property for Jennie McDonald, and that she ultimately paid the purchase price for it.

Ronald McDonald testified that he had a place of business for a considerable time, between 1910 and 1929, in the Hermitage property, and rooms there for a number of years during that period for which he paid his sister no rent; that he collected all the rents, took care of all the business transactions in connection with the property, paid all the taxes, insurance, repairs, improvements thereon for his sister, and otherwise completely managed it for her. He could produce no vouchers, receipts, or records of accounts showing his payment of any of the income from the property to the sister. A number of years after the purchase of the property he arranged a lien upon the Hermitage property and the Opera Market property to secure a note for the sum of $50,000 the proceeds of which were used for the financial assistance of one of his friends who was entirely unknown to his sister. The remaining material facts will be gleaned from the quotations from the testimony of Ronald McDonald hereinafter set forth.

[1, 2] Appellants maintain that two findings of the trial court are not supported by the evidence and are contrary to it. These findings are, first, that the Hermitage property was paid for by Ronald McDonald and not by Jennie McDonald; and, second, that the original Alton deed as executed and delivered by Alton was made to Ronald McDonald as grantee, who after its delivery to him erased his name therefrom and substituted the name of Jennie McDonald in its place and as so changed had the deed recorded.

We have concluded that the following testimony of Ronald McDonald, in addition to the facts already detailed, amply support these findings which are challenged by appellants:

"Mr. Harvey: Q. Now where was the money paid to Thomas Alton for this property when it was purchased from him? A. It was really paid in San Francisco; it was taken out of the brewery account in the Kern Valley Bank in Bakersfield; I don't remember the details but it was an exchange of credits. * * *

"Q. How did your sister pay for it? A. Well, you are talking about my sister's purchase from Alton—my sister paid for it from time to time. I can't go through the details when she paid for it. She did not have the full amount of money to pay for it. It was carried for some time on the books.

"Q. She didn't have the money at the time to pay for it? A. She did not have $24,000 at the time to pay for it.

"Q. Do you know how much money she had at that time? A. I can't recall what the details of the transaction were; it ran along for some time before it was paid for.

"Q. Do you recall the other day you were asked this question: 'Q. In other words, the San Francisco Breweries charged your account with the $24,000, is that it? A. No, the San Francisco Breweries carried the account until my sister's money—she got her money together—at least I got her money together and cleared it. She did not have any account in the bank: it was the San Francisco Breweries, Limited, account.'

"Q. Is that correct? A. Yes, that is correct.

"Q. And do you remember it was charged against your account with the San Francisco Breweries? A. I didn't say that—the San Francisco Breweries account was not my individual account.

"Q. Your sister was supposed to have bought this property for $24,000 from the San Francisco Breweries, Limited? A. Yes, sir.

"Q. And didn't she have the money? A. Yes, sir.

"Q. In the meantime where did the money come from to pay for it, the $24,000? A. It came from her—my sister's money from time to time.

"Q. In the meantime, before she got her money together, where did the money come from? A. It was not paid for; she made a deposit and paid a portion of it and paid for it from time to time.

"Q. It was paid for, was it not, out of the account that you carried with the San Francisco Breweries, Limited? A. Yes, sir.

"Q. Where was the deed to your sister delivered, Mr. McDonald? A. I suppose it was delivered at the bank—my office was in the bank at that time.

"Q. In the office of the Kern Valley Bank? A. Yes, sir.

"Q. Don't you remember that the deed was delivered to you at San Francisco? A. I don't recall that; it may be but I don't remember those small details.

"Q. In any event you got the deed? A. Yes, I think the deed was delivered to me. I transacted all of her business at the time.

"Q. You transacted all of your sister's business and you got the deed, is that correct? A. I judge I did. I got the deed and held it until the transaction was closed up.

"Q. Now, Mr. McDonald, I will ask you to state who was the grantee named in that deed from Thomas Alton? A. Well since this hearing came up it emphasized my memory some—I always had it in my hands and always thought that I had changed the deed, but I don't think I did change it from what evidence I got here.

"Q. Have you got some new evidence? A. No, only from the argument and testimony that I heard here.

"Q. You don't think now that you did change the deed after you received it? A. I say, it is a long time to remember and I don't want to state something that is not true and it is impossible for me to decide whether I had that or whether it was changed by Mr. Alton or who, if it was changed.

"Q. It was changed? A. If that was the deed, that was changed.

"Q. Well wasn't the deed made out to you originally, Mr. McDonald? A. I believe it was; whether it was the same deed or not.

"Q. At the time you received the deed from San Francisco, your name was on there as grantee, is that correct? A. That I cannot be positive or whether there was another deed. When the transaction was closed Mr. Alton sent the deed down to the office.

"Q. You don't recall any other deed? A. That is where I am puzzled; I can't remember any other deed.

"Q. You don't remember another deed from Thomas Alton to R. McDonald? A. I can't positively remember that it was from Thomas Alton to Ronald McDonald direct, but I have an idea that that was the first deed.

"Q. And that the first deed was from Thomas Alton to you? A. Yes, if there was more than one deed but if it was changed I think the first one was to me.

"Q. Is it not a fact, Mr. McDonald, that you yourself erased the name Ronald McDonald as the grantee in that deed and inserted in it the name of your sister Jennie McDonald? A. I can't recall that I did. It may be possible.

"Q. In other words you say you might have done it? A. Anything is possible, but I can't recall that I did it if I did do it.

"Q. It is possible then that you may have done that? A. Yes, it may be possible. * * * Mr. Harvey:

"Q. Now, Mr. McDonald, you recall giving your deposition in 1927, in my office, before Nellie C. Denslow, a notary public in this county and state? A. I do, yes.

"Q. Now do you recall at that time being asked these questions, and giving these answers, page 37: 'Q. Did you give your sister a deed to the Hermitage property? A. I certainly did, I just remember Alton did deed it to me before he deeded it to my sister. I know there was quite a delay in closing the deal between me and Mr. Alton. Q. You now recall giving a deed to the property to your sister from yourself? A. No, I cannot recall it; after Alton deeded it to me I must have deeded it to my sister, I don't remember the transaction, the deed from Alton was direct to me.'

"Q. Do you recall giving that testimony at that time? A. I don't recall giving it, but it is a fact if it is in that deposition. I don't recall the entire deposition or any portion of it. * * *

"Q. Have you anything to show that you turned that money over to her, in the way of cancelled checks or vouchers or anything of that kind? A. It was her account that I collected. Whenever I collected the money I put it on her account.

"Q. Have you anything to show that you ever, by check or receipt or voucher of any kind, to show that you ever paid to Jennie McDonald any of this rent which you collected? A. I have no receipts; I took no receipts.

"Q. You have no receipts and no cancelled checks? A. Well, yes I have; I have some C.D.'s.

"Q. Where are they? A. She has them I guess. In fact I know she has. I collected the interest on one or two of them just recently for her.

"Q. You say she has C.D.s', you mean certificates of deposit at the bank; she would cash them? A. No she does not cash them; she carried them; she does not carry any checking account.

"Q. She has no checking account at all? A. No she has never had a checking account.

"Q. In what form did you turn this money over to her? A. When I collect the $400 I give it to her.

"Q. In what form do you give it to her? A. Hand it to her.

"Q. In cash? A. Cash or currency or whatever she wants. I put it in whatever shape she wants it.

"Q. But you have no receipts or cancelled checks to show that, have you? A. No.

"Q. When you get a check payable to you as Ronald McDonald, what do you do with that? A. Endorse it Ronald McDonald, agent, get the money and take it to her home.

"Q. That book that you have been consulting there, Mr. McDonald, does that show where you paid her any money? A. No, sir.

"Q. It does not? A. No.

"Q. You have no record to show that you ever paid her any money at all, have you? A. None at all."

[3] It is well recognized by all courts that in cases of this kind where the facts and circumstances of a transaction are entirely within the knowledge of the adverse parties, it is often impossible for a plaintiff to secure direct testimony of the real facts of a transaction of the nature of the one here involved. Under such circumstances the trial court is permitted to draw reasonable inferences from the evidence and upon such inferences base its judgment. As was said in the case of Maxson v. Llewelyn, 122 Cal. 195, 54 P. 732, 734: "By appellant it is first insisted that the charge of fraud and the evidence in support of it are both insufficient, in that it is not made to appear that, at the time Larrabee made the representations to Llewelyn, he did not believe he could procure such a policy, and that the only testimony upon the point is that such policy was not, in fact, procured. It would in most cases be extremely difficult, and in many cases absolutely impossible, to procure direct evidence of this nature. In all cases it is permissible to prove fraud by circumstances, and in most cases it is the only evidence available. In aid of the direct facts proved, legitimate inferences are permitted to be indulged to establish others not directly in evidence. Butler v. Collins, 12 Cal. 457; Levy v. Scott, 115 Cal. 39, 46 P. 892." Our duty under these circumstances is set forth in Mah See v. North American Accident Ins. Co., 190 Cal. 421, 213 P. 42, 44, 26 A. L. R. 123. "This court has frequently held that, even though all the facts are admitted or uncontradicted, nevertheless, if it appears that either one of two inferences may fairly and reasonably be deduced from those facts there still remains in the case a question of fact to be determined by the jury (or by the trial judge where the case is tried without a jury), and that the verdict of the jury or the finding of the trial judge thereon cannot be set aside by this court on the ground that it is not sustained by the evidence. Anderson v. Los Angeles Transfer Co., 170 Cal. 66, 148 P. 212. In so far as the evidence is subject to opposing inferences, it must upon a review thereof be regarded in the light most favorable to the support of the judgment. Woodard v. Glenwood Lumber Co., 171 Cal. 513, 519, 520, 153 P. 951; Hassell v. Bunge, 167 Cal. 365, 367, 139 P. 800. 'In reviewing a question of this kind, all the inferences reasonably possible from the evidence favorable to the plaintiff (the prevailing party) must be

indulged by this court.' Bandle v. Commercial Bank of Los Angeles, 178 Cal. 546, 547, 174 P. 44, 45."

We believe that certain portions of the testimony of the appellants were so inherently improbable that the trial court was not only justified, but was required, in the exercise of sound discretion, to reject certain portions of it, especially the testimony concerning the hoarding of $5,000 in $20 gold pieces, which would have a total weight of about fifteen pounds, in a small knitted purse about six inches in length, and the storing of this money, together with valuable stocks and bonds, in an old trunk in the basement of a San Francisco house for many years. We believe that the complete lack of any knowledge shown by Miss McDonald of any business transactions supposedly carried on for her by her brother, together with his complete possession and control of the Hermitage property for many years, together with Ronald McDonald's testimony which we have quoted, rather conclusively shows that he paid for the Hermitage property and received the deed, thereafter substituting his sister's name for his own in exact accordance with the findings of the trial court. These findings are amply supported by the evidence and the reasonable inferences which the trial court drew from it.

[4, 5] Appellants strenuously maintain that as the findings and judgment, if supported, must be sustained by their evidence and inferences therefrom, and as the trial court rejected part of it as inherently improbable and false, all of it must be rejected for the same reason, leaving the record barren of any evidence at all to support the final judgment. While it is true that the evidence of a witness, false in one particular, must be regarded with suspicion in others, it is not true that because certain testimony is doubted and rejected by the trial court all of the testimony given by such an unreliable witness must be rejected. The trial court is made the judge of the weight and sufficiency of the evidence and the credibility of the witnesses to meet a situation of this kind. If the trial judge can glean flashes of truth from the evidence of a witness whom he concludes has been false in other portions of his testimony, he may base his findings and judgment upon the portions of such evidence which he can accept as true.

[6] Appellants further complain that the trial court committed prejudicial error in refusing to grant their motion for a new trial on the ground of newly discovered evidence. In an affidavit submitted in support of their motion it is set forth that at the time of the trial their attorneys sent searchers to the office of the county recorder of Kern county to search for the recorded copy of a quitclaim deed to the Hermitage property supposedly given by Ronald McDonald to Jennie McDonald in 1911; that they found the index record of such a deed, but that the volume containing the record could not then be found. They made no request at the trial for a continuance of the case to secure the missing record and did not call to the attention of the trial court the fact of the supposed existence of the deed or that the original had been lost, if it were lost, or that the book containing the copy was not available at that time. It appears from the record before us that the deposition of Jennie McDonald was taken in the presence of one of her then attorneys almost two years before the trial of the action. In this deposition appears some discussion of the possible existence of such a deed. The statement of these facts entirely negatives the contention of appellants that the existence of this deed was newly discovered evidence or that they used any diligence to produce it or its recorded copy at the time of the trial. It does not seem possible that the existence of such a deed could be newly discovered evidence to appellants when one of them as grantor was supposed to have executed it to the other as grantee. We find no error on the part of the trial court in refusing to grant appellants' motion for new trial upon this ground.

[7] Appellants forcefully maintain that, as the pleadings admit the execution of a deed to the Hermitage property from Thomas Alton to Jennie McDonald, this must be taken as an admitted fact, and that the contrary finding of the trial court to the effect that the deed was executed to Ronald McDonald as grantee and changed by him after delivery by inserting the name of Jennie McDonald therein must be disregarded. They support this contention with well-considered authorities. We, however, do not consider this variance sufficiently material or prejudicial to the rights of appellants to warrant a reversal of the judgment by us.

The evidence supporting the finding that Ronald McDonald was named as the original grantee, and that it was changed by him after delivery, was admitted without objection on the part of appellants. The case was tried upon this theory and the findings of the trial court are supported by the evidence, consisting of admissions by appellants. We cannot conclude that they could successfully change their testimony upon this subject if the case were tried again. If the judgment were reversed and a new trial had, we presume that the evidence of these witnesses would be in accord with that given by them at the preceding trial. If the judgment were reversed, respondent would amend his pleadings. If the case were then resubmitted upon the evidence of the appellants, a judgment in accordance with the one now before us would have to be entered. Section 4½ of article 6 of the Constitution prohibits us from reversing a judgment "for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." We are of the opinion that this section of the Constitution was adopted to prevent a reversal of a judgment under such facts as are now before us. See, also, Nittler v. Continental Casualty Co., 94 Cal. App. 498, 271 P. 555, 272 P. 309.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

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122 Cal.App. 205

MOORE v. UNITED STATES FIDELITY & GUARANTY COMPANY et al.

Civ. 7940.

District Court of Appeal, First District, Division 1, California.

March 29, 1932.

Rehearing Denied April 28, 1932. Hearing Denied by Supreme Court May 26, 1932.

1. Appeal and error 🔑900.

Every presumption is in favor of judgment, error not being presumed.

2. Limitation of actions 🔑127(11).

If cause of action stated in amended complaint is different from that stated in original complaint, new action is deemed to have commenced at time of amendment, as regards tolling of limitation period.

3. Limitation of actions 🔑202(2).

Appellate court could not conclude that libel of March 12, 1928, alleged in amended complaint filed September 29, 1930, was not barred by one-year limitation period because original complaint, filed February 26, 1929, counted upon same libel, where record did not disclose contents of original complaint.

4. Limitation of actions 🔑1.

Pleas of limitation present substantial defense and are favored in the law.

5. Limitation of actions 🔑5(1).

Limitation in statute serves to strengthen statute and to embrace definitely all things not excluded thereby.

6. Courts 🔑78.

In absence of statute, court may define and limit general rules, but they have no independent lawmaking power.

7. Libel and slander 🔑38(1).

Privilege as applied to alleged libelous statements in pleadings in civil actions *held* absolute and not to extend only to matters relevant and material to issues (Civ. Code, § 47).

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by M. B. Moore against the United States Fidelity & Guaranty Company and another. From the judgment for defendants, plaintiff appeals.

Affirmed.

Kilpatrick & Goodman, of Oakland, for appellant.

Myron Harris, of Oakland, Horace W. B. Smith, of San Francisco, and John Jewett Earle, of Oakland, for respondents.

PER CURIAM.

This is an action to recover damages alleged to have resulted from a libel. The trial was commenced before a jury. Upon the calling of the first witness, defendants interposed an objection to the taking of any evidence, upon the ground that the complaint did not state a cause of action, and that said complaint on its face disclosed the cause of action to have been barred by the statute of limitations. The judge presiding, having announced his intention of ruling in favor of defendants, it was then agreed that the jury should be dismissed, and thereafter the matter was submitted to the court. Judgment was thereupon ordered in favor of defendants.

The appeal presents the question noted, and at the outset it becomes necessary to detail the cause of action alleged. At the outset, however, specific mention must be made of the fact that the complaint here being considered and referred to is the second amended complaint. This is the only complaint before us and the only complaint contained in the clerk's transcript. We assume, from the term "second amended," that other complaints had been filed and the reporter's transcript containing the arguments made in the trial court seems to take it for granted that such prior complaints had been filed. When any reference is made herein to the complaint, it means the second amended complaint.

[1] The complaint alleges that on or about February 15, 1928, the defendant United States Fidelity & Guaranty Company brought a civil action against Moore in the superior court of the state of California, in and for Alameda county. Inasmuch as repeated use of the name of the corporation will be had, we will hereinafter use the term Fidelity Company to designate said corporation. The first step in the action of the Fidelity Company was the filing of a complaint. This complaint contained matter which appellant alleges was and is libelous. It is not necessary that these alleged libelous statements be here repeated. Thereafter, on the 12th day of March, 1928, in a proceeding before the court wherein certain injunctive relief

was sought as ancillary to the action of the Fidelity Company against Moore, the said company by and through its agents and attorneys did publish again the said defamatory and libelous statements. While, as stated, the record before us is incomplete in respect to any showing of the time when the present action was commenced, there is sufficient from the transcript of proceedings from which it may be conceded by all sides that the first complaint herein was filed on February 26, 1929. There is no question that any cause of action for libel accruing more than one year prior to the commencement of the action is barred by limitations. Code Civ. Proc. § 340, subd. 3. Little controversy would present itself if the cause of action here admittedly rested solely upon the filing of the complaint containing the alleged libelous statements. But, argues appellant, the publication of these charges upon March 12, 1928, constituted a new ground of action entirely separate from the filing of the complaint. At this point the record fails. All that our record discloses is that this second amended complaint was filed on September 29, 1930. If we adopt appellant's theory that the publication alleged as of March 12, 1928, created a new cause of action, then the statute cited would operate as a bar against the same if the action were instituted in September of 1930, being almost one and one-half years after the cause of action accrued. Appellant is in a position from which he cannot escape the force of the claim of statutory bar. Every presumption is in favor of the judgment and error is not presumed.

[2] Nothing before us indicates the contents of the original complaint. If the original complaint set forth the publication of March 12, 1928, there might be ground for appellant's claim that the said publication was a new and separate libel, distinct from the filing of the complaint by the Fidelity Company. This, however, it is unnecessary to decide. But if appellant's theory be adopted here, to the effect that the later publication by reading in open court was the basis of a new cause of action, then the statute of limitations would not have been tolled by the commencement of an action based entirely upon the original filing by the Fidelity Company. If a cause of action stated in an amended complaint is new and totally different from that stated in the original complaint, the action is deemed to have been commenced, so far as the new cause of action is concerned, at the time of the amendment. 16 Cal. Jur. 547; Bowman v. Wohlke, 166 Cal. 121, 135 P. 37, Ann. Cas. 1915B, 1011; Merchants' National Bank v. Bentel, 166 Cal. 473, 137 P. 25.

[3] With this undisputed rule in mind we must compare the original complaint with the second amended complaint to make application of this doctrine. But we have no original complaint before us. We then revert to a rule of equal force. An appellate court will never indulge in presumptions to defeat a judgment. On the contrary, every intendment and presumption not contradicted by or inconsistent with the record on appeal must be indulged in favor of the orders and judgments of superior courts. 2 Cal. Jur. 852–854. Applying these rules together in order to reverse the judgment of the court below, it would be most necessary that we conclude that a libel of March 12, 1928, alleged in an amended complaint filed on September 29, 1930, was not barred for the reason that the original complaint counted upon the same libel. To reach this conclusion we would have to presume the contents of the original complaint. In Dahlberg v. Dahlberg, 202 Cal. at page 297, 260 P. 290, 291, it is said: "All presumptions * * * are in favor of the regularity of the judgment and proceedings upon which it is based, hence it devolves upon an appellant to affirmatively show the existence of the error upon which he asks for a reversal."

It may be noted that the brief of respondent was filed herein on June 23, 1931, and these points were extensively argued therein. Appellant on July 29, 1931, filed his reply brief, and on August 24, 1931, the cause was submitted, and resubmitted in November. During all this time appellant must have been fully aware of the contention made and yet did not see fit to bring up any of the original pleadings either by a suggestion or motion for diminution of the record or otherwise.

[4] Before finally passing upon the question, however, we may note a contention of appellant anent the running of the statute in cases of this character. Citing Corpus Juris, volume 37, at page 17, appellant argues that "a cause of action for libel or slander founded on publications made in the course of judicial proceedings does not accrue until the final determination of the proceedings in which the publication is made." For the purposes hereof we may concede this to be the true rule, and we expressly note that such concession is made purely for the purposes of argument and illustration. The complaint before us shows that the action or judicial proceeding in the course of which the claimed libel occurred was completed on January 10, 1929; that is to say, that on that date the trial court rendered its judgment. In the absence of appeal, and it is not shown that there was an appeal, this judgment became final more than one year prior to September 29, 1930, the date of the filing of the amended complaint before us. Appellant, to obtain comfort from this rule, must rely then upon the allegations of the original complaint, which, to repeat, is not before us. Lastly on this subject, appellant urges the law's dis-

favor of pleas of limitation. Contrary to this contention, pleas of limitation present substantial defense and are favored in the law. Citation to this point is needless.

[5] The second ground of the trial court's judgment was that the publication was privileged. Section 47 of the Civil Code reads: "A privileged publication is one made * * * in any * * * judicial proceeding. * * *" Appellant concedes this, but argues that the privilege thus given has been limited by decision to the end that the privilege is not absolute but conditional, and extends only to matters which are relevant and material to the issues. Section 47 of the Civil Code originally read: "A privileged publication is one made * * * in testifying as a witness in any proceeding authorized by law to a matter pertinent and material, or in reply to a question allowed by the tribunal." Prior to the amendment it was held that to claim privilege it must appear that the statements complained of were material and pertinent to the facts in controversy. Wyatt v. Buell, 47 Cal. 624. It is interesting, therefore, to note the scope of the amendment. As amended, the section reads as quoted with a proviso. Without detailing the latter it will suffice to say that the present case does not come within the proviso. Therefore, as far as the Legislature could enact, the privilege was made absolute, limited only by the proviso. As a recognized rule of construction, a limitation serves to strengthen a statute and to embrace definitely all things not excluded thereby. Therefore, when the statute states that a privileged publication is one made in the course of a judicial proceeding, with the proviso, however, that an allegation or averment in a divorce action presented under section 137 of the Civil Code, made or concerning one by or against whom no affirmative relief is sought, shall not be a privileged publication unless such allegation or averment be material and pertinent to the issues in such action, it fully discloses the intent of the Legislature. It discloses that a privilege is given in judicial proceedings with the thought of materiality and pertinency to the issues in mind, and that this requirement of materiality and pertinency is limited to a special character of action. Obviously, if it had been the legislative intent to extend only a conditional privilege in all cases, the proviso would be meaningless and needless. And if the Legislature had in mind the prior decisions limiting privilege, it is manifest that its intent was to bound the limitation.

[6, 7] The privilege given under the section as amended is declared to be absolute in Ball v. Rawles, 93 Cal. 222, at page 236, 28 P. 937, 27 Am. St. Rep. 174. Many decisions, ancient and modern, announce the rule to be that such a privilege is conditional upon the relevancy rule. However, in analyzing these decisions, we find them to announce the rule independent of statute. In the absence of a statute, courts may define and limit the general rules, but we have no independent lawmaking power. Our Supreme Court in Gosewisch v. Doran, 161 Cal. 511, 119 P. 656, 657, Ann. Cas. 1913D, 442, discusses this subject, but under the facts of that case it was held that the alleged libelous statements were relevant and pertinent to the issues. This language was used in the case: "But if, *notwithstanding the provision of our Code,* * * * we take the view that the privilege is not absolute, the only limitation upon it is that the defamatory matter must be pertinent and material to the cause or subject of inquiry before the court." (Italics ours.) The word "notwithstanding" has its significance and its use indicates an admission. Yet, in the cited case the doctrine was not definitely announced for the reason that it was not necessary to the decision. Our conclusion is that the wording of the statute makes the privilege absolute.

We may add that, regardless of the absolute or conditional nature of the privilege, the defamatory matter here complained of was material and pertinent to the issues involved. There is no hard and fast rule whereby we may absolutely determine materiality —it is always an open and debatable question addressed to the particular tribunal determining the issues. A fact seemingly irrelevant may, by association with other facts, become of great importance and at times decisive of the questions presented.

The original action of the Fidelity Company against appellant sought equitable relief, and the complaint, in many respects, served the purpose of an affidavit showing the equities as adding to the essential facts. The theory of privilege is that the avenues of justice be not barred, and in the actual operation of the rule it would seem that the widest latitude should be allowed. There is nothing particularly harsh about the doctrine. At many stages of our procedure the rights of the individual must yield to the common good. Where one seeks the courts only to libel another, the greater wrong is perpetrated upon the sovereign, and the power of the court is ample to prevent and punish such procedure. Inasmuch as the defamatory matter complained of is deemed libelous, we refrain from detailing the facts of the charge. Appellant is an attorney at law and in active practice. We can see no good to be accomplished by an analysis of the libel, other than perhaps to aggravate the situation. Those particularly concerned already know the record, and to others it would have no interest, nor would a recital add to the principles of law announced.

Judgment affirmed.

121 Cal.App. 480

Ex parte MORELLO.

Cr. 145.

District Court of Appeal, Fourth District, California.

March 9, 1932.

1. Habeas corpus 🔑113(12).

Points presented in brief on appeal which record does not disclose were raised below should not be considered.

2. Receivers 🔑74.

Affidavit presenting facts constituting contempt for interference with receiver, committed not in view of court, *held* sufficient to confer jurisdiction, though made by one other than receiver (Code Civ. Proc. § 1211).

> Code Civ. Proc. § 1211, provides: When the contempt is not committed in the immediate view and presence of the court, an affidavit shall be presented to the court, or judge, of the facts constituting the contempt, "or" a statement of the facts by the referees or arbitrators, or other judicial officer.

3. Receivers 🔑74.

Evidence disclosed by affidavit alleging accused took property from receiver appointed to hold it, and by answer thereto, *held* sufficient to show contempt of court.

4. Receivers 🔑74.

That one demanding and receiving property from employee of receiver appointed to hold property, used no force, *held* no defense to proceeding for contempt for interfering with receiver.

Application by E. Morello for a writ of habeas corpus against the Sheriff of Fresno County.

Petition dismissed, and petitioner remanded.

H. A. Savage, of Fresno, for petitioner.

Glenn M. DeVore, Dist. Atty., and Arthur C. Shepard, Deputy Dist. Atty., both of Fresno, for respondent.

BARNARD, P. J.

Petitioner seeks his release on habeas corpus on the ground that he is unlawfully imprisoned by the sheriff of Fresno county. The facts may be briefly stated as follows: On April 20, 1931, in an action then pending in the superior court of Fresno county, one W. H. A. Truxaw was appointed receiver and placed in possession of certain real property involved in that action. On December 18, 1931, while said receiver was still in possession of said property under appointment by said court, the petitioner herein, without permission of the court, demanded possession of the property and the keys to the house thereon from one Hardwick, who was actually in possession of the property, acting for the receiver, and on that day petitioner took possession of the property. On December 28, 1931, one Levy, who was a defendant in the action in which the receiver was appointed, presented to the court an affidavit setting forth the facts as to the appointment of the receiver and his possession of the property; that about the 18th day of December, 1931, the petitioner herein, without authority and against the consent and permission of the receiver and of the defendants, took possession of the property and still remains in possession thereof; that on or about the 22d day of December, 1931, the receiver notified this petitioner in writing to remove from the premises and return possession thereof to the receiver; and that at that time the petitioner stated that he cared nothing about court orders and that he was going to keep the property. The court ordered the citation to issue, citing petitioner to appear to show cause why he should not be punished for contempt of court in dispossessing the receiver. The citation issued on January 4, 1932, and in response thereto this petitioner appeared on January 15, 1932, before the superior court. The matter was partially heard on January 15, and finally, on January 27, 1932, petitioner was adjudged to be in contempt of court and fined, with the alternative of going to jail if the fine was not paid. Petitioner surrendered himself to the sheriff and applied for this writ. The petition alleges the making of the affidavit by Levy, a copy of which is set forth; the making of the order for a citation to issue; the issuance of the citation; the appearance of the petitioner; that he moved to quash the proceedings for lack of jurisdiction; that he filed a demurrer to the affidavit of Levy; that he filed an answer, a copy of which is attached; that testimony was taken; and that an order was made finding him guilty and prescribing the punishment therefor, a copy of which order is attached to the petition. The petition then alleges that petitioner is illegally restrained, for the following reasons:

"1. That the aforesaid affidavit of Melville Levy charging Petitioner with contempt of Court is insufficient and does not state facts sufficient to constitute a contempt of Court by virtue thereof.

"2. That the said citation issued by said Clerk is void for the same reason.

"3. That the evidence received by said Court in the hearing of said matter was and is insufficient and does not show that Petitioner committed a contempt of Court.

"4. That said order finding Petitioner guilty of contempt and punishing him therefor is void for the reason that the Court was without jurisdiction to make said order."

Two questions are thus presented: First, whether the affidavit was sufficient to confer jurisdiction upon the court; and, second, whether the evidence is sufficient to show the commission of a contempt.

Taking up the first of these questions, it is alleged in the petition that the order for citation and the citation were based upon this affidavit of Levy, and the point is raised that this affidavit is insufficient, in that it does not state facts sufficient to constitute a contempt of court. The only deficiency in the affidavit which is called to our attention or argued by the petitioner is that it is not sufficient because it was not made by the receiver himself, the petitioner relying on a portion of section 1211 of the Code of Civil Procedure, reading as follows: "When the contempt is not committed in the immediate view and presence of the court, or judge at chambers, an affidavit shall be presented to the court, or judge, of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators, or other judicial officer."

[1, 2] This contention does not particularly commend itself to us for the reason that there has been presented here the entire record of the proceedings in the court below, and from these proceedings it appears that this objection was not there presented, but it does appear that the affidavit was there treated as sufficient. The defense relied on was that no act of contempt was committed since the property was surrendered to the petitioner upon demand, without the use of any force. However, taking up the contention on its merits, the section of the Code relied upon plainly states that the matter shall be presented by an affidavit of the facts constituting the contempt or by a statement of the facts by the judicial officer. We are unable to interpret this as meaning that an affidavit which sets forth sufficient facts to constitute a contempt arising through interference with a receiver must be made by the receiver himself and cannot be made by another person or party who is in possession of the facts. In our opinion, the affidavit here in question was sufficient as against the attack made upon it, to give the court jurisdiction to proceed in the matter.

While the only question, aside from the sufficiency of the evidence, raised in the petition before us, is the sufficiency of this affidavit to confer jurisdiction, in the respect named, the petitioner in his brief proceeds to argue that no proper service was had upon him, in that the court's order for a citation directed the service upon him of two affidavits, namely, this one by Levy and another one by Truxaw, the receiver, and that the court did not acquire jurisdiction since the Truxaw affidavit was not served upon him; and also for the reason that the Levy affidavit served upon him did not have attached thereto a copy of "Exhibit A," which was referred to therein. There is nothing in the record before us, so far as we can find, which shows that copies of both affidavits were not served on petitioner. The affidavit of Levy appears in the original record before us, and it is true that, while it contains a reference to an "Exhibit A," no such exhibit appears attached thereto. However, it appears from the reference thereto that "Exhibit A" related to something that happened after the alleged contempt was committed and was in no way material to the hearing in the court below or to this proceeding. And, further, it in no way appears, either here or in the proceedings in the court below, that the petitioner was not served with both a copy of Levy's affidavit and this "Exhibit A." It may also be observed that petitioner alleges in his brief that, at the hearing in the superior court, his counsel called the court's attention to the fact that, while both affidavits were ordered to be served, the so-called "Exhibit A" was not attached or served. Petitioner having referred only to this immaterial omission in the Levy affidavit, and made no objection that the Truxaw affidavit was not served, while at the same time calling attention to the court's order that both affidavits should be served, the court was justified in considering it admitted that both affidavits had been served. No other objection to the service of the papers was made at the hearing, and no attack at all upon the service is found in the petition now before us. Under such circumstances, we feel justified in concerning ourselves only with the claims of illegality set forth in the petition, especially since the necessary facts are not before us.

[3] The second question presented is whether the evidence is insufficient to show the commission of a contempt of court. The court had before it at least the Levy affidavit and the answering affidavit of this petitioner. In his affidavit petitioner admits the appointment of Truxaw as receiver and that he was in control and possession of the property until about the 18th day of December, 1931. After denying that he took possession of the property without the authority and against the consent of the receiver, the petitioner admits that he is now in possession of the property and alleges as follows:

"Alleges that on or about the 18th day of December, 1931, this affiant went to the said Receiver and asked the said Receiver for the keys to the house located on said Paradise Vineyard, and that said Receiver turned over the said keys to this affiant voluntarily;

"Alleges that affiant then and there told said Receiver that he was president of Paradise Vineyards, Inc., a corporation, that said corporation was the owner and holder of the fee simple title to said lands and premises known as Paradise Vineyard, that said premises had theretofore been sold to Harry Faith and Melville Levy, defendants in this action, under a written agreement wherein and whereby the said Faith and Levy agreed to make certain payments which they had failed and defaulted in making, and that by reason of said breach the said Paradise Vineyards had a right under said agreement to re-enter and take possession of said premises; and that they would immediately do so."

He then alleges that at the time he took possession of the property there was pending in the superior court a report by the receiver with a petition for his discharge as such receiver, and that the receiver was subsequently discharged. At the hearing, the receiver testified that he had not given possession of the property to the petitioner and had not given him permission to go upon the place. We think a flagrant case of contempt of court here appears, not only from the original affidavit, but from the answer of the petitioner himself. Strain v. Superior Court, 168 Cal. 216, 142 P. 62, Ann. Cas. 1915D, 702. If it is not contempt of court to take property away from a receiver who has been duly appointed by a court for the very purpose of holding and caring for that property, we are at loss how to name such a performance.

[4] Some contention is made that at the hearing of the contempt proceedings the court refused to hear evidence in favor of the petitioner. While no witnesses testified for the petitioner, the court gave him the widest latitude in cross-examining two witnesses who testified against him, during which the court finally interrupted petitioner's counsel, whereupon this counsel admitted: "This is a little far afield." Thereupon, the court stated that he was only interested in whether or not the property had been taken from the receiver. The court then announced an adjournment to a later date, whereupon counsel for petitioner stated: "If the Court please, we want to present at that time what actually occurred. We take the position we didn't take any steps whatever except with consent." At the next hearing, when the court asked if the matter had been submitted, counsel for petitioner stated that he had asked permission to put on evidence and he understood that the court had denied it, whereupon the court said: "You may state what your evidence would be." Counsel then stated in effect that he wanted to prove that the property had been voluntarily surrendered to them upon their demand and that they had directed the receiver's agent upon the premises to call the receiver and ascertain whether he would oppose giving them possession. The court refused to allow such evidence and proceeded to pronounce judgment. It thus appears that the petitioner then, as now, relied on the claim that his act in demanding and taking possession of the property was proper since no force was used. While admitting that he demanded the possession and keys from the receiver and took possession of the property, he contends that the surrender of possession was voluntary on the part of the receiver and, therefore, he was not in contempt of court. We are unable to agree with this contention. It fully appears that the petitioner knew that the property was in the possession of a receiver appointed by the court; that he went to the place in the absence of the receiver and demanded the keys from an employee of the receiver, who was found upon the property; and that he thus took the possession away from an officer of the court. We think this constituted contempt of court whether force was used or not, and that the facts sought to be shown, to the effect that actual force was not used in obtaining possession, were immaterial and constituted no defense. Petitioner set forth in his answering affidavit that when he demanded possession he told them he "had a right under said agreement to re-enter and take possession of said premises; and that they would immediately do so." Whether or not the person in charge put up a fight, or telephoned the receiver to inquire as to how much of a fight he would put up, was not material.

In his oral argument, counsel for petitioner assumed the blame and stated that the acts committed by the petitioner were done upon his advice. It was attempted to excuse these acts on the ground that the court was about to discharge the receiver in any event. In our opinion, instead of excusing, this tends to aggravate the offense, emphasizing, as it does, how unnecessary the acts were. Counsel knew that the receiver was in charge under appointment by the court, and we refrain from further comment except to say, as was said in Houser v. Superior Court (Cal. App.) 8 P.(2d) 483, 485: "Until vacated or other legal proceedings were had which might result in the order being set aside, such order should have been treated as binding and in full force and effect, especially by an attorney at law whose bounden duty required him to maintain the respect due to courts of justice (subdivision 2, § 282, Code Civ. Proc.), and to refrain from disobedience of any lawful judgment, order, or process of the court (subdivision 5, § 1209, Code Civ. Proc.)."

The petition is dismissed, and the petitioner is remanded.

We concur: MARKS, J.; JENNINGS, J.

121 Cal.App. 533

MURPHY et al. v. SHEFTEL et al.

Civ. 8172.

District Court of Appeal, First District, Division 1, California.

March 11, 1932.

Rehearing Denied April 9, 1932. Hearing Denied by Supreme Court May 9, 1932.

1. Appeal and error 🔑994(3).

Witnesses' credibility is for court in juryless trial.

2. Evidence 🔑65.

Where actual knowledge of law must be established, affirmative proof is necessary; pseudo presumption that everyone knows law being unavailing.

The so-called presumption that everyone knows the law rests on no basis of fact, but is a rule of substantive law or of administration which has been found convenient or necessary to apply in the trial of cases.

3. Vendor and purchaser 🔑107.

As respects rescission, statute providing that seller of article manufactured by him warrants its freedom from latent undisclosed defect arising from manufacturing process refers to sales of personalty, not improved realty (Civ. Code, § 1769).

4. Vendor and purchaser 🔑107.

As respects rescission, in absence of misrepresentation or fraud, purchaser of improved realty takes risk of quality.

5. Vendor and purchaser 🔑107.

In determining whether defects in apartment building were material, test should be same as that whereby it is ascertained whether a contract has been substantially performed.

6. Contracts 🔑294.

Where defect is not such failure to perform as renders performance of rest of contract something substantially different from what was contracted for, and loss may be compensated in damages, there is substantial performance, precluding rescission.

7. Contracts 🔑323(1).

Whether defects or omissions are substantial, justifying rescission of contract, is generally fact question.

8. Vendor and purchaser 🔑107.

Where defects, as in girder and joists of apartment building, did not materially impair benefits received by purchasers, remedy was damages, not rescission.

9. Appeal and error 🔑1122(2).

Where jury trial is waived or is not matter of right, Court of Appeal may make additional findings (Code Civ. Proc. § 956a; Const. art. 6, § 4¾).

10. Appeal and error 🔑1071(6).

In purchasers' rescission action, selling price *held* immaterial, in view of findings, and omission to find thereon was not error.

11. Vendor and purchaser 🔑341(2).

Purchasers' complaint praying rescission, recovery of amount paid, and other suitable relief, and vendor's answer averring that alleged defects could be remedied by expending specified sums, raised issue on such question and justified finding thereon.

12. Election of remedies 🔑3(3).

There is no inconsistency in purchasers' asking for rescission, and for damages if rescission be denied.

13. Equity 🔑39(3).

That complaint in rescission action nowhere asks damages does not preclude award thereof, since equity, having acquired jurisdiction, will retain it to adjust all differences.

Where equity has acquired jurisdiction for one purpose, it will retain it to the final adjustment of all differences between the parties arising from the cause of action presented, it being the duty of a court of equity, where all the parties to a controversy are before it, to adjust the rights of all and leave nothing for further litigation.

14. Vendor and purchaser 🔑123.

Evidence supported conclusion negativing any intentional violation of any duty owing to purchasers; defense of substantial performance being available in rescission action.

The fact that apartment building sold by vendor was not erected pursuant to any contract with purchasers, and that it was practically complete before purchase was made, together with the findings that there was no misrepresentation and no fraudulent concealment on part of vendor, was sufficient to support conclusion that there was no willful or intentional violation of any duty owing to purchasers.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Cornelius Murphy and another against M. Sheftel and another. From a judgment granting partial relief, plaintiffs appeal.

Affirmed.

See, also, 6 P.(2d) 549.

Frank L. Guerena and Lionel B. Browne, both of San Francisco, for appellants.

Jerome H. Bayer and G. C. Ringole, both of San Francisco, for respondents.

PER CURIAM.

As the result of negotiations which commenced in February, 1926, plaintiffs in April of the same year purchased from defendants a lot fronting on Washington street in San Francisco upon which was situated a three-story frame building containing 15 two-room apartments, and paid therefor the sum of $55,000. Previous to the transfer to plaintiffs the premises had been leased by defendants for the term of ten years commencing on March 1, 1926, to a tenant, who agreed to pay a monthly rental of $502.50. The court found that plaintiffs in April, 1926, through the lessee mentioned, entered into possession of the premises. In June, 1926, plaintiffs served upon defendants a notice of rescission, claiming that the condition of the building had been misrepresented, that the same contained certain latent defects of which they were unaware at the time of the purchase and which defendants concealed.

The complaint alleged as a first cause of action that during the negotiations defendants falsely and fraudulently represented "(a) that the laminated girder in the basement of the building, which was partially exposed to view during the negotiations, was constructed of six planks each 2"x14" of 10' span spiked together, four of said six planks resting on 8"x8" posts supported on concrete piers, and (b) that the first floor joists extended from the side walls across the girder mentioned and rested thereon; * * *" that in fact the girder was constructed "of only four planks of the above dimensions and two 2"x4" nailing pieces or ledgers spiked to the planks and running parallel therewith," and the first floor joists did not cross the girder or rest thereon.

Plaintiffs' second cause of action was based upon latent defects in the construction of the building which were alleged to have been concealed. These were the two instances of defective construction averred in the first cause of action, it being further alleged: "(3) The first floor joists in said building are each 2"x10" in dimension and are spaced 16" on centers, and the size and spacing of the said joists are such that the transverse extreme fiber stress in the said joists is in excess of 1600 lbs. per square inch," and "(4) that the size and span of the laminated girder in said building is such that the transverse extreme fiber stress in said girder is in excess of 1600 lbs. per square inch, and such that the compression across grain in said girder is in excess of 300# per square inch."

The material allegations of the complaint were denied, and the court found that the defendant Sheftel for a long time prior to the negotiations mentioned had been to plaintiffs' knowledge a builder of apartment houses, and that during the negotiations he represented himself to be an expert builder of such houses, with years of experience and success as such, but that it was not true that he represented that the girder and joists mentioned in the first cause of action were constructed in the manner alleged by plaintiffs; and, further, that no false or fraudulent representations of any character were made; that it is not true that plaintiffs were induced by the alleged representations to purchase or that they relied thereon. It was also found that the conditions described in the first and second cause of action existed when the negotiations commenced and are unchanged, and that in this connection the following conditions exist, namely:

"(a) That there is an excess transverse extreme fiber stress in the said girder ranging from 20 to 30%, and that there would be no such excess if the girder was 12"x14" instead of 8"x14" in dimensions;

"(b) That considering the building load the method of relating the said joists to the said girder is not satisfactory construction;

"(c) That the compression across the grain in said girder ranges from 68% to 82% in excess of the limit, which is 300# per square inch;

"(d) That in order to protect against that excessive compression across grain in the girder the 8"x8" supporting post should be capped, or that there should have been hardwood bolsters between the top of the post and the girder;

"(e) That the transverse extreme fiber stress in the first floor joists allowed by the building law is 1600# per square inch, and that the limit has been exceeded from 40% to 47%;

"(f) That the transverse extreme fiber stress in the said first floor joists would not have been exceeded if defendants had used 2"x12" joists spaced 16" center instead of 2"x10" joists spaced 16" center;

"(g) That the plans of said building called for first floor joists 2"x12" in dimensions spaced 16" on center, not for the 2"x10" joists which were used, and for joists that rest upon the girder and not upon 2"x4" ledgers;

"(h) That the transverse excess fiber stress in the first floor joists is in excess of the legal limit from 40% to 47% by reason of the span from the side wall to the girder being 14' instead of 12';

"(i) That defendant should have used bolsters or joist hangers and also extra joists."

Further, that, while plaintiffs prior to the purchase had full opportunity and did inspect the building frequently, it was then complete, and they were unable to discover the conditions described in the findings last quoted, nor the third or fourth instances of defective construction set forth in their second cause of action without tearing out portions of the building, and that the same were then unknown to them and could not have been discovered by the exercise of ordinary diligence, but that they should and might by the exercise of ordinary diligence have known of the existence of the conditions described in their first cause of action; that defendants did not fraudulently conceal any of said conditions or prevent the detection thereof by plaintiffs, and that the defects described can be corrected at a cost of $500, which amount will fully compensate for any damage suffered by plaintiffs.

The court concluded from its findings that plaintiffs were not entitled to rescind, but should recover, the amount found to be sufficient to correct the defects, and entered judgment accordingly.

Plaintiffs, who have appealed, admit that the testimony relating to the alleged fraud is conflicting and would require an affirmance of the findings on that issue; but they contend that they contracted for a well-constructed building, and that there was an implied warranty that such was its condition; that the defects found constituted a substantial failure of consideration, and that consequently it was error to deny rescission; also that the finding that the imperfections can be remedied for $500 is unsupported and erroneous because the cost was not in issue, and that the findings that defendants had no knowledge of all the defects and that there was no concealment of any of them are likewise without support; further, that the omission to find the purchase price of the building was erroneous, and that the defense of substantial performance was not available to defendants.

The structure was not built for plaintiffs, nor was it alleged or found that plaintiffs stipulated for a well-constructed building, and, while there was some testimony by plaintiffs and their witnesses of such a representation by Sheftel, the latter testified in effect that the extent of his representation in this respect was his remark to plaintiffs that he prided himself that he put up good buildings, that they withstood the earthquake well, and that he always employed good mechanics and contractors and accepted no low bids. There was other testimony tending to corroborate the truth of Sheftel's admitted statements.

[1] The credibility of the witnesses was a question for the trial court, and there was no evidence which would compel a finding that any other representations were made.

In this connection it was shown that certain of the defects mentioned were violative of the state housing law and the building ordinance of the city of San Francisco; and, in view of the rule that ignorance of the law excuses no one—sometimes stated as a presumption that all persons know the law—and the presumption that the law has been obeyed (Code Civ. Proc. § 1963, subd. 33), it is contended that it must be presumed that plaintiffs had knowledge of the statute and ordinance mentioned, and assumed that their provisions had been observed.

[2] While it is commonly said that existing laws form part of a contract, and that it is to be so interpreted (Civ. Code, § 1646), the proposition that every one is presumed to know the law rests upon no basis of fact (10 Cal. Jur., Evidence, § 72, p. 760; 10 R. C. L., Evidence, § 17, p. 874; Chamberlayne, Law of Evidence, § 1170), but it is a rule of substantive law or of administration which has been found convenient or necessary to apply in the trial of cases; and it has been held not to be available for the purpose of supplying evidence of a fact material to the controversy nor to prevail against the real truth as to any particular situation, except as regards punishment for a criminal offense or responsibility for actual damage for the violation of private rights (22 Cor. Jur., Evidence, §§ 73, 85, pp. 143, 151). Consequently, where it is necessary to establish the fact of actual knowledge, affirmative proof to that effect must be introduced, and no assistance in so doing can be derived from the pseudo presumption itself. Chamberlayne, Law of Evidence, § 1170; Vogel v. Brown, 201 Mass. 261, 87 N. E. 686; Black v. Ward, 27 Mich. 191, 15 Am. Rep. 162; Topolewski v. Plankinton Packing Co., 143 Wis. 52, 126 N. W. 554; Caffey v. Tindall, 99 Mis. 851, 56 So. 177; State v. Cutter, 36 N. J. Law, 125; Hicks v. Stillwater County, 84 Mont. 38, 274 P. 296.

In this instance—as was true of the claim that plaintiffs stipulated for a well-constructed building—there was no allegation or testimony that they knew of the statute or ordinance; and, in view of the authorities last cited, there was no evidence that they were induced to contract by the belief that the provisions thereof had been complied with.

[3, 4] It is further claimed that there was an implied warranty of good construction. In support of this, plaintiffs rely upon the provisions of the Civil Code, which, before the adoption of the Uniform Sales Act in 1931 (St. 1931, p. 2234) provided that "one who sells or agrees to sell an article of his own manufacture thereby warrants it to be free from any latent defect, not disclosed to the buyer, arising from the process of manufacture, and also that neither he nor his agent in such manufacture has knowingly used improper materials therein" (Civ. Code, § 1769); and to certain cases involving the sale of personal property manufactured by the seller, or work by subcontractors upon structures in course of erection, where the articles to be constructed were designed for a particular purpose, and the subcontractor by his occupation held himself out as competent to make articles adapted to that purpose. The pro-

visions of the section quoted clearly refer to sales of personal property and not to improved real property (Williston, Contracts, § 926); and the purchaser, in the absence of misrepresentation or fraud, takes the risk of quality (Warvelle, Vendors, § 907).

The trial court did not expressly find that the defects were not material; and it is urged that the only reasonable conclusion from the facts found, taken together with the testimony, is that the defects pervaded the entire structure and constituted a substantial failure of consideration.

According to the testimony of several experts called by defendants, all the defects found by the court could be corrected at a cost of not exceeding $500, and there appears to be no conflict in the testimony on this question. Plaintiffs urge that, in determining whether the defects found are material, the test to apply is the same as that by which it is ascertained whether a contract has been substantially performed.

[5-8] With this we agree; and as held in effect in the following cases, where the defect is not such a failure to perform as renders the performance of the rest of the contract a thing different in substance from what was contracted for, and the loss occasioned is capable of compensation in damages, there is a substantial performance. Connell v. Higgins, 170 Cal. 541, 150 P. 769; Walker v. Harbor Business Blocks Co., 181 Cal. 773, 186 P. 356; Thomas Haverty Co. v. Jones, 185 Cal. 285, 197 P. 105. The defects must not be so essential as to substantially defeat the object which the parties intended to accomplish; and whether defects or omissions are substantial is generally a question of fact. 2 Elliott on Contracts, § 1607; Connell v. Higgins, supra. It is a fair conclusion from the testimony that the defects did not materially impair the benefits received by plaintiffs; and, under the decisions referred to and those hereinafter cited, the remedy was damages and not rescission. Fountain v. Semi-Tropic L. & W. Co., 99 Cal. 677, 34 P. 497; Giberson v. Fink, 28 Cal. App. 25, 151 P. 371; J. Musto, etc., Co. v. Pacific States Corporation, 48 Cal. App. 452, 192 P. 138; Gale v. Dixon, 91 Cal. App. 529, 267 P. 342.

[9] Moreover, under section 4¾ of article 6 of the Constitution and section 956a of the Code of Civil Procedure, in the disposition of appeals, in cases in which a jury trial is not a matter of right, or if so has been waived, this court is empowered to make findings upon the evidence in addition to those made by the trial court (Kirk v. Culley, 202 Cal. 501, 261 P. 994); and in view of the evidence we accordingly find that the defects complained of were not material.

[10] We are also of the opinion that the selling price of the property was not material, in view of the other findings made, and the omission to find thereon was not error.

As to plaintiffs' objection to the finding that the defects could be remedied for $500 on the ground that the same is not supported, and that the cost was not in issue, there was ample testimony by expert builders to support the finding, and we are satisfied that the sum allowed will adequately compensate plaintiffs for any damage suffered by them.

[11] Furthermore, it appears from plaintiffs' complaint that, in addition to rescission and the recovery of the amount paid, there was a prayer for "such other or further relief as may be meet," and the answer averred as a special defense that the alleged defects were inconsequential and could be remedied by the expenditure of sums not exceeding $425. These pleadings raised an issue on this question and justified the finding complained of.

[12, 13] Plaintiffs claim that, having elected to rescind, they were precluded from seeking damages in the same action, and that therefore they offered no evidence of the cost of remedying the defects; but, as held in the following cases, there is nothing inconsistent in asking for rescission, and damages if rescission be denied. Montgomery v. McLaury, 143 Cal. 83, 88, 76 P. 964; Bancroft v. Woodward, 183 Cal. 99, 102, 190 P. 445. Moreover, it is no objection that the complaint in an action for rescission nowhere asks for relief by way of damages. Where equity has acquired jurisdiction for one purpose, it will retain it to the final adjustment of all differences between the parties arising from the cause of action presented, it being the duty of a court of equity, where all the parties to a controversy are before it, to adjust the rights of all and leave nothing for further litigation. Swan v. Talbot, 152 Cal. 142, 94 P. 238, 17 L. R. A. (N. S.) 1066. There was full opportunity for plaintiffs to prove that defendants' witnesses were mistaken in their estimates, but no attempt was made to do so, and no valid excuse for the omission has been shown.

The court also found that Sheftel did not know that the first floor joists were 2 inches by 10 inches in dimensions, or know of the excess strain thereon and in the girder, or of the excess in the compression across the grain in the girder, and also that defendants did not fraudulently conceal from plaintiffs any of the conditions found or prevent the detection thereof by the latter. These findings so far as material were sufficiently supported, and the record discloses no evidence which would compel findings to the contrary.

[14] Lastly, it is urged that the defense of substantial performance is founded in equity; and that Sheftel, having permitted the de-

fects in question to be created, does not come within the rule permitting such a defense.

As stated, the structure was not erected pursuant to a contract with plaintiffs, and was practically complete before the purchase was made. This, together with the findings that there was no misrepresentation and no fraudulent concealment, was sufficient to support the conclusion that there was no willful or intentional violation of any duty owing to plaintiffs.

After an examination of the entire record, including the evidence, we are of the opinion that the findings are fully supported, and that nothing has been shown which would warrant a reversal.

The judgment is affirmed.

122 Cal.App. 132

VAN ORDEN v. GOLDEN WEST CREDIT & ADJUSTMENT CO. et al.

Civ. 8182.

District Court of Appeal, First District, Division 1, California.
March 25, 1932.

1. Parties 🔑40(2).

To warrant intervention, intervener's interest must concern matter in litigation and be such that intervener will gain or lose by direct operation of judgment.

2. Parties 🔑40(6).

To warrant intervention, it is sufficient if intervener's interest be created by claim to or lien upon property, or part thereof, in litigation.

3. Interpleader 🔑19.

In interpleader, all parties having right or interest to protect are proper parties.

4. Interpleader 🔑19.

In interpleader by chairman of stockholders' committee against creditors of committee and against stockholders claiming fund. corporation's creditors' assignee who attached fund to satisfy stockholder's liability *held* entitled to intervene.

> Present case presented question of plaintiff's right to discharge from liability both as trustee and as garnishee, together with rights of numerous claimants to the fund in suit, all of which creditor of stockholders was interested in contesting, and facts made proper case for intervention by such creditor of stockholders.

5. Interpleader 🔑31.

Right of interpleader plaintiff should first be determined, and, if sustained, interlocutory decree should be entered requiring defendants to interplead and litigate claims to fund inter se.

6. Interpleader 🔑21.

Upon payment of money into court pursuant to order and upon his discharge, interpleader plaintiff ceases to be party.

7. Garnishment 🔑58.

Absent statutory authority, property in custodia legis is not subject to garnishment.

8. Garnishment 🔑58.

To constitute "custodia legis," property must have been lawfully taken pursuant to legal authority.

[Ed. Note.—For other definitions of "Custodia Legis," see Words and Phrases.]

9. Garnishment 🔑59.

Money paid voluntarily into court without order or in mistaken expectation that motion for interpleader would be granted is not in "custody of law," as regards immunity from garnishment.

[Ed. Note.—For other definitions of "Custody of the Law," see Words and Phrases.]

10. Garnishment 🔑59.

In interpleader, where no interlocutory decree, requiring defendant to interplead, was entered, and money remained in bank in plaintiff's name, and no order respecting fund was made before final judgment, fund *held* not, prior to judgment, in "custodia legis," as regards immunity from garnishment.

11. Garnishment 🔑105.

Garnisher's rights against garnishee rise no higher than defendant's.

12. Garnishment 🔑32.

Generally, property held under trust is not subject to garnishment.

13. Garnishment 🔑32.

Trust having terminated, balance in trustee's hands is subject to garnishment.

14. Garnishment 🔑32.

Contingency respecting amount due trust beneficiary upon termination does not prevent valid garnishment, provided beneficiary's interest is definitely ascertainable.

15. Garnishment 🔑32.

On termination of trust, surplus in trustee's hands is subject to garnishment by beneficiary's creditor, though ascertainment of amount of surplus requires adjustment of claim for compensation by trustee.

16. Garnishment 🔑105.

Garnishee is held only for debts owing when writ is served.

17. Garnishment 🔑51.

Property and credits assigned by defendant cannot subsequently be garnisheed, same rule applying to equitable assignments.

18. Assignments 🔑48.
To constitute "equitable assignment," no express words are necessary.

It is sufficient if, from entire transaction, it appears that intention of parties was to pass title, and that payment should be made to the one who becomes equitable assignee.

[Ed. Note.—For other definitions of "Equitable Assignment," see Words and Phrases.]

19. Garnishment 🔑51.
Where defendants made equitable assignment of interest in fund before levy of garnishment, assignee's claim *held* prior to that of garnisher.

20. Evidence 🔑581.
In interpleader between corporation's creditors and stockholders, record of testimony before corporation's bankruptcy referee *held* inadmissible, there being no showing that witness was deceased, out of jurisdiction, or unable to testify (Code Civ. Proc. § 1870, subd. 8).

21. Interpleader 🔑29.
Evidence did not support finding that there existed or was violated agreement between bankrupt corporation's creditors and stockholders that creditors reject no bids before sale of property, or finding that creditors made promise for purpose of inducing stockholders to pay moneys to stockholders' committee so that funds might be attached by creditors.

22. Interpleader 🔑32.
In interpleader respecting fund claimed by stockholders and assignee, assignee's claims against those stockholders who had not assigned their interest in fund *held* not payable therefrom.

23. Interpleader 🔑28.
In interpleader, litigation can be maintained only upon claims relating to fund or rights held by stakeholder.

24. Reference 🔑8(1).
In interpleader, appointing referee to distribute fund in accordance with judgment and make report *held* not error (Code Civ. Proc. § 639).

Code Civ. Proc. § 639 provides for appointment by court, of its own motion, of referee when taking of an account is necessary for information of court before judgment, or for carrying judgment or order into effect.

25. Reference 🔑76(1).
In interpleader, allowance of compensation in advance to referee appointed to make distribution in accordance with judgment, without regard to time to be spent, *held* error (Code Civ. Proc. § 1028).

Allowance of sum in advance, without regard to time necessary to carry judgment into effect, was erroneous, in view of Code Civ. Proc. § 1028, which provides that fees of referees are $5 for every day spent in business of reference.

26. Interpleader 🔑35.
Generally, attorney's fees are not allowable in interpleader.

27. Interpleader 🔑35.
In interpleader by express trustee who became involved in considerable litigation over fund before filing interpleader, trustee *held* entitled to allowance for legal expenses incurred on such account, and $500 allowance was not unreasonable (Civ. Code, §§ 2250, 2273).

28. Interpleader 🔑21.
Discharging plaintiff in interpleader, where no order directing plaintiff to pay money into court had been made otherwise than by directing bank, not a party, to pay sum deposited to referee, *held* improper.

29. Interpleader 🔑21.
Proper practice in interpleader requires that, before plaintiff is discharged from liability, fund be placed in court's custody.

30. Judgment 🔑255.
In interpleader, awards to those defendant creditors whose claims were unsupported by evidence, though named in complaint, *held* erroneous, where claims were resisted by other defendants.

31. Appeal and error 🔑1171(2).
In interpleader suit involving distribution of $10,000 fund, $370 legal error in judgment precluded application of rule "De minimis non curat lex."

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by George N. Van Orden, chairman of the Rehabilitation Committee of the Jenny Wren Stores, Inc., against Hilda M. Anderson, the American Biscuit Company, and others, wherein the Golden West Credit & Adjustment Company intervened. From the judgment, defendant last named and intervener appeal.

Affirmed in part, modified and affirmed in part, reversed in part, and remanded.

Jesse A. Mueller, of San Francisco, for appellants Golden West Credit & Adjustment Co. and American Biscuit Co.

Hugh K. McKevitt and Holloway Jones, both of San Francisco, for respondent Van Orden.

A. V. Dalrymple, of San Francisco, for respondents Hilda M. Anderson and others.

W. J. Cullinan, of San Francisco, for respondents Dalrymple and others.

Robert E. Hatch, of San Francisco, of counsel, for respondents.

PER CURIAM.

This action involves two appeals from the judgment entered in a suit in interpleader, one taken by the intervener and the other by one of the defendants to the original action.

The Jenny Wren Stores, Inc., was a Delaware corporation operating chain stores in California. In 1927 a bill in equity for the appointment of a receiver of the business was filed in the federal court, and this was followed by a petition to have the corporation adjudicated an involuntary bankrupt. Thereafter certain of its creditors for the purpose of protecting their interests, appointed a committee (which will be hereinafter referred to as the creditors' committee). At about the same time the stockholders also selected a committee, called the rehabilitation committee, of which the plaintiff in the present action was made chairman. The latter committee undertook to procure sufficient additional capital from the stockholders and others to discharge the company's indebtedness in order that it might continue in business. It secured subscriptions from certain of the stockholders, part being paid in cash, but it failed to procure sufficient to pay the debts of the corporation, and a new committee, consisting of A. V. Dalrymple, an attorney who was not a stockholder, and stockholders E. A. Keller and L. D. Courtermarsh, were appointed. This committee (which will be hereinafter referred to as the Dalrymple committee) procured subscriptions from a number of the stockholders, who also paid sums on account thereof. The subscription agreements procured by the rehabilitation committee provided: "All checks are to be made payable to a trustee to be appointed by this committee, and it is further understood by all parties that any and all moneys received are to be returned and all notes canceled in the event this committee should not receive subscriptions in an amount not less than $125,000.00." That the payments by these subscribers were made to plaintiff is not denied.

The subscription agreements procured by the Dalrymple committee constituted its members special attorneys in fact of the subscribers, with authority to enter into contracts to effect the purposes expressed in the agreement, namely, the purchase of the stores and assets of the company, and contained the provision that:

"Such funds as are not applied to the purposes herein set out shall be returned to the undersigned within a reasonable time thereafter, less only such actual expenses as have been incurred as expenses, postage, professional and clerical services and incidentals. The total of such deductions shall not exceed ten (10%) per cent. of the amount herein subscribed, which deduction I hereby expressly authorize to be made.

"Subscriptions and payments made previously for reorganization or rehabilitation of the aforesaid corporation are hereby altered and amended to conform to the conditions hereof, and the custodian of such funds is hereby authorized and directed to deliver the same to my attorneys in fact for the purposes set out herein."

While the stockholders were endeavoring to carry out the above plans, the assets of the company were on January 5, 1928, sold in the bankruptcy proceeding to the Mutual Stores, Inc., for $280,000. The rehabilitation committee had in the meantime incurred liability for certain expenses in connection with their efforts, and were consequently unable to return to the subscribers in full the amounts paid on account of their subscriptions. Some of the expense claimants had brought suit against plaintiff, and the Dalrymple committee also sued to recover the amounts paid to plaintiff by stockholders who had also signed the subscription agreement with the latter committee. Plaintiff had in his hands something over $10,000, and being faced with the above claims filed the present action, in which those subscribers who had paid sums to the rehabilitation committee (therein called defendants subscribers), and individuals and corporations (called in the complaint defendants creditors) to whom the committee had incurred liabilities for expenses, were joined. Several of these subscribers had also signed subscription agreements with the Dalrymple committee.

The complaint, which was filed on March 17, 1928, contained the allegations usual in interpleader actions, and prayed that all the defendants be restrained from commencing or prosecuting actions against the plaintiff to recover their claims; that they be required to interplead, and upon his payment of the remainder of the fund into court he be discharged from all liability in relation thereto, and recover his costs with attorney's fees. A restraining order issued, and this was followed by a temporary injunction restraining the defendants named in the complaint as prayed.

Certain of the defendants subscribers answered the complaint, asserting their respective claims to the fund, as did also certain of the defendants creditors, who asserted claims for supplies, etc.; and on May 2, 1928, respondent Dalrymple filed in the action a complaint in intervention, claiming from the said defendants subscribers who had also signed subscription agreements with the Dalrymple committee the sum of $1,208.04, which sum it was alleged had been necessarily expended for professional services by the committee and liability for the repayment of which the said subscribers incurred under their agreement. It appears that there were about 1,280 stockholders in the company.

On May 10, 1928, the Golden West Credit & Adjustment Company, a corporation (which will be hereinafter referred to as the Adjustment Company), as assignee of certain creditors of the Jenny Wren Stores, Inc., filed two actions to recover from the stockholders on their liability as such. One action upon the claims of 219 creditors, aggregating about $200,000, was filed in the superior court against 170 of the stockholders; and another in the justice's court upon claims against approximately 1,100 stockholders.

On May 17, 1928, writs of attachment issued in said actions and were levied upon the funds alleged to be in the hands of plaintiff Van Orden and belonging to the subscribing stockholders joined as defendants in the present suit in interpleader.

On March 26, 1929, by leave of the court, the adjustment company filed in the present action its verified complaint in intervention, alleging the commencement of the two actions mentioned, the issuance and levy of the writs of attachment upon the interests of said defendant stockholders, and that by virtue thereof it had an interest in the fund superior to such defendants subscribers, and asked judgment accordingly. On April 17, 1929, it filed a supplemental complaint in intervention, alleging that, since the filing of its original pleading, judgments had been entered against certain of the defendants mentioned.

On April 19, 1929, there was filed by respondent Dalrymple, on behalf of stockholders named as defendants to the complaint of the adjustment company, an answer alleging that said funds were held by plaintiff as a trustee, and that the same were in the custody of the court at the time the attachments were levied, and that for either reason were not subject thereto; further, that the bankruptcy proceedings were instituted by 219 of the creditors mentioned in the complaint as assignors of the adjustment company, whose claims the latter acquired for collection only; that at a meeting of the creditors, which included said assignors, a committee was appointed with power to act for the creditors in calling for and receiving bids, or otherwise adjusting the affairs and business of the company; that at a joint meeting between the creditors' committee and the stockholders, including those named as defendants in the adjustment company's complaint, it was agreed to call for bids, and that all bids received should be submitted to the referee in bankruptcy; that before action should be taken on such bids the stockholders would be given an opportunity to raise the funds necessary to pay the company's indebtedness, and that no bid should be rejected prior to the sale in the event the stockholders failed to raise sufficient funds to pay the same. That in December, 1927, W. J. Espinolda presented to the creditors, including said defendants, a bona fide bid of $400,000 for the assets and good will of the corporation, payment of the same to be secured by a mortgage on said assets and good will and the assets of the bidder; that the bid was in excess of the debts of the corporation, but was rejected by the creditors without reason and without submitting the same to the referee in bankruptcy; that as a consequence the assets of the corporation were sold for $280,000, causing a loss to the stockholders of $120,000. Further, that the creditors made the above promises with the intent to mislead the stockholders and for the sole purpose of inducing them to place funds in the hands of the plaintiff so that the same might be attached, and that the stockholders were misled thereby and would not otherwise have subscribed as aforesaid.

The trial court found that plaintiff, by virtue of the agreements between the stockholders mentioned and the rehabilitation committee, became a trustee of the fund, which he continued to hold as such until May 2, 1928, when as the result of said injunction proceedings the same came under the control and into the custody of the court, where it has since remained. It also found in accordance with the allegations contained in the answer filed by the stockholders to the complaint in intervention and the adjustment company, and concluded that the latter had no interest in the fund and that its attachments and executions should be set aside.

It was adjudged that plaintiff be awarded the sum of $500 attorney's fees; that attorney Dalrymple recover the sum of $1,208.04, the said defendants creditors the sum of $430.27, and that the adjustment company take nothing by its complaint in intervention. No orders with reference to the disposition of the fund were made, and no decree discharging plaintiff from liability was entered previous to the entry of the above judgment, which provided that plaintiff be relieved from all liability in connection therewith.

It appears without dispute that the fund is on deposit in the Wells Fargo Bank and Union Trust Company of San Francisco in the name of plaintiff; and the court in its judgment required the bank to pay the same to Martin F. Thane, whom the court appointed a special referee in the matter. The referee was directed by the judgment to distribute the fund in accordance therewith and to make his report to the court, and for these services he was allowed the sum of $500 payable from the fund.

The American Biscuit Company, a corporation, was one of the subscribing stockholders, and paid into the fund the sum of $262.50. The stockholders so contributing were allowed the several sums so paid less the above amounts awarded plaintiff, the defendants creditors, respondent Dalrymple, and the referee appointed by the court. The corporation last named, together with the adjustment company, have appealed from the judgment.

[1-3] To warrant the filing of a complaint in intervention, the intervener's interest must concern the matter in litigation and be of such a character that he will either gain or lose by the direct operation of the judgment (20 Cal. Jur., Parties, § 25, p. 520); but it is sufficient if it be created by a claim to or a lien upon the property or some part thereof which is the subject of litigation (Horn v. Volcano Water Co., 13 Cal. 62, 73 Am. Dec. 569; Kimball v. Richardson-Kimball Co., 111 Cal. 387, 43 P. 1111; McEldowney v. Madden, 124 Cal. 108, 56 P. 783); and, as was said in Israel v. Bryan, 52 Cal. App. 66, 75, 197 P. 121, 125, "the proceeding in interpleader is a proceeding in equity, and all persons having any right or interest to protect may properly be made parties to such proceeding."

[4] The present case presents the questions of plaintiff's right to a discharge from liability both as a trustee and as a garnishee, together with the rights of numerous claimants to the fund, all of which the intervener as a creditor of the stockholders was interested in contesting, and the facts made a proper case within the above rules for an intervention by the adjustment company.

First to be considered are the questions of the effect of the attachments and executions levied by the adjustment company, the findings that the defendants were fraudulently induced to deposit funds with the plaintiff that the same might be attached, and that the creditors failed to carry out their alleged agreement to submit all bids received by them to the referee in bankruptcy, which findings appellants claim are unsupported.

[5, 6] In proceedings of this character the right of the plaintiff in interpleader should first be determined, and, if the right is sustained, an interlocutory decree should be entered requiring the defendants to interplead and litigate their claims to the fund inter se (San Francisco Savings Union v. Long, 123 Cal. 107, 55 P. 708), and upon the payment of the money into court pursuant to this order and upon his discharge the plaintiff ceases to be a party to the action. Woodmen of the World v. Rutledge, 133 Cal. 640, 65 P. 1105.

[7-10] It is the rule that property in the custody of the law is not subject to garnishment or execution except by statutory authority (13 Cal. Jur., Garnishment, § 5, p. 5; 15 Cal. Jur., Levy and Seizure, § 20, p. 1011); but in order to constitute custodia legis the property must have been lawfully taken pursuant to legal authority (28 Cor. Jur., Garnishment, p. 67). Thus money paid voluntarily into court without an order therefor, or in the mistaken expectation that a motion for an interpleader would be granted, is not in the custody of the law. Kimball v. Richardson-Kimball Co., supra; Colver v. W. B. Scarborough Co., 73 Cal. App. 455, 238 P. 1110; Oddo v. Smith (Sup.) 183 N. Y. S. 4; 33 Cor. Jur., Interpleader, p. 467. In the present case no interlocutory decree was entered; and, as stated, no order was made previous to the final judgment with reference to the fund except the preliminary restraining order and the temporary injunction mentioned. These orders made no disposition thereof, nor did they direct the plaintiff to do so, but merely restrained the defendants named in the complaint from commencing or prosecuting any actions against the plaintiff for the return thereof. The court found that on April 2, 1928, the date when the temporary injunction issued, the fund was by an order placed in its custody; but the admitted fact is that the same was then and at all times since has remained on deposit in the bank mentioned in the name of the plaintiff. While a deposit in bank to the order of the clerk of the court and receipted for by the county treasurer has been held to place the fund in the court's custody (Agoure v. Peck, 17 Cal. App. 759, 121 P. 706), here no change in the status of the deposit was made by order or otherwise; and we are constrained to hold that previous to the final judgment nothing was done in the proceeding which rendered the fund immune from garnishment process by the assignors of the adjustment company.

Respondents contend, however, that plaintiff was a trustee of the fund, and that this is a reason for holding that the same was not subject to garnishment.

[11-17] While a plaintiff by garnishment acquires no better right against the garnishee than the defendant would have (Marble Co. v. Merchants' National Bank, 15 Cal. App. 347, 115 P. 59), and property held under a trust is not as a general rule subject to garnishment or attachment (Ward v. Waterman, 85 Cal. 488, 24 P. 930; Raffo v. Foltz, 106 Cal. App. 51, 288 P. 884), nevertheless, where the purposes of the trust have been accomplished, or the trust otherwise terminated (which was clearly the situation here), the surplus or balance remaining in the hands of the trustee can be so reached by a creditor of the beneficiary of the trust (Parker v. Parker, 69 Vt. 352, 37 A. 1112; Greene & Button Co. v. Remington, 72 Wis. 648, 39 N. W. 767, 40 N. W. 643; Stetina v. Bergstein, 204 Mo. App. 366, 221 S. W. 420; Baker v. Bundy, 55 Ind. App. 272, 103 N. E. 668; Handley v. Pfister, 39 Cal. 283, 2 Am. Rep. 449; Steineck v. Hass-Baruch Co., 106 Cal.

App. 288, 288 P. 1104). Nor will a contingency as to the amount prevent a valid levy provided the defendant's interest is capable of certain and definite ascertainment (28 Cor. Jur., Garnishment, § 133, p. 103), nor that the amount of the surplus requires the adjustment of a claim for compensation by the trustee (Snyder v. Parmalee, 80 Vt. 496, 68 A. 649). However, garnishees will only be held for debts owing at the time of the service of the writ (Nordstrom v. Corona City Water Co., 155 Cal. 206, 100 P. 242, 132 Am. St. Rep. 81), and property and credits which have been transferred or assigned by the defendant cannot subsequently be subjected to garnishment as belonging to him. 28 Cor. Jur., Garnishment, § 138, p. 104. The same rule applies to equitable assignments (Walling v. Miller, 15 Cal. 38; McIntyre v. Hauser, 131 Cal. 11, 63 P. 69); and it has been held that the rule is not changed by the fact that the garnishment was levied before notice of the assignment was given the debtor. 3 Cal. Jur., Assignments, § 36, p. 285.

[18, 19] As stated, certain stockholders who had signed subscription agreements with the rehabilitation committee also signed contracts with the Dalrymple committee. The contracts last signed expressly referred to the previous agreements and provided that "* * * the custodian of such funds is hereby authorized and directed to deliver the same to my said attorneys in fact for the purposes set out herein." The plaintiff was the custodian of the funds paid to the rehabilitation committee, and the language clearly indicates an intention to transfer the same to the Dalrymple committee. In order to constitute an equitable assignment, no express words to that effect are necessary, but it is sufficient if from the entire transaction it appears that the intention of the parties was to pass title, and that payment should be made to the one who becomes the equitable assignee. McIntyre v. Hauser, supra; Goldman v. Murray, 164 Cal. 419, 129 P. 462; Title Insurance & Trust Co. v. Williamson, 18 Cal. App. 324, 123 P. 245, 247; Puterbaugh v. McCray, 25 Cal. App. 469, 144 P. 149; Los Angeles City School Dist. v. Tucker, 99 Cal. App. 390, 278 P. 507. The levies were subsequent to these transactions, and the claim of Dalrymple was by reason of the assignments prior to that of the adjustment company.

[20, 21] With reference to the evidence upon which the findings to which appellants except were based, it was testified by the witness Courtermarsh that at a meeting between the stockholders' and the creditors' committees it was agreed that the stockholders should endeavor to raise funds to rehabilitate the corporation, and that the committee was told to call for bids; that on a later date bids were submitted to the referee in bankruptcy by the Dalrymple committee and by the Mutual Stores Company, Inc. This witness failed to testify that to his own knowledge any other bid was received by the stockholders, the creditors or the referee; but he was asked if he was present at a hearing before the referee when the above bids were offered. His reply being in the affirmative a record certified by the official reporter of the referee, purporting to contain the testimony of one Schwartz given on that occasion, was read by the witness, who testified that he heard Schwartz so testify. The admission of this record and the testimony of Schwartz was objected to by the adjustment company on the ground that the record was not competent and the testimony hearsay. Schwartz testified in substance that W. J. Espinolda had submitted to the creditors a bid of $400,000 for the assets of the business, which bid they rejected. It was also testified by the witness Thorpe, a stockholder, that she was present at the meeting between the stockholders and the creditors' committee at which the latter was directed to call for bids to be submitted to the referee. She was then asked the following question, to which she replied in the affirmative: "If they received a bid of $400,000.00 and they rejected the bid without submitting it to the referee, then it would be contrary to their agreement that evening?"

This is all evidence on the above issues. It is apparent that neither Courtermarsh nor Thorpe knew of their own knowledge of any bids other than those submitted to the referee, and the record contains no evidence supporting the allegations that the creditors fraudulently induced the stockholders to deposit any sums with the plaintiff that the same might be attached. Moreover, while the answer of the stockholders alleged that the creditors' committee had full power to act for the creditors in calling for and receiving bids, or otherwise adjusting the affairs of the company, and that this committee in entering into the alleged agreement with the stockholders was acting on behalf of the creditors, there is no evidence of any authority given the committee by the creditors, the two witnesses mentioned (and theirs is the only testimony on the question) stating merely that at a meeting between the stockholders' and the creditors' committee the latter were told to call for bids, and that those bids were to be submitted to the referee. As to the Schwartz testimony, assuming that the proceedings before the referee and the present action were between the same parties, there was no attempt made to bring this witness within the provisions of subdivision 8 of section 1870 of the Code of Civil Procedure. Furthermore, his testimony fails to disclose except by surmise that he was a member of the creditors' committee, or, if so, that he was authorized as such or otherwise to bind the creditors by his statements or omissions. For the above reasons there was no competent evidence sufficient to support findings of fraud or the existence or violation of the alleged agreement by the creditors.

The adjustment company also attacks the award made to Dalrymple, and both appellants object to the allowance of attorneys' fees to plaintiff and the compensation allowed the special referee.

[22, 23] It is clear that the Dalrymple committee acquired an interest in the funds of the assignors held by plaintiff, which interest was superior to the claims of the adjustment company. The trial court named in its findings those who contributed to the fund in plaintiff's possession and the amounts of such contributions. It appears therefrom that two of those who signed contracts with the Dalrymple committee had no interest in the fund. These are Joseph Mishke and Cussei Eckstein (sometimes known as Gussie Ekstein), from whom respondent Dalrymple claims a total of $327.61, and which amount was included in the award. Moreover, the record discloses no evidence of such interest, and the claims of respondent Dalrymple against these persons were consequently not payable from the fund, nor may litigation be maintained in actions of this character upon claims other than those relating to the fund or the right held by the stakeholder. 33 Cor. Jur., Interpleader, § 48, p. 459.

[24, 25] As respects the compensation of the referee, section 639 of the Code of Civil Procedure provides for the appointment by the court of its own motion of a referee when the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect; and we cannot say that such appointment was or will be unnecessary for the latter purpose in the present case. Section 1028 of the same Code, however, provides that the fees of referees are $5 for every day spent in the business of the reference; and the allowance of a sum in advance without regard to the time necessary to carry the judgment into effect was erroneous.

[26, 27] Although as a general rule interpleader is not one of the actions where attorneys' fees may properly be allowed (Los Angeles Trust & Savings Bank v. Ward, 197 Cal. 103, 239 P. 847), it is clear that plaintiff was the trustee of an express trust within the meaning of sections 2250 and 2273 of the Civil Code, and as such became involved in considerable litigation over the fund previous to the filing of the present action. Such facts would warrant an allowance for legal expenses incurred on this account as provided by the section last mentioned (Los Angeles Trust & Savings Bank v. Ward, supra), and we cannot say that the amount awarded was unreasonable.

[28, 29] Appellants further claim that the fund was never placed in the custody of the court, and that the judgment discharging plaintiff was consequently improper. As they point out, no order directing the plaintiff, in whose name the fund is on deposit, to pay the same into court has yet been made otherwise than by directing in the judgment that the bank (which is not a party to the action) pay the fund to the referee. Proper practice requires that before a plaintiff in an interpleader suit is discharged from liability the fund be placed in the court's custody. Interlocking Stone Co. v. Scribner, 19 Cal. App. 344, 126 P. 178; 14 Cal. Jur., Interpleader, § 33, pp. 450, 451.

[30, 31] The court entered judgment in favor of fourteen of the defendants creditors joined in plaintiff's complaint for a total of $430.27. The judgment recited that these creditors appeared in the action and offered evidence in support of their claims. The record shows, however, and the fact is not disputed, that only two of the creditors whose alleged claims were allowed appeared, namely, Eagles Hall Association, Inc., and V. Wallace, a total of $60; and the allowance of the others was unsupported by evidence, and hence erroneous. Each appellant was interested in resisting these claims, and the amount involved precludes the application of the de minimis rule. 2 Cal. Jur., Appeal and Error, § 600, p. 1009.

Other points are made by appellant which do not require discussion.

For the reasons stated the judgment as to respondents Eagles Hall Association, Inc. (referred to in the judgment as Eagles' Hall), and V. Wallace is affirmed; the award to respondent Dalrymple is modified by deducting therefrom the sum of $327.61, and as so modified is affirmed; the judgment as to the other respondents named and referred to therein is reversed, and the cause remanded for further proceedings in accordance with the views above expressed.

It is further ordered that as between appellants and respondent Dalrymple each bear his own costs on appeal.

121 Cal.App. 606

LINDSAY STRATHMORE IRR. DIST. v. SUPERIOR COURT IN AND FOR TULARE COUNTY et al.

Civ. 777.

District Court of Appeal, Fourth District, California.

March 14, 1932.

As Modified March 23, 1932.

Rehearing Denied April 13, 1932. Hearing Denied by Supreme Court May 19, 1932.

1. Courts 🔑70.

Judge of Kern county superior court could sit in Tulare county superior court for trial of irrigation district's action to condemn water right when authorized by chairman of judicial council, whether local judges were disqualified or not (St. 1897, p. 258, § 15, as amended by St. 1927, p. 23; Code Civ. Proc. § 170; Const. art. 6, § 1a).

2. Mandamus 🔑28.

Mandamus lies to require inferior tribunal to perform clear legal duty, but not act involving exercise of judgment or discretion.

3. Mandamus 🔑48.

Writ of mandate, requiring court to set condemnation action for trial, will not be denied on ground that petitioner's complaint in such action states no cause of action.

4. Mandamus 🔑15.

Party having clear legal right should not be denied writ of mandate because he may ultimately fail to gain relief sought.

5. Appeal and error 🔑460(2).

Order denying motion to intervene is self-executing, and appeal therefrom does not stay its execution.

6. Mandamus 🔑15.

Erroneous allegation of quarter section, in which diversion point of water was located, by complaint in action to condemn water right, *held* not ground for denial of writ of mandate to set action for trial (St. 1897, p. 258, § 15, as amended by St. 1927, p. 23; Code Civ. Proc. § 1264).

7. Continuance 🔑10.

Refusal to set action to condemn water right for trial pending appeal in defendant's suit against plaintiff and another, involving amount of water defendant was entitled to, *held* reasonable exercise of discretion (St. 1897, p. 258, § 15, as amended by St. 1927, p. 23; Code Civ. Proc. § 1264).

8. Mandamus 🔑48.

Irrigation district, declaring its willingness to pay for water rights condemned by it on basis of water company's ownership of maximum amount of water claimed by its pleadings in pending action against district, *held* entitled to writ of mandate requiring court to set condemnation action for trial (St. 1897, p. 258, § 15, as amended by St. 1927, p. 23; Code Civ. Proc. § 1264).

9. Mandamus 🔑48.

In proceeding for writ of mandate to set irrigation district's action to condemn water right for trial, legal technicalities should not be permitted to work injury to large community of people, if desired result can be achieved without violating others' rights or well-established legal principles (St. 1897, p. 258, § 15, as amended by St. 1927, p. 23; Code Civ. Proc. § 1264).

Original petition by the Lindsay Strathmore Irrigation District for a writ of mandate to the Superior Court of the State of California, in and for the County of Tulare, and Erwin W. Owen, Judge, Presiding.

Respondents' demurrer overruled and writ granted.

Hearing denied by Supreme Court. PRESTON and LANGDON, JJ., dissenting.

Sloss & Turner, of San Francisco, Guy Knupp, of Porterville, and W. G. Irving, of Riverside, for petitioner.

Farnsworth, Burke & Maddox and W. R. Bailey, all of Visalia, for respondents.

MARKS, J.

This is an original petition filed in this court praying for a writ of mandate requiring respondents to set for trial an action pending in the superior court of Tulare county wherein the petitioner here and the plaintiff there is seeking, under the right of eminent domain, to condemn the right to take water from within the boundaries of the Consolidated People's Ditch Company to lands lying without such boundaries. The respondents filed a general demurrer and answer to the petition. The general demurrer will be overruled for reasons which will hereafter appear. We will consider the cause upon its merits.

The petitioner is an irrigation district organized and existing under an act of the Legislature entitled, "An act to provide for the organization and government of irrigation districts and to provide for the acquisition or construction thereby of works for the irrigation of lands embraced within such districts and also to provide for the distribution of water for irrigation purposes," approved March 31, 1897 (St. 1897, p. 254), and the acts amendatory thereof and supplementary thereto. Under section 15 of this act as amended by St. 1927, p. 23, petitioner possesses the power of eminent domain and may condemn water and water rights "in this or in other states or in a foreign nation."

The Consolidated People's Ditch Company is a mutual water company organized for the purpose of distributing irrigating water to its stockholders without profit. Its amended articles of incorporation restrict the use of this water to the limits of a defined district which did not include the lands served by petitioner. In the action filed by petitioner in Tulare county, it sought to condemn the right to restrict the use of this water to the lands within this district so that it could take the water from within the district served by the Consolidated People's Ditch Company and deliver it to lands without such district which were irrigated by waters furnished by petitioner.

The capital stock of the Consolidated People's Ditch Company was divided into 9,324 shares, of which the petitioner owned 495 at the time of the institution of the condemnation suit. It sought to have condemned the right to have delivered to it and take without the Consolidated People's Ditch Company's district 495/9324 of the irrigating water belonging to and diverted from the Lower Kaweah river by the last-named company in what is known as the "Peoples Ditch." The amount of such water to which it was entitled varied during different seasons and depended somewhat on the amount of the flow of the river.

The complaint in condemnation was filed on January 15, 1931, and the defendant answered on October 31, 1931. As between these parties the action was then at issue and ready for trial. On November 25, 1931, the Kaweah Delta water conservation district filed its motion for leave to intervene in the action. This motion was heard by the respondent judge sitting in the superior court of Tulare county and was denied on December 21, 1931. An appeal has been taken from this order which is now pending and is not decided.

[1] It was evidently assumed by counsel for both parties and both of the judges of the superior court of Tulare county throughout the proceedings in the respondent court that as the action was brought "by or against * * * any irrigation * * * district * * * affecting or relating to any real property * * * the judge of the superior court of the county * * * shall be disqualified to sit or act." Section 170, Code Civ. Proc. Regardless of whether or not the local judges were disqualified, we believe the respondent judge could sit in the superior court of Tulare county whenever authorized so to do by an order of the chairman of the judicial council. Section 1a, art. 6, Const. of Cal.; Fay v. District Court of Appeal, 200 Cal. 522, 254 P. 896; Edler v. Hollopeter (Cal. Sup.) 6 P.(2d) 245.

On November 18, 1931, the petitioner here, plaintiff in the condemnation action, filed the usual memorandum for the purpose of setting the cause for trial, with proof of service on the attorneys for the defendant. The matter of setting the case for trial was continued from time to time until December 21, 1931, when the petitioner's motion to set was denied by the respondent judge upon the grounds, as alleged in the answer before us, first, because of the proceedings for intervention, and, second, because certain material issues in the condemnation proceedings were involved in the case number 8807 of the superior court of Tulare county entitled "Tulare Irrigation District et al., plaintiffs, v. Lindsay Strathmore Irrigation District, defendant," filed on July 15, 1916, which is now pending on appeal to the Supreme Court and is undecided. The court calendars in Tulare county are in such condition that the condemnation case could be tried within a reasonable time.

The respondent judge, Honorable Erwin W. Owen, is a judge of the superior court of the state of California in and for the county of Kern. On January 2, 1931, the chairman of the judicial council regularly made an order authorizing and directing him to sit and act as such judge of the county of Tulare until December 31, 1931. On January 2, 1932, a similar order was made which was effective until December 31, 1932.

Section 1264 of the Code of Civil Procedure provides as follows: "In all actions brought under the provisions of this title, to enforce the right of eminent domain, all courts wherein such actions are or may hereafter be pending, shall give such actions preference over all other civil actions therein, in the matter of setting the same for hearing or trial, and in hearing the same, to the end that all such actions shall be quickly heard and determined."

[2] A writ of mandate may be issued to require an inferior tribunal to perform a clear legal duty which the law especially enjoins when not to do so would amount to an abuse of discretion. The writ has been employed to require a superior court to try a cause. Section 1085, Code Civ. Proc.; Hill v. Superior Court, 15 Cal. App. 307, 114 P. 805; Moore v. Superior Court, 20 Cal. App. 299, 128 P. 946; In re Ford, 160 Cal. 334, 116 P. 757, 35 L. R. A. (N. S.) 882, Ann. Cas. 1912D, 1267; Anderson v. Superior Court, 187 Cal. 95, 200 P. 963. If, however, the act in question involves the exercise of judgment or discretion, mandamus will not issue to require its performance. 16 Cal. Jur., 809, and cases cited.

[3, 4] Respondents earnestly urge that the writ of mandate should be denied for the reason, as they assert, that the complaint of petitioner in the condemnation action fails to state a cause of action and that, therefore, the granting of the writ by this court would be an idle act. We cannot agree with this contention. We assume that the respondent judge is able to settle the pleadings in the cases before him either on demurrer, if one were filed, or upon objection to the introduc-

tion of evidence. We cannot assume that the complaint may not be amended before trial, if it does not now state a cause of action. Where a party has a clear legal right we should not withhold the writ because such party may be ultimately unsuccessful in gaining the relief sought. In Walker v. Kingsbury, 36 Cal. App. 617, 173 P. 95, 98, it was said: "Respondent advances the point that the writ should be denied because, if issued, it would be an idle act, and this for the reason that, should the writ be granted, and should the respondent comply therewith, the reselection would be rejected when it reached the Land Department at Washington. If petitioners have the clear right to the reselection, as we think they have, under the act of 1917 we may not assume that the Secretary of the Interior will arbitrarily interfere with its consummation. The Land Department has held both ways, as we understand, during different administrations, on the very question here involved. That Department may not, should the question again be presented, hold to its more recent ruling. At any rate, our duty is to announce the law of the case and leave the consequences to take care of themselves. We cannot deny the relief sought on the assumption that it would be an idle act."

[5] Respondents urge that the case should not be set for trial until the appeal of the Kaweah Delta water conservation district from the order denying its motion to intervene is determined. The order appealed from denied the motion and the relief sought. An order denying such a motion is self-executing, and an appeal from such an order does not stay its execution, because there is nothing to stay. In re Imperial Water Co. No. 3, 199 Cal. 556, 250 P. 394; Sarthou v. Reese, 151 Cal. 96, 90 P. 187; Lickley v. County Board of Education, 62 Cal. App. 527, 217 P. 133; Wood v. Board of Fire Commissioners, 50 Cal. App. 594, 195 P. 739.

[6] Respondents next urge that in the complaint in condemnation it is alleged that the diversion point of the water in question is in one-quarter of a section, while, in fact, it is in another quarter of the same section. We do not anticipate that there will be any great difficulty in the trial court in determining the correct legal description of the point of diversion should the plaintiff prevail in its condemnation action.

[7] The remaining reason for a denial of the writ of mandate urged by respondents has merit and, we believe, furnished to the respondent judge sufficient grounds for a reasonable exercise of his discretion in refusing to set the condemnation action for trial on the state of the record then before him. As we have observed, the case of Tulare Irrigation District et al. v. Lindsay Strathmore Irrigation District was filed in the office of the clerk of the respondent court on July 15, 1916, and is now on appeal to the Supreme Court of the state and is undecided. We are informed by counsel that in its long journey through the courts this case has accumulated a record of gigantic proportions which will take considerable time to review. In this case the petitioner here is the defendant and cross-complainant, and the Consolidated People's Ditch Company is one of the plaintiffs and cross-defendants. One of the issues between these parties as made by their pleadings, decided by the trial court and, as we are informed, presented on the appeal, is the amount of water which the Consolidated People's Ditch Company is entitled to divert from the Lower Kaweah river. We are informed that this company in its pleadings and during the trial of this case and upon the appeal asserts the right to take from the river 300 cubic feet of water per second from February 1st to July 31st each year, both dates inclusive, and a lesser quantity during the remaining months of the year, both dependent upon and varying with the flow of the river. The trial court found and adjudged that it was entitled to divert 250 cubic feet per second during the six months specified, and 125 second feet during the remaining months of the year, both amounts being subject to deductions depending upon the number of second feet flowing in the stream. We are informed that the quantity of water which the Consolidated People's Ditch Company may take in its ditches is one of the controversial questions involved in the appeal and to be decided and determined in the final judgment in that case.

In the condemnation action the plaintiff, petitioner here, is seeking to condemn the right to take to lands within its boundaries 495/9324 of the water flowing in the main ditch (People's ditch) of the Consolidated People's Ditch Company diverted by it from the Lower Kaweah river. During the period from February 1st to July 31st, will it take this fraction of 250 or 300 second feet? It is obvious that this question cannot be answered until the judgment becomes final in the case now on appeal, either by its affirmance, its modification on appeal, or after new trial if the present judgment should be reversed. At the present time the value of the rights sought to be condemned cannot be fixed and determined because the quantity of water to be diverted cannot now be fixed and determined. If the right to take to the Lindsay Strathmore irrigation district a lesser quantity of water has a value which must be paid for by the plaintiff to the defendant, certainly the right to so take a larger quantity of water would require the payment of a greater sum as compensation therefor. In the present state of the record in the condemnation action and in the case now on appeal, we do not see how the evidence as to the value of the rights to be condemned could be sufficiently certain to support a judgment. In what we have just said we do not wish to be understood as intimating that the plaintiff in the condemnation action should or should not prevail in this suit.

In the case of Houghton v. Superior Court, 187 Cal. 661, 203 P. 765, 766, a writ of mandate was sought to compel the respondent court to proceed with the trial of the case of Houghton v. Kales, in which the plaintiff was seeking to recover judgment for $2,538.60 on a promissory note. The defendant had recovered judgment against Houghton in a much larger sum in another action which was then pending on appeal. This judgment was pleaded as a set-off against the plaintiff's demand. The trial court refused to proceed with the trial of the action on the promissory note until after the decision in the case on appeal. In upholding the action of the trial court, the Supreme Court said: "The petitioner therefore seeks a writ of mandate to compel the trial court to proceed with the trial and thus enable him to secure a judgment for $2,538.60, together with interest at 6 per cent. from June 21, 1916, against the defendant, who holds a judgment for nearly ten times that much against him. It is obvious that the action of the trial court was in furtherance of justice and the proper exercise of discretion, if authorized by law. The action of the trial court is amply sustained by authority. In the case of Smith v. Jones, 128 Cal. 14, 60 P. 466, a petition for writ of mandamus was sought in this court to compel a judge of the superior court to render judgment in an ejectment suit. The defendant in that case pleaded the rendition of a prior judgment between the same parties wherein said defendant was adjudged the owner of the premises; that an appeal had been taken from the judgment and remained undetermined. Upon the trial of that action plaintiffs had offered evidence in support of their complaint and demanded judgment according to the prayer of their complaint, but the defendant asked that the cause be stayed until the judgment pleaded in his answer should become final. The motion was granted, the submission of the case set aside, and all proceedings stayed until the further order of the court. In determining the matter this court in bank said: 'The jurisdiction of the trial court in a case like the one recited is unquestioned, and the power of the court in a proper case to set aside a submission and postpone final determination is also unquestioned. Many cases may be supposed wherein it would not only be the right of the judge to do so, but it would be his duty in the interest of justice and to promote the substantial rights of the parties. To justify this court in interfering with and controlling the action of the trial courts in proceedings of this nature, it would require a clear showing that the act complained of was an abuse of discretion. In this case no such showing has been made; on the contrary, from an inspection of the petition and the return thereto, it would appear that the order of the court complained of, under the circumstances, was one very proper to be made.' * * * From the foregoing decisions it is clear that a judgment which would be res adjudicata of matters involved in an action may be availed of during the pendency of an appeal from such judgment, either by a plea in abatement upon proof of which a judgment may be rendered that the action abate (Conner v. Bank of Bakersfield, 174 Cal. 400, 163 P. 353), or by a continuance of a second action until the result of the appeal has been determined. * * * In any event, we now expressly overrule the case of Dunphy v. Belden, 57 Cal. 427, and hold that, where the trial of an action involves the consideration of a previous judgment rendered between the parties to the action, which, if final, would be res adjudicata on some or all of the issues involved in the trial, the trial court, in the exercise of a sound discretion, may continue the trial of the case until the final adjudication of the matter in the other action."

We are of the opinion that the condemnation action involves the consideration of the previous judgment in the case of Tulare Irrigation District et al. v. Lindsay Strathmore Irrigation District, which, if final, would be res adjudicata on some of the issues in the condemnation case. On the state of the record before him we believe that the respondent judge exercised a reasonable discretion in refusing to set the condemnation case for trial.

[8, 9] From the record before us it appears that an early trial of the condemnation action is of the most vital importance to the petitioner. There are about 14,000 acres of land within its boundaries suitable for the cultivation of citrus and deciduous fruits of which more than 10,000 acres are planted to such fruit trees in full bearing. A serious shortage of irrigating water has existed and probably will exist again. Such fruit trees cannot be cultivated without being adequately irrigated. It is well known that citrus trees will not live without sufficient water.

In the complaint in condemnation it is alleged that the Consolidated People's Ditch Company claims to be the owner of and entitled to divert from the Lower Kaweah river 300 cubic feet of water per second. This is the maximum amount of water claimed by this company, if we correctly understand the record and counsel. We infer from the record and the oral argument of counsel for petitioner that if an early trial of the case can be had, it would be willing to try it, and pay for the rights condemned, on the basis of the ownership by the Consolidated People's Ditch Company of the maximum amount of water which this company claimed the right to divert from the Lower Kaweah river at various times of the year, in its pleadings in the case of Tulare Irrigation District et al. v. Lindsay Strathmore Irrigation District, now on appeal. If this were done it would be unnecessary to delay the trial of the condemnation suit until after the final judgment in the other case, because the petitioner here, the plaintiff in condemnation, would concede to the Consolidated People's Ditch Company, everything it could possibly gain under a final judgment most favorable to it in the case on appeal. By permitting the trial of the condemnation action a serious loss of large proportions to the residents of the Lindsay Strathmore irrigation district might be prevented should it be able to prevail in its suit. In a proceeding of this nature the technicalities of the law should not be permitted to work an injury upon a large community of people if such a result can be achieved without violating the rights of others or well-established principles of law and procedure. While the plaintiff may or may not finally prevail in its condemnation action, it should, if possible, be given the opportunity of having its rights adjudicated without long and unnecessary delay.

If the petitioner here, the plaintiff in the condemnation action, be so advised, and if within twenty days from the filing of this opinion it file in the respondent court, and a certified copy thereof with the clerk of this court, a declaration that in so far as it is concerned the case may be tried and judgment, if any, rendered upon the theory that it is seeking to condemn, and is condemning, if successful in its suit, the right to take without the district served by the Consolidated People's Ditch Company, as such district is defined in its articles of incorporation, 495/9324 of the maximum amount of the flow of the Lower Kaweah river, with the variations according to the seasons and the total flow of the river, to which the Consolidated People's Ditch Company claims and alleges it is entitled to take in its ditch known as the "Peoples Ditch" in its pleadings in the case of the Tulare Irrigation District et al. v. Lindsay Strathmore Irrigation District, bearing number 8807 in the office of the respondent court, and number Sacramento No. 4041 in the files of the Supreme Court of California, then the writ of mandate will issue as prayed for; but upon the failure to file such declaration and the certified copy thereof within the time and in the places hereinbefore specified the writ of mandate will be denied, and the alternative writ dismissed and discharged.

Upon the filing of said agreement, and the certified copy thereof, within said twenty days as herein provided, if it be filed, the demurrer will be overruled and the writ of mandate issued. If the agreement and a certified copy thereof be not so filed at the expiration of twenty days, an order will be entered overruling said demurrer and denying said writ.

We concur: BARNARD, P. J.; JENNINGS, J.

On Modification of Opinion.

PER CURIAM.

The petitioner having filed with the clerk of the respondent court the agreement referred to and required in the opinion, and having this day filed a certified copy thereof in the office of the clerk of this court, it is further ordered that the demurrer of respondents be overruled, and that the writ of mandate herein be issued as prayed for in the petition of the petitioner.

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122 Cal.App. 221

PEOPLE v. MURAKAMI.

Cr. 140.

District Court of Appeal, Fourth District, California.

March 29, 1932.

Rehearing Denied April 13, 1932. Hearing Denied by Supreme Court April 28, 1932.

1. **Embezzlement** ⚿15.

Partner may be convicted of embezzlement by appropriating partnership's property in his possession as officer thereof (Pen. Code, § 504).

2. **Larceny** ⚿28(1).

Information charging grand theft by taking money belonging to mutual savings association, of which defendant was treasurer, *held* sufficient as against contention that it should have been drawn under embezzlement statute (Pen. Code, §§ 484, 490a, 504).

3. **Larceny** ⚿65.

Evidence *held* sufficient to justify conviction of grand theft by conversion of money, collected by defendant as treasurer of mutual savings association, from member to whom loan had been made (Pen. Code, § 484).

4. **Criminal law** ⚿1172(1).

Instruction defining partnership in trial for grand theft by taking money of mutual savings association *held* not prejudicial to defendant, though improper (Pen. Code, § 484).

5. **Criminal law** ⚿782(7).

Evidence in trial for theft *held* sufficient to justify instruction to consider evidence of defendant's flight (Pen. Code, § 484).

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

T. S. Murakami was convicted of taking and converting to his own use a sum of money collected by him as treasurer of a mutual savings association, and he appeals.

Affirmed.

Lindsay & Gearhart, of Fresno, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

BARNARD, P. J.

The defendant was charged with the crime of grand theft in an information, the charging part of which read as follows: "The District Attorney of the County of Fresno hereby accuses T. S. Murakami of a felony to-wit: Grand theft in that on or about the 15th day of May, 1930, in the County of Fresno, State of California, he unlawfully took the property of the Fresno Mutual Savings Association, a voluntary association, consisting of the sum of $300.25, in lawful money of the United States."

This appeal is from a judgment which followed his conviction by a jury, and from an order denying a motion for a new trial. It appears from the evidence that the Fresno Mutual Savings Association was an organization or association, not incorporated, organized for the purpose of using certain funds paid in by its members to make loans to members and to others for the joint benefit and profit of all of the members. The offense for which the appellant was tried and convicted consisted in taking and converting to his own use a sum of money which had been collected by him as treasurer of this organization, from one of the members of the society to whom a loan had previously been made. Other material facts will appear in this opinion.

[1, 2] A number of the points raised by the appellant, namely, that his demurrer to the information should have been sustained, that the information does not charge a public offense, that the appellant was charged with one crime in the information and tried upon the theory that he had committed a separate and distinct offense, and that there was a fatal variance between the information and the proof, may be all treated together. The essence of these contentions is that the information attempts to charge a crime under section 484 of the Penal Code, while the case was tried upon the theory that a crime had been committed under section 504 thereof. It is argued that the appellant may not lawfully be convicted under section 484 for the reason that he cannot be guilty of larceny unless he takes the personal property of another, and that, since it was not proved that this association or society was organized under the laws of the state of California, it follows that there was no other person or legal entity whose property could be taken. It is also urged that the appellant could not be convicted of the crime referred to in section 504 since the society or organization here in question was a partnership of which the appellant was a member, and that he could not be convicted of embezzlement from himself. This last contention, we think, is sufficiently answered by the case of People v. Mahlman, 82 Cal. 585, 23 P. 145. Appellant concedes the force of this if, as he states, the information had been drawn under the provisions of section 504, but insists that it has no bearing for the reason that the information was drawn under the provisions of section 484. The former crimes of larceny, embezzlement, and obtaining money under false pretenses are merged by section 484 of the Penal Code into the one crime of theft. People v. Stevenson, 103 Cal. App. 82, 284 P. 487. Section 484 includes, not only the crime of stealing the "personal property of another," but also the crime of fraudulently appropriating "property which has been intrusted" to a defendant. Section 504 of this Code more particularly covers one form of this last offense and makes it embezzlement for an officer of any association or society to fraudulently appropriate to his own use any property which he has in his possession by virtue of his trust. Under section 490a of this Code, the word "embezzlement" in this section is to be read as if the word "theft" were substituted therefor. The appellant maintains that, under the theory upon which this case was tried, the information itself should have been drawn with particular reference to section 504 of the Penal Code. It was drawn under section 484 of this Code, and, as above pointed out, this includes the offense which is more particularly described in section 504. In People v. Fewkes (Cal. Sup.) 4 P.(2d) 538, 541, the court said:

"The information charged the offense as 'Grand Theft, a felony, committed as follows' (reciting the particulars), under the authority of sections 484, 490a, and 952 of the Penal Code as amended and added in 1927 (St. 1927, pp. 1043, 1046, 1047). This was sufficient. See People v. Myers, 206 Cal. 480, 275 P. 219; People v. Plum, 88 Cal. App. 575, 263 P. 862, 265 P. 322; People v. Giron, 94 Cal. App. 53, 270 P. 462. It is not necessary that the information state the kind of grand theft with which the defendant is charged in order to comply with subdivision 2 of section 950 of the Penal Code. People v. Manchell, 91 Cal. App. 788, 267 P. 718.

"Under the new procedure, it is obviously unnecessary and improper to compel the district attorney, in advance of the proof, to elect upon what theory the prosecution is to proceed, whether larceny, false pretense, trick, and device, embezzlement, etc. These distinctions in the charge and proof obtained under the old practice, but are done away with in the new. They were eliminated, not only for the purpose of simplifying procedure, but also to relieve the courts of the necessity of drawing fine distinctions as to whether the particular crime charged had been proved, and the prosecution of charging in advance, at its peril, an offense which the evidence, because of such fine distinctions, might show not to exist, although the guilt of the defendant be manifest. People v. Myers, supra."

Not only was the information in this case entirely sufficient, but it fully appears from the evidence that, throughout the trial and long before, the appellant was fully apprised of the exact nature of the offense with which he was charged, and no possible claim of prejudice in such a respect can be maintained.

[3] It is contended that the evidence is not sufficient to justify the verdict in two respects: First, that there was no evidence that the appellant ever received the money referred to in the information, and, second, that the evidence shows, without conflict, that the Fresno Mutual Savings Association was a partnership of which the appellant was a member, and that therefore he could not be guilty of embezzlement. While we do not view the evidence as establishing the fact that this society or association was a partnership, we think this point has been sufficiently disposed of by what has been heretofore said. We will, therefore, turn to the first specification as to the insufficiency of the evidence. The following facts appear: The appellant was treasurer of the society named in the information and for a number of years had in his possession the books and accounts of the organization. One J. Mori borrowed $300 from the society, giving his note to cover the same, dated November 24, 1923, payable to the Fresno Mutual Savings Association. A number of payments of interest were made at various times and receipted for by the appellant. Some months before May 15, 1930, the exact time not being disclosed, the appellant called on Mori at Los Angeles with reference to the payment of the loan and at that time suggested that a new note be made out payable to the appellant personally. It does not appear whether such a new note was given or not. In any event, on May 15, 1930, Mori mailed to the appellant, at Fresno, his personal check for $300.25, payable to the appellant, on a bank at Downey, Cal., and intended by him to cover the balance due on the note. This check was afterwards returned to him as paid by his bank, was charged against his account in the bank, and the banker testified that it went through the bank in regular course and was paid. The check was introduced in evidence and, bore the indorsement of the appellant, and underneath that the indorsement of one Harry Hori whose connection with the matter is not disclosed. The association in question had a bank account in a Fresno Bank, but neither this check nor the proceeds thereof was ever deposited in this account. This check was paid within a few days after May 15, 1930. In July, 1930, a meeting of the members of this association was held for the purpose of going into its affairs. The appellant was present and presented to the meeting a statement purporting to show the assets of the association, which included a statement of the account of Mori, showing that he was still indebted to the association in the sum of $655.56. At that time the appellant stated that this statement as to the assets of the association was correct, but during the meeting, when particularly asked by one of the persons present if Mori owed this amount of $655.56, the appellant did not answer. At this meeting, one Muratani, who kept the books of the association at intervals by writing up records from slips and who had prepared the above statement of assets of the association from slips and from information furnished to him by the appellant, was present and explained the statement. This man Muratani testified that at some time during the last half of the year 1930 he asked the appellant if he had ever received anything from Mori, to which appellant replied that he had received $200. It thus fully appears that the appellant knew that members of the association were investigating its affairs and in particular, that they were questioning the status of Mori's account in July, 1930, and also at some other time during the last half of that year. It further appears that the appellant went to Seattle in April, 1931, and that he registered in a hotel there under an assumed name. Shortly thereafter, an old acquaintance of his from Fresno saw him at this hotel, whereupon the appellant asked this person not to disclose the fact that he had seen him in Seattle. A day or two later the appellant was arrested upon this charge at the request of Fresno authorities. Shortly thereafter, he stated to this old acquaintance that he wanted to get out of jail and settle this matter when he got back to Fresno. He was ordered released and promptly proceeded to Japan, being later extradited and brought back to Fresno for trial. Some evidence was introduced of other sums received by the appellant as treasurer of this association, which were not deposited in the association's account in the bank or credited to the accounts of the persons paying the same. In his opening brief appellant made the statement that a certain witness testified that the indorsement of the appellant's name on the back of the check was in the appellant's handwriting. In a later memorandum filed, the appellant sets forth that this statement was not correct, and, that the record contains "no other authentication of this endorsement." It is true that this witness testified that he believed this indorsement was in the appellant's

handwriting, and that this statement was, upon motion, stricken out. However, the check itself was admitted in evidence, as were also certain receipts which were proven to have been signed by the appellant. Sufficient evidence was before the jury to support the implied finding that this check was indorsed by the appellant. Some contention is made that the jury should have drawn the inference from the fact that the check was also indorsed by one Hori; that Hori, and not the appellant, received the money. A contrary inference is also possible, as it is common experience that a man who indorses a check and parts with the possession thereof usually obtains either the money or an equivalent credit or value. While we have only briefly summarized the evidence on this particular point, in our opinion, it is sufficient to sustain the conclusion implied by the verdict of the jury, that the appellant received the money which was unquestionably paid by Mori to discharge his debt to the association.

[4, 5] It is next contended that five instructions given by the court to the jury were erroneous. As to three of these it is not claimed that they did not correctly state the law, it being only contended that they had no relation to the facts in this case. This contention is based entirely upon the proposition that the offense covered by section 504 of the Penal Code was not involved in this case, since the information was drawn under section 484 of this Code. For the reasons heretofore given the objections to these instructions are without merit. Another one of the instructions complained of covered the definition of a partnership. So far as it might have application to this case, the instruction as given was correct. However, we think that under the evidence and the law, no instruction on this subject should have been given. In any event, the instruction was more favorable to the appellant than he was entitled to and could not have been prejudicial to him. The other instruction complained of had to do with the consideration by the jury of any evidence as to the flight of the appellant. The only objection made is that the instruction should not have been given for the reason that there was no evidence produced as to any such flight. The evidence upon this subject has been summarized by us heretofore in this opinion, and was sufficient to justify the trial court in instructing the jury as to the law upon that subject.

The argument is advanced that certain instructions given by the court were disregarded by the jury. While, under our view of the law as to the main point raised upon this appeal, namely, as to whether the information was sufficient, we think that portions of these instructions should not have been given, the giving of these instructions was much more favorable to the appellant than he was entitled to and they were very far from prejudicial to him. The jury was fully and fairly instructed upon the issues raised by the information and the appellant's plea thereto.

While a large number of points are raised by the appellant, both directly and incidentally, nearly all of these are based upon the contention that the information did not charge an offense, and that there was a variance between the proof and the allegations of the information. We think the law as to pleading such an offense as is here involved is thoroughly established, and that this case well illustrates both the sort of situation which these various amendments to the Penal Code were designed to prevent and the wisdom of the procedural changes thus made.

The judgment and order appealed from are affirmed.

We concur: MARKS, J.; JENNINGS, J.

121 Cal.App. 660

MILLER v. CITY OF ARCADIA et al.

Civ. 8245.

District Court of Appeal, First District, Division 2, California.

March 16, 1932.

1. Municipal corporations 🔑625.

Ordinance restricting keeping of dogs *held* not unreasonable, though enforcement would render kennels useless.

That enforcement of ordinance would render kennels useless and cause property loss did not, in itself, render ordinance unreasonable, since property is held subject to lawful exercise of police power.

2. Municipal corporations 🔑63(2).

That ordinance fixed limit of six months beyond which more than three dogs could not be kept within certain distance of dwellings *held* matter for city council, as regards reasonableness.

Court must assume from enactment of ordinance that city council thought there was reason for placing age limit of six months, and question was one falling within council's jurisdiction, and court could not, as matter of law, rule to the contrary.

3. Evidence 🔑13.

It is common knowledge that dogs in pens bark and howl, especially at mating times.

4. Municipal corporations 🔑595.

City's police power extends to preservation of inhabitants' comfort.

5. Municipal corporations 🔑625

Placing six months' age limit beyond which more than three dogs cannot lawfully be kept within certain distance of dwelling houses *held* not to render ordinance unreasonable.

6. Municipal corporations 🔑625.

That keeping of other animals was not restricted in same manner *held* not to render ordinance restricting keeping of dogs unreasonable.

7. Municipal corporations 🔑625.

That ordinance, limiting number of dogs that could be kept within certain distance of dwellings, in effect created zone of which owner's property was center, *held* not to render ordinance unreasonable.

8. Municipal corporations 🔑625.

Ordinance *held* not unreasonable, though limiting to three number of dogs permitted to be kept within certain distance of dwellings.

9. Constitutional law 🔑293.

Ordinance restricting keeping of dogs *held* not, as applied to kennel owner, arbitrary and unreasonable restriction on free use of property and pursuit of useful activities, nor repugnant to Fourteenth Amendment (Const. U. S. Amend. 14).

Ordinance prohibited any person from keeping more than three dogs, over age of six months, within two hundred and fifty feet of any inhabited dwelling other than dwelling belonging to owner of such dogs.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Frank P. Miller against the City of Arcadia. From the judgment rendered, plaintiff appeals.

Affirmed.

Arnold Praeger and Praeger & Biddle, all of Los Angeles, for appellant.

Walter F. Dunn, City Atty., of Monrovia, for respondents.

STURTEVANT, J.

The plaintiff commenced an action against the defendant municipal corporation, the members of the city council, and the chief of police, to obtain a judgment enjoining the defendants from enforcing against him the provisions of a certain ordinance on the ground, as he claimed, that the ordinance was unreasonable and violated provisions of the State Constitution and the Fourteenth Amendment of the Federal Constitution. The defendants answered, and a trial was had before the trial court sitting without a jury. The trial court made copious findings, and from the judgment entered thereon the plaintiff has appealed.

Section 1 of the ordinance complained of provides as follows: "That it shall be unlawful for any person, firm or corporation to keep more than three dogs, over the age of six months each, in any place in said city of Arcadia, within two hundred and fifty feet of any dwelling house in use or occupied by human beings other than a dwelling house belonging to the owner of such dogs." Among other things the trial court found that the city of Arcadia is a municipal corporation organized under the general statute as a city of the sixth class; that the property owned by the plaintiff is located in a neighborhood that is sparsely settled; that there are only two houses within two hundred and fifty feet of plaintiff's property; that said houses were constructed after plaintiff had constructed and erected his kennels for the purpose of keeping dogs; that the plaintiff keeps and maintains substantial kennels, and that they are maintained in a clean and sanitary manner and therein are housed more than three dogs over the age of six months; that the chief of police threatens to and will, unless enjoined, arrest the plaintiff; that in the city of Arcadia there is an ordinance prohibiting the keeping of hogs within one thousand feet of a dwelling, one prohibiting the keeping of bulls except in a substantial inclosure, one prohibiting fowls and rabbits from running on the premises of others, and one prohibiting the keeping of bees, but there are no other ordinances restricting the keeping of animals or fowls excepting Ordinance 214, which is the ordinance under attack; that the inhabitants to a considerable extent keep chickens, dogs, turkeys, rabbits, horses, goats, and some other animals; and that a large portion of the territory embraced within the city limits is devoted to agriculture, horticulture, and animal husbandry.

[1-8] In his brief the plaintiff makes four separate attacks. In points 1, 2, and 4 he specially relies on the contention that the ordinance is unreasonable. In support of this contention he asserts that, if the ordinance is enforced, his kennels will be rendered useless, and that he will suffer a property loss, but it is settled law that property is held subject to the lawful exercise of the police power. Ex parte Quong Wo, 161 Cal. 220, 228, 118 P. 714. The plaintiff also asserts that there is not "* * * any fathomable reason for placing an age limit of six months beyond which more than three dogs cannot lawfully be kept in any place within * * *" the defendant city. From the mere enactment of the ordinance we must assume that the city council thought otherwise and the question was one falling within its jurisdiction. Boyd v. City of Sierra Madre, 41 Cal. App. 520, 527, 183 P. 230. Certainly this court may not as a matter of law rule to the contrary. It is a matter of common knowledge that dogs in pens bark and howl and at mating times are particularly obnoxious in that respect. The police power extended to the preservation of the comfort of the city's inhabitants. Boyd v. City of Sierra Madre, supra. Therefore, if this court were entitled to substitute its determination for that of the city council, the point must necessarily be ruled against the plaintiff. Because the keeping and maintaining of other animals is not restricted in the same manner, the plaintiff asserts is another reason for holding the ordinance unreasonable; but it has been held that police laws need not necessarily be omnibus. In re Hixson, 61 Cal. App. 200, 214, 214 P. 677. Again, it is contended that, because the ordinance in effect creates a zone of which the owner's property is the center and two hundred and fifty feet is the radius, the ordinance is unreasonable. The point is not a new one. It has been ruled against the plaintiff. In re Mathews, 191 Cal. 35, 41, 214 P. 981. Finally, it is claimed that the ordinance is unreasonable because it fixes the number of animals at not "* * * more than three dogs, over the age of six months each. * * *" It has been held that a limitation as to the number of the animals is for the lawmaking body. In re Linehan, 72 Cal. 114, 13 P. 170. When attempting to eliminate barking, howling, etc., the age of the animals is also clearly within the legislative discretion.

[9] The last point made by the plaintiff is that the ordinance is an arbitrary, unnecessary, and unreasonable restriction on the free use of private property and the pursuit of useful activities and is repugnant to the Fourteenth Amendment to the Constitution of the United States. In the case of In re Flaherty, 105 Cal. 558, at page 566, 38 P. 981, 983, 27 L. R. A. 529, the court said: "But the proposition that a man has a natural, ingrained, inviolate, common-law, or constitutional right to beat a drum on the traveled streets of a city has no foundation in reason or authority. As, therefore, it is not a right that may not be entirely suppressed, it may be regulated as the lawmaking power may determine." If the individual may not claim a constitutional right to "beat a drum" in the streets, we think it clearly follows that he may not claim the constitutional right to maintain a pack of dogs which are capable of making a much greater disturbance.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

122 Cal.App. 58

PEOPLE v. SERRANO.

Cr. 65.

District Court of Appeal, Fourth District, California.

March 22, 1932.

Criminal law 🔑1081.

Prosecutor's statement in open court that, if order setting aside information charging escape from jail was made on certain ground, people gave notice of appeal, *held* sufficient announcement of appeal (Pen. Code, § 1240).

Facts disclosed that on court's granting motion to set aside information charging crime of escape from jail prosecutor stated in effect that, if motion was granted on ground that sufficiency of preliminary examination on forgery charge could be tested on motion of this kind, "the people give notice of appeal at this time, because we would like to have that matter decided," and that thereupon court ordered that record should show that grounds for setting aside information included ground which induced the appeal, and that such statement was understood to be notice for appeal by people and was consented to by defendant.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Criminal prosecution by the People against Valentine J. Serrano. From an order setting aside an information charging crime of escape from jail, the People appeal. On motion to dismiss appeal.

Motion denied.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for appellant.

Joseph Seymour, of Riverside, for the People.

THOMSON, Justice pro tem.

This is a motion to dismiss an appeal by the people from an order of the superior court of Riverside county setting aside an information which charged the defendant and respondent with the crime of escape from jail. The motion is made on the ground that the appeal was not taken at the time or in the manner provided for in the Penal Code of California.

The transcript shows the following facts: On Saturday, August 29, 1931, the chief of police of the city of Corona was requested by one Holbrook to arrest respondent because he had given him a bad check. The chief of police, with a city traffic officer and Holbrook, went to respondent's home where Holbrook identified him, and then the officers took respondent to the home of one Enos, who also identified respondent as one who had passed bad checks. Whereupon the officers placed respondent under arrest and then took him to the city jail, where he was booked on a charge of "suspicion of forgery" and placed in jail at about 4:30 o'clock in the afternoon. The respondent remained in jail Saturday night and Sunday and was last seen there Sunday, August 30th, at about 5:30 in the afternoon. On Monday morning he was not there. No complaint was filed against respondent until Monday morning, August 31st, after his escape.

In the superior court the respondent moved to set aside and quash the information on five grounds, the substance of which is as follows: (1) That the transcript of the preliminary examination did not support the allegations of the complaint filed in the justice's court; (2) that the testimony taken at the preliminary examination does not support the charges set forth in the information; (3) that there was no testimony at the preliminary examination showing that defendant was charged with a felony at the time of the escape; (4) that the trial court does not have jurisdiction of either defendant or the cause of action; and (5) that the justice's court was without jurisdiction to commit the respondent to the superior court for trial.

The record discloses that, at the conclusion of the argument on respondent's motion to set aside the information, a discussion was had by the court, Mr. French, deputy district attorney, and Mr. Seymour, counsel for respondent, after which the following proceedings were had:

"The Court: I think in this case that there is no reason why they did not file a complaint. The testimony shows Mr. Holbrook said he gave him a 'bum check' and wanted us to pick him up, so we went down and brought him up on suspicion. Mr. Holbrook said he was the man, when we went down to his home, and so we picked him up and brought him up to the city jail and booked him at 4:30 in the afternoon. I will grant the motion.

"Mr. French: If the motion is granted on the ground that the sufficiency of the preliminary examination could be tested on a motion of this kind, the People give notice of appeal at this time, because we would like to have that decided.

"The Court: All right. Let the record so show, Mr. Reporter. I think it would be well to iron out that point.

"Mr. French: It will probably come up again.

"Mr. Seymour: I appreciate Mr. French's position, and I want to know, also. May I ask that the ruling of the Court be that the defendant be ordered released? That is a perfectly safe order to make, in view of the fact that there are three other charges upon which he has been referred in the lower court.

"The Court: Yes, I think so, in this matter, because, frankly, under the testimony, I do not believe he has been legally committed."

The transcripts on appeal were prepared and filed in this court, and appellant's opening brief was filed herein. Some time later respondent filed this motion to dismiss this appeal.

It is very evident from the language used in the superior court at the conclusion of the argument on the motion to set aside the information, as set forth above, that all parties present understood that appellant was in good faith endeavoring to take an appeal on behalf of the people and to comply with the statutory requirement therefor. Section 1240 of the Penal Code of California reads as follows: "An appeal may be taken by the people by announcing in open court at the time the order is made that the people appeal from the same." If there was any doubt about the meaning of the language of the deputy district attorney, that doubt was immediately removed by the order of the court, which discloses that the court wanted the record to show that the court's grounds for setting aside the information included the ground which induced the appeal. The remark of counsel for respondent immediately thereafter showed that he understood that an appeal had been taken by the people and he acquiesced therein. Having consented to the appeal, he should not now be trying to prevent a hearing by the appellate court on the merits.

Respondent cites, in support of his motion to dismiss the appeal, the case of People v. Shell Oil Company, a corporation (Cal. App.) 8 P.(2d) 180, and the two cases therein cited. These authorities are not in point for the reason that in each of them the facts recited show that no notice or announcement of appeal whatever was given at the time the order was made, but an attempt to take an appeal was made at a later date. In the instant case, however, the announcement was made in open court at the time the order of the court was made.

We are of the opinion that, taking into consideration the context and the surrounding circumstances of this case, the language of the deputy district attorney in announcing the appeal by the people was sufficient to effect a substantial compliance with the requirements of section 1240 of the Penal Code of California.

The motion is denied.

We concur: BARNARD, P. J.; MARKS, J.

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122 Cal.App. 35

FOX v. RAVERA et al.

SAME v. RAVERA.

Civ. 8083.

District Court of Appeal, First District, Division 2, California.

March 21, 1932.

Rehearing Denied April 20, 1932. Hearing Denied by Supreme Court May 19, 1932.

1. Automobiles 🔑245(78).

Where plaintiff was driving at same speed as cable car, which suddenly stopped in intersection when defendant swerved to left and cut in ahead of it and struck plaintiff's car, contributory negligence *held* for jury.

2. Trial 🔑296(4, 5).

Instruction that law does not require person to refrain from occupying position which would be dangerous only through another's negligence *held* not prejudicial error, where it was applicable to both autoists, and other instructions covered contributory negligence and duty to exercise ordinary care.

3. Automobiles 🔑246(22).
Trial 🔑296(3).

Instruction that, if plaintiff and driver of car were not negligent, plaintiff could recover if injuries resulted from defendant's negligence, *held* erroneous, but harmless, where proximate cause was elsewhere fully covered.

4. Appeal and error 🔑1026.

Error must prejudicially affect rights of appellant to justify reversal.

5. Trial 🔑296(4, 5).

General instruction that question to be determined before defendant could be liable for injuries was whether he was negligent *held* not error, where contributory negligence was elsewhere fully covered.

Appeals from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Separate actions by Cora M. Fox against Armando Ravera and others, and by Frank A. Fox against Armando Ravera, which were consolidated. From judgment for plaintiffs, defendants appeal.

Affirmed.

Hadsell, Sweet & Ingalls, of San Francisco, for appellants.

Ford & Johnson, of San Francisco, for respondents.

SPENCE, J.

The above-entitled actions arose out of a collision between the automobile of defendant and the automobile of plaintiff Frank A. Fox, in which said plaintiff and plaintiff Cora M. Fox, his wife, were riding. The two actions were consolidated and tried before a jury. From a judgment in favor of plaintiffs, defendant appeals.

The accident occurred at the intersection of California and Battery streets in San Francisco. Plaintiff Frank A. Fox was driving his automobile in a westerly direction along California street on the northerly side of a west-bound cable car which was approaching Battery street. Defendant Ravera was proceeding in a northerly direction along Battery street. It appears that neither the motorman of the cable car nor the drivers of the automobiles intended to stop at said intersection. Defendant swerved to the left in attempting to cross in front of the on-coming cable car, and the motorman suddenly stopped his car in the intersection to avoid a collision. The motorman testified that he stopped his car within a distance of six feet. Defendant passed within four or five feet of the front of the cable car as it came to a stop. Plaintiff Frank A. Fox, who had been driving at about the same speed as the cable car, did not stop with the cable car, and defendant's automobile collided with the left side of plaintiff's automobile on the north side of California street at a point to the west of the center line of Battery street.

[1] Appellant seeks a reversal contending that respondent Frank A. Fox was guilty of contributory negligence as a matter of law. We find no merit in this contention. The question of whether the driver of an automobile is chargeable with negligence is ordinarily a question for the jury. Sites v. Howrey, 108 Cal. App. 348, 291 P. 597; Klemko v. Ryer (Cal. App.) 4 P.(2d) 998. We find nothing in this case to make it an exception to the general rule. There was a substantial conflict in the testimony relating to the speed of the vehicles and other material matters, but the jury resolved the conflict in favor of respondent. There was evidence to show that appellant was driving at a high rate of speed and swerving in an effort to beat the cable car across the intersection; that the motorman was forced to make an unexpected and exceptionally sudden stop to avoid a collision with appellant's automobile; that respondent's automobile was traveling about opposite the center of the cable car and at about the same speed as the cable car, to wit, twelve miles per hour, as it approached and entered the intersection; and that the respondent driver did not intend to pass the cable car at Battery street. It cannot be said as a matter of law that the respondent driver was guilty of negligence in approaching and entering the intersection in the manner described. It is obvious that the accident happened very quickly after the vehicles entered the intersection, and the jury could properly conclude that the negligence of appellant brought about a sudden emergency, and that the respondent driver was not chargeable with negligence merely because he failed to stop his automobile as quickly as the motorman stopped the cable car. Counsel for appellant dwell at length upon a four-page statement made by respondent Frank A. Fox shortly after the accident. It is contended that in two particulars this statement is at variance with respondent's testimony, and that, if respondent had testified in accordance with said statement on the trial, appellant would have been entitled to a directed verdict. We need not dwell upon this statement. Appellant used it upon the trial as a contradictory statement in attempting to impeach respondent. No doubt respondent's testimony explaining the statement was accepted by the jury, and the attempted impeachment failed. In considering the question here presented, we are not concerned with said statement of respondent, but are concerned only with the testimony given by respondent upon the trial. Vinole v. Caso (Cal. App.) 6 P.(2d) 586.

[2] Appellant further contends that the trial court erred in giving certain instructions to the jury. The first instruction complained of reads: "The law does not require a person to refrain from occupying a position which would become a place of danger only by reason of the negligence of another." Appellant takes the position that this instruction ignores the doctrine of contributory negligence. We do not believe that the instruction has this effect when read with the other instructions which thoroughly covered that doctrine. Appellant further argues that it ignores the necessary qualification that it is only a person "who is in the exercise of ordinary care that receives the benefit of this rule." The duty to exercise ordinary care was imposed by other instructions, and the instruction under discussion was limited to a situation arising "only by reason of the negligence of another." The wording of the instruction may be subject to criticism, but in the form it was given it was equally applicable to both drivers, and it cannot be said that the giving of the instruction constituted prejudicial error.

[3, 4] The court further instructed the jury that, if they found that plaintiff Cora M. Fox sustained her injuries "as the result of the negligence, if any, of defendant" and without any negligence upon her part or upon the part of her husband, then their verdict should be in favor of plaintiffs. This instruction is assailed because it omitted the necessary qualification that the negligence of defendant must have been the proximate cause of the accident. Appellant's criticism of this particular instruction is technically sound, but, before the giving of an instruction justifies a reversal, it must appear that it prejudicially affected the rights of the complaining party. Jackson v. Lactein Co., 209 Cal. 520, 288 P. 781; Dullanty v. Smith, 203 Cal. 621, 265 P. 814. Such prejudice does not appear in the present case. The jury was fully instructed on the subject of proximate cause in several instructions, and was told: "If you find in this case that the defendant Armando Ravera was not negligent, or that, if he was negligent, his negligence was not a proximate cause of the injury complained of, the plaintiff cannot recover." It is well settled that all of the instructions must be read together, and as was said in Weaver v. Carter, 28 Cal. App. 241, at page 247, 152 P. 323, 326, "if all the instructions, taken together, and not being inconsistent with each other or confusing, give to the jury a fair and just notion of the law upon the point to which they are addressed, it is sufficient."

[5] Criticism is directed at an instruction commencing, "The question in this case for you to determine before liability can be fas-

tened upon the defendants is the question of negligence, and this question you are to solve upon a consideration of all of the facts and evidence in the case." The balance of the instruction covered the usual definition of negligence. Appellant contends that this instruction "ignores one of two questions" which the jury was required to pass upon, to wit, contributory negligence. Here again the instructions must be read together. The instruction given is a so-called stock instruction frequently given by trial courts in personal injury cases. Appellant's criticism is hypertechnical. The instruction did not purport to state the entire law applicable to the case nor to tell the jury that the question of defendant's negligence was the only question for their consideration before rendering a verdict against defendant. Better phraseology might be found than that employed in the above-quoted portion of the instruction, but we find nothing confusing or misleading about the instruction when it is read with the other instructions. We have carefully reviewed the entire charge, and are satisfied that the jury was fully and fairly instructed on all of the issues in the case.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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122 Cal.App. 1

SOGOV v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 8320.

District Court of Appeal, First District, Division 1, California.

March 19, 1932.

Rehearing Denied April 18, 1932.

1. Master and servant ⚿417(7).

In compensation proceeding, reviewing court cannot disturb commission's finding respecting claimant's continued employment under partnership association, where evidence supports it (St. 1917, p. 835, § 8 (f).

2. Master and servant ⚿385(1).

Award to workman under partnership association should be at maximum weekly rate of $38.46, where workmen's average weekly earnings were $45.01 and not at arbitrary scale of $12 as for wages not otherwise ascertainable (St. 1917, p. 835, § 8 (f); and p. 842, § 12 (a), as amended by St. 1929, p. 553).

3. Master and servant ⚿419.

Evidence supported Industrial Commission's conclusion that employee's disability from eye injury had terminated.

Proceeding under the Workmen's Compensation Act by Harry Sogov, claimant, opposed by the Industrial Accident Commission and another. To review an award of the Commission, as made upon a wrong basis of earnings, claimant brings certiorari.

Award annulled in respect to rate of compensation and remanded for readjustment.

George Olshausen, of San Francisco, for petitioner.

A. I. Townsend, of San Francisco, for respondents.

PER CURIAM.

Certiorari to review the action of the Industrial Accident Commission in awarding compensation to petitioner.

It is petitioner's contention that the award made is upon a wrong basis of earnings, and, further, that the commission erroneously determined and fixed the period of disability resulting from the injuries shown. The employment of petitioner was such as is provided for in subdivision (f) of section 8 of the Workmen's Compensation Act (St. 1917, p. 835, § 8 (f). This subdivision reads as follows: "Workmen associating themselves under a partnership agreement, the principal purpose of which is the performance of the labor on a particular piece of work, shall be deemed employees of the person having such work executed, and, in the event the average weekly earnings are not otherwise ascertainable, shall be deemed to be employed at an average weekly wage of twelve dollars."

[1] Respondent commission found that petitioner was an employee coming under such partnership agreement, and that the weekly earnings were not otherwise ascertainable. Petitioner attacks both findings. He contends that his employment was on a per diem basis and not under a partnership agreement. It is conceded that, at a time prior to the date of injury, petitioner was a member of a partnership working under an agreement, but that such partnership and agreement had terminated and a new contract of employment entered into. We have carefully reviewed the record and find ample evidence to support the holding of the commission on this phase of the controversy. Indeed, throughout petitioner's arguments, we find repeatedly the contention that certain evidence adduced would be equally favorable to the claim of petitioner and the finding of respondent. Accepting this, we have no discretion to disturb the finding.

[2] Petitioner next contends that, even if he was associated under a partnership agreement within the meaning of the quoted section, yet the average weekly earnings are easily ascertainable, and compensation should have been awarded in accordance therewith,

instead of the award being made on an average weekly wage of $12 per week. The quoted section provides that the earnings shall be deemed at an average of $12 per week when and only when the average weekly earnings are not otherwise ascertainable. The language obviously is in keeping with the general theory of the act, which is to secure adequate and fair compensation to injured employees without the necessity of mathematical accuracy. The term "otherwise" must qualify something, and its apparent use is to indicate that, the agreement of employment being silent or uncertain as to the wage paid, then recourse must be had to whatever available information that may disclose the average earnings. When there is no method by which the earnings may be averaged or determined, the arbitrary figure of $12 per week may be adopted.

In Singer v. Industrial Acc. Com., 105 Cal. App. 374, 287 P. 567, 568, it is said: "The law favors the payment of compensation. The statute upon which [it] the claim is based was designed to protect, in proper cases, a workman against economic insecurity." The power given the commission to fix an arbitrary sum as average weekly earnings in the very nature of things must be a power given to promote the beneficence of the act rather than to limit it. If a case should arise wherein a controversy was presented on the question of earnings, wherein one side contended the average earnings were $50 per week, and the other side contended that the earnings were $40 per week, and the commission found a conflict of testimony such as to render it almost impossible to determine where the exact truth might be, surely it could not be contended that a solution was afforded by arbitrarily adopting a $12 per week average on the ground that the earnings were not ascertainable. To a degree such is the situation here.

The partnership of which petitioner was a member had a contract to excavate material and dirt on a certain portion of highway at a price of 95 cents per cubic yard, which price of 95 cents included, not only labor, but also materials, incidental supplies, and cleaning and burning débris. Each partner, there being ten partners, had an equal interest in the affairs of the copartnership and each shared equally in the earnings of the company as prorated for the actual days each individual should work. The testimony before the commission was somewhat detailed and exhaustive and to an extent in conflict as to figures. Yet the employer, in disputing the claim of petitioner, contended his accounts showed that under the contract there was due the partnership the sum of $9,000 on account of dirt removed in a gross total of fourteen hundred days' work. That is to say, that the partners and those employed by them did, in fourteen hundred working days, earn under the contract the sum of $9,000. An easy computation gives the daily earnings as $6.43 a day. For clarity we may explain that, when we say fourteen hundred working days, it means the equivalent of one man working fourteen hundred days, or, for the purposes of illustration only, fourteen men working one hundred days. By accepting the lowest figures given we reach average weekly earnings of $45.01 per week, it being stipulated that the employment was on a seven day a week basis.

The respondents' theory seems to be that the amount due petitioner under the contract could not be ascertained in the absence of a proration showing how many men worked and how many days each actually was employed. The net amount each man might receive is immaterial. Our purpose is to ascertain the weekly earnings from the wages earned. And the figures demonstrate that, regardless of a proration and regardless of the days that other partners or laborers worked, the actual receipts of each man for each day's labor was, as computed, $6.43. This is the only question presented on the issue of weekly earnings, and it is our opinion that the arbitrary scale of $12 per week was not the proper basis of compensation, but that the true basis of compensation should be the maximum rate of $38.46 a week as provided in the statute, section 12(a), as amended by St. 1929, p. 553.

[3] The next point urged is that the commission found the disability resulting from the injury to have terminated on February 25, 1931, and allowed compensation up to and including that date. Upon the question of disability, injury, and the permanence thereof, there was and is a decided conflict. The report of the attending physician, filed on June 25, 1930, shows petitioner as completely cured on that date. A later report filed on May 19, 1931, is to the effect that petitioner is still under care on account of injuries to his eyes, with a disability rating of 45 per cent. This latter report is meager in detail and makes no attempt at connecting the then existing condition with the original injury. Other medical witnesses testify as to some systemic condition, which under no theory could be traceable to the cause complained of. There was no traumatic injury. The fact was, as stated, that petitioner had contacted with gelatine powder and had rubbed his eyes with his hands, thereby causing something caustic to enter the eye chamber. Positive testimony appears to the effect that such a cause could not possibly produce the present symptoms, and that the condition now presented is one arising from other causes totally disconnected from any inflammation or irritation caused by the elements in the powder or from any external irritation. We cannot say that the finding of the commission is unsupported.

However, the award is annulled in so far as the commission based the compensation upon the arbitrary rate of $12 per week, and the proceeding is remanded so that the award may be readjusted to conform to the average weekly earnings as ascertained herein.

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121 Cal.App. 542

CALIFORNIA THORN CORDAGE, Inc., v. DILLER et al.

Civ. 7747.

District Court of Appeal, Second District, Division 1, California.

March 11. 1932.

Rehearing Denied April 6, 1932. Hearing Denied by Supreme Court May 9, 1932.

1. Action 🔑62.

That action is prematurely commenced may be asserted by way of defense in action itself.

2. Pleading 🔑226.

Answer claiming action has been prematurely commenced is dilatory plea not affecting merits of cause of action.

3. Injunction 🔑26(6).

Plaintiff corporation *held* not entitled to injunction on ground notes sued on by defendant in other actions against plaintiff were usurious, and that they were prematurely filed; such facts constituting matters of defense.

4. Estoppel 🔑112.

Allegations *held* too indefinite to present question of estoppel, as against director's right to enforce payment of notes against corporation.

> The allegations were to effect that director and member of corporation's finance committee neglected to perform his duties as member of such committee and prevented corporation from obtaining loan by slandering its business and credit.

5. Action 🔑7.

If notes executed by corporation to director were due, holder had right to sue thereon, regardless of motive.

> Under above rule, allegation of plaintiff corporation complained of that the actions were instituted by defendant on notes and to foreclose mortgages, not merely to obtain payment of notes, but to wreck corporation and to drive it into bankruptcy by overwhelming it with numerous foreclosures and attachments, did not state facts authorizing injunction, in view of remedy by consolidation of actions under Code Civ. Proc. § 1048, if proper case therefor is presented.

6. Pleading 🔑18.

Complaint seeking to enjoin officer and member of corporation's finance committee from slandering its credit and reputation *held* demurrable for uncertainty.

7. Injunction 🔑194.

In action to enjoin prosecuting pending actions against corporate plaintiff, judgment ordering cancellation of certain mortgages and giving defendant in lieu thereof lien on all plaintiff's property *held* erroneous.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by California Thorn Cordage, Inc., against William Diller and another. From an adverse judgment, defendants appeal.

Reversed.

Frank M. Willcox, George A. Judson, Hill, Morgan & Bledsoe, and Benjamin F. Bledsoe, all of Los Angeles, for appellants.

Halverson & Halverson, Lorrin Andrews, and George I. De Vor, all of Los Angeles, for respondent.

CONREY, P. J.

At the time of filing the amended complaint in this action, March 31, 1928, the defendant William Diller was a stockholder and director of plaintiff corporation, and also was a creditor of plaintiff. As such creditor he held several notes of the corporation, some of which were secured by mortgage and others were unsecured. Although Eilzabeth Diller is named as a defendant, she had no part in the transactions now to be considered, and it will be convenient and sufficient to refer to William Diller as the defendant, or as the appellant, and to describe the plaintiff and respondent as the corporation.

At the time above mentioned, there were pending in the superior court of Los Angeles county several actions of Diller against the corporation, as follows: No. 240962, on a note for the principal sum of $6,873.90; No. 240963, on a note for the principal sum of $23,041.50; No. 240964, for the foreclosure of a chattel mortgage given to secure a note of which the principal sum was $15,000; No. 240965, for the foreclosure of a real property mortgage given to secure a note of which the principal sum was $60,000.

The objects of the present action as set forth in the prayer of the complaint, so far as pertinent to this appeal, were: (1) That an account be taken, etc., and that it be adjudged that said loans are usurious, and that the true amount thereof be determined. (2) That the defendant be enjoined from slandering the credit and good reputation of the plaintiff. (3) That the defendant be enjoined from conveying information or trade secrets of the plaintiff to its competitors in business. (4) That said actions be consolidated and that the defendant be enjoined from bringing any other suits against the plaintiff for the purpose of harassing or oppressing it or in contravention of a certain "agreement of December 2, 1926," set out in the complaint. (5) That defendant be temporarily enjoined from prosecuting his said pending actions. (6) For general relief, as equity might require.

The complaint herein contains allegations of fact which may be described in general terms as charging that the notes were usurious; that the defendant, contrary to his duty as a director and at one time president of the corporation, and also in violation of certain duties of management assumed by him under said agreement of December 2, 1926, and for the purpose of wrecking the corporation, had willfully refused to aid the corporation in negotiating other loans, and "by slandering the credit and business" of the corporation had prevented it from obtaining funds for the operation of its business; that he "conveyed information and trade secrets of the plaintiff to its competitors in business"; that, without making any effort "to raise finances for said corporation," Diller commenced said actions numbered 240962 and 240963, and caused attachments to be levied on the property of the corporation, so that the corporation was required to give large bonds for release of the attachments, all at great expense, in order to resume its business; that, in order to further injure the corporation and to drive it into bankruptcy, the defendant commenced said foreclosure actions No. 240964 and 240965, all of which was in violation of the covenants and agreements entered into by the defendant in said agreement of December 2, 1926, and of his duties as president and director of the plaintiff, and as chairman of the finance committee constituted by said agreement. It was further alleged that, in addition to the sums included in said pending actions, the defendant had loaned to the plaintiff certain other sums of money represented by promissory notes of date October 1, 1926, the aggregate principal sums thereof amounting to $27,530.84, and that the defendant now threatens to commence other actions upon each of said promissory notes, and to attach the property of the plaintiff and to close down its business and to drive it into bankruptcy; that the defendant is one of the largest stockholders of the plaintiff and until January 12, 1928, was president thereof, and is still a director thereof, and chairman of said finance committee, and has repeatedly threatened, etc., and unless enjoined and restrained will bring other actions, etc. Upon the issues presented by this complaint and the answer thereto the case went to trial. Thereafter the court made its finding of fact and entered its decree in favor of the plaintiff, from which the defendant now presents this appeal.

Pursuant to the findings of fact and conclusions of law as determined by the trial court, the principal terms of the judgment and decree are substantially as follows: The defendant is enjoined and restrained from slandering the credit or good reputation, etc., of the plaintiff. The defendant is removed from office as a director of the corporation for unfaithfulness in office. The defendant is enjoined and restrained from further prosecuting the said four pending actions and from further prosecuting any action on the obligations upon which said or either of said actions are brought, or upon the promissory notes mentioned and described in the findings, "and said defendants and each of them, are hereby ordered and directed to dismiss said and each of said actions forthwith, and the attachments issued therein shall be released, and all bonds or undertakings given therein shall be exonerated, and in case of the failure or refusal of said, or either of said defendants, to dismiss said, or either of said actions or to release said attachments, or to exonerate said bonds or undertakings, the clerk of this court is hereby ordered so to do for and on behalf of said and each of said defendants, upon application of the plaintiff, but said defendants shall not be absolved of contempt for such failure or refusal by dismissal thereof or other action by said clerk."

The decree, entered January 4, 1929, next finds and declares the amount that will be due on January 30, 1929, upon the obligations included in the foreclosure actions, and declares the several amounts of indebtedness upon the obligations described in actions 240962 and 240963, as well as upon the said several promissory notes upon which no action has yet been brought.

The decree then proceeds as follows: "It is further ordered, adjudged and decreed that the amount so due on said mortgage indebtedness, to-wit: the sum of $49,505.25, shall be, and the same is hereby declared to be a first lien upon all the real estate belonging to the plaintiff and described as follows, to-wit: (description) and a first lien upon all the following described personal property of the plaintiff, to-wit: (description). Provided, however, that the defendants shall dismiss said foreclosure suits and surrender up to the clerk of this court for cancellation, the said mortgages and said mortgage notes before this decree shall become final; it is further ordered, adjudged and decreed, that the amount of said indebtedness so due and to become due the defendant William Diller from the plaintiff, to-wit: (stating the sums found to be due in actions 240962 and 240963 and said other unsecured notes), shall be and the same is hereby declared to be a lien on all the real and personal property of the plaintiff hereinbefore described, subject to said first lien; provided, however, the defendant William Diller shall likewise surrender up to the clerk of this court for cancellation, the said promissory notes now evidencing said obligations before this decree shall become final." Next, it was ordered that payment of all of said indebtedness be stayed and postponed, for the period 18 months after the decree herein shall become final. "It is further ordered, adjudged and decreed that in the event the defendants shall fail to surrender up said obligations for cancellation that the lien herein established shall not attach by virtue of this decree, but in case said obligations are surrendered as herein provided, then said lien shall attach, and in the event that said indebtedness, or any part thereof, shall not be paid at the end of said period of eighteen months, an order of sale shall issue herein, and said property shall be sold in the manner provided by law on foreclosure, and the proceeds thereof, etc., shall be applied," etc., as directed.

Prior to the filing of his answer, defendant demurred to the complaint, and this demurrer was overruled. The grounds of demurrer were that the complaint did not state facts sufficient to constitute a cause of action, and also that the complaint was in certain respects uncertain, and for like reasons ambiguous. This demurrer should have been sustained. We so decide, primarily because the facts alleged do not justify the maintenance of a suit in equity for the purpose of obtaining the demanded relief.

[1-3] The complaint does not state a case authorizing an injunction against prosecution by appellant of his pending actions against respondent corporation, nor against the commencement by appellant of actions to recover judgments on any other notes held by him. If any action is prematurely commenced, that fact may be asserted by way of defense in the action itself. Or if obligations are tainted with usury, any defense arising out of that fact may likewise be presented. As to such defenses, there is not any sufficient reason for equitable relief by way of injunction. Moreover, the answer of a defendant, claiming that an action has been commenced prematurely, is a dilatory plea, not affecting the merits of the plaintiff's cause of action. Seches v. Bard (Cal. Sup.) 8 P.(2d) 835.

[4] To meet this obstacle to the relief demanded in this case, respondent relies chiefly upon the proposition that the facts alleged show not only that by virtue of said agreement of December 2, 1926, the maturity of the indebtedness represented by the notes was postponed for two years, but also that appellant, by reason of his conduct in his relations with the corporation and its affairs, was estopped to deny that the time of such maturity of the notes was so extended. Both contentions are without merit. The said agreement of December 2, 1926, did contain a provision for renewal, or extension of time for payment, of all obligations then owing by the corporation to Diller, "for a period of time not to exceed two years from the date hereof, as in the judgment of said Finance Committee may be necessary," etc. (The finance committee was provided for in the agreement, to act on behalf of the corporation.) The complaint does not show any further action by way of agreement extending time of maturity of the notes. The allegations that thereafter the defendant neglected to perform his duties as a member of said finance committee, and has prevented the corporation from obtaining loans by slandering the credit and business of the corporation, etc., are too indefinite to present any question of estoppel as against defendant's rights to enforce payment of his notes whenever they became due. We need not now seek to determine the merits of the suggestion that said agreement, being an attempted abdication of the authority of the board of directors, is void.

[5] A further claim is made by respondent that, as alleged in the complaint, the said actions were instituted by appellant, not merely to obtain payment of the notes, but for the purpose of wrecking the corporation and driving it into bankruptcy, by overwhelming it with numerous foreclosures and attachments of its property. And it is argued that, by reason of these facts, respondent became entitled to an injunction, and to a determination of the entire controversy in one action. In other words, the corporation, made defendant in four actions on four separate obligations, and threatened with other actions on other separate obligations, claims the right by a suit in equity, to obtain from "the chancellor" a decree which in this one action shall be substituted for and stand in lieu of any and all such judgments as otherwise might be obtained in said several actions of appellant Diller against respondent corporation. Here again the answer is that, if the notes were due, the holder had a right to sue, whatever his motive might be. It is only because they were not due, if such be the fact, that the prosecution of his actions might be delayed.

Of course, if appellant was prosecuting several actions where one would be sufficient, and if the several actions were such that they might be consolidated and tried as one action, there is an appropriate procedure for that purpose. Section 1048, Code Civ. Proc. The obvious and direct method in that situation would take the form of a motion made in those actions, or in some one of them, with due notice to all interested parties, for an order of consolidation. If the cases were open to that procedure, a separate action like the present action would not be necessary. And, if the cases were not so related to each other that their consolidation could be demanded as of right, it would be equally true that the debtor could not, for his mere convenience, require that they be absorbed into a suit of his own creation.

"In an action of equitable cognizance, it is the policy of our law to allow a party to obtain in one action all the relief to which he may be entitled on account of a single transaction, although such relief may be of a character that would require several suits under the strict rules relating to the forms of common-law actions prior to the adoption of the Codes. Murphy v. Crowley, 140 Cal. 141, 145, 73 P. 820. Equity does not deal with cases piecemeal, and, in a proper case, it may give other and different relief justified by the circumstances." This quotation is from the very late case, Cal. Trust Co. v. Cohn (Cal. Sup.) 7 P.(2d) 297, 300. But there must be "a proper case" before the rule can apply. Two of the pending actions described in respondent's complaint are mortgage foreclosures, which must be conducted according to the statutory procedure provided for such cases. Code Civ. Proc. § 726. The others are actions at law, arising out of different transactions wholly separate from those of the mortgages, and with additional parties defendant, and resting entirely in the law side of the court. It is indeed conceivable that under some circumstances, where actions are being wrongfully prosecuted, and where there exists no other remedy that would be adequate for the protection of the defendant in such actions, the iniquitous arm of the wrongdoer may be stayed by the power of injunction. The complaint here, however, does not comply with these conditions; for, if the facts be as alleged therein, those facts themselves would constitute a defense, complete and adequate for every necessary purpose.

[6] In addition to the demand for an injunction against further prosecution of defendant's actions against the plaintiff, the complaint asked that defendant be enjoined from slandering the credit and good reputation of the plaintiff. The demurrer for uncertainty in regard to the allegations on this topic should have been sustained. The allegations concerning the conveying of trade secrets of plaintiff, by defendant, to its competitors in business, were likewise insufficient; but this point needs no further attention, since the court by its findings determined that the defendant "has not conveyed information and trade secrets of the plaintiff to its competitors in business."

The demurrer to the amended complaint having been overruled, and the defendant having filed his answer, the case was tried before the court. At the beginning of the trial, counsel for defendant objected to the introduction of any evidence, upon the ground that the complaint failed to state a cause of action, and failed to state facts sufficient to entitle the plaintiff to any relief. This objection was overruled.

Appellant has presented for consideration sundry other assignments of error, to the effect that certain findings are not sustained by the evidence, and that some of the findings are in themselves defective, and that wrong conclusions of law were drawn from the findings, and that the decree is erroneous as a whole and in various provisions thereof. We find that it is not necessary to enter into a discussion of all of the questions thus raised. In addition to the statements which have been made, and the opinions expressed, in the preceding paragraphs, a statement concerning a few vital errors in the decree will be sufficient.

[7] As we have seen, two of the defendant's pending actions were for the foreclosure of mortgages upon property of the corporation. By virtue of those mortgages defendant acquired liens on the described property from the time of execution thereof. In the other pending actions appellant had acquired attachment liens upon property of respondent, and those attachments had been released by virtue of the substitution of undertakings given for that purpose. In these securities also appellant had acquired vested rights. Even if in this action the court was authorized to enter a decree, it must be remembered that the court has found herein that all of the notes are existing obligations of respondent, upon which respondent is indebted at least to the extent of the amounts shown by the court's findings. This being so, an appropriately framed decree necessarily would have preserved for the benefit of appellant the liens of the mortgages and would have given him the further benefit of judgment permitting him to recover upon the notes which were not secured by mortgage, and to recover the deficiencies, if and there might be, after foreclosure sale of the mortgaged properties. Instead of entering a decree directed to the preservation of these undoubted rights of appellant, the court by its decree has undertaken to order the surrender and cancellation of all of the notes and mortgages, and dismissal of the several actions, and to substitute therefor a lien created and declared by the decree itself. It is our opinion that there is nothing in the findings or in the law applicable thereto which authorizes the entry of such a decree. We do not know that other creditors of respondent corporation, or purchasers of property belonging to the corporation, have acquired intervening rights since the recording of the mortgages. But, if the mortgages are canceled by virtue of this decree, the door

is left wide open for proof of the acquisition of such third party rights by persons who are not parties to this action, and who by the assertion of prior rights conceivably might place themselves ahead of the liens attempted to be created by this decree.

We have not undertaken at this time to verify the claim of appellant that the amount of indebtedness of respondent to appellant as found by the court is less than the total amounts admitted by the complaint, and also less than the amounts unquestionably established by the evidence. If we are to accept the results of the record of the evidence as summarized in tabulated form in the brief for appellant, it would appear that the amounts of such indebtedness as fixed by the decree herein are very much less than they should be. The brief on behalf of respondent, instead of pointing out errors in said tabulated statements presented by appellant, has given us a separate statement formulated in a different manner, so that it is at least difficult to compare one with the other. Since upon other grounds which have been herein stated it is necessary that the judgment be reversed, we refrain from going into the record for the purpose of analyzing these statements and making up a new one from which we might determine the true amounts of the several items of indebtedness, and perhaps also might determine the merits of respondent's claim that the mortgage notes were tainted with usury.

The judgment is reversed.

I concur: HOUSER, J.

YORK, J., deeming himself disqualified, takes no part in this decision.

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121 Cal.App. 707

DALTON v. CHAPMAN.

Civ. 4511.

District Court of Appeal, Third District, California.

March 18, 1932.

Sheriffs and constables ⚷138(3).

Evidence sustained finding that sows taken by claim and delivery based on chattel mortgage were not covered by mortgage, making constable liable for wrongful taking.

Facts disclosed that mortgagee took chattel mortgage on 60 head of hogs to secure certain indebtedness, and that, after most of the mortgaged hogs had been sold for chattel mortgagee's benefit, he instituted claim and delivery action, based on chattel mortgage, for remainder of mortgaged property, and that constable in taking hogs took eleven sows mortgagor had sold to third party and which were not covered by chattel mortgage, and third party brought action against constable for damages for sows so taken and for sucking pigs caused to die.

Appeal from Superior Court, Yuba County; K. S. Mahon, Judge.

Action by Jack Dalton against B. James Chapman. From a judgment for plaintiff, defendant appeals.

Affirmed.

Ray Manwell, of Marysville, for appellant.

Rich & Weis, of Marysville, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

Plaintiff had judgment against the defendant in the sum of $430. From this judgment, the defendant appeals.

Three hundred and thirty dollars of said judgment represents the value of certain sows taken by the defendant, found by the court to belong to the plaintiff, and $100 of said judgment represents the damages caused the plaintiff by the act of the defendant just stated.

The record in this case shows the following state of facts: That on or about the 23d day of January, 1930, Mrs. J. J. Bast, J. H. Ware, and Bessie B. Ware executed and delivered to A. B. Jackson a chattel mortgage covering the following described property, to wit: 60 head of Poland-China hogs, some marked with the earmark "V," and now situate upon the ranch of Mr. and Mrs. J. H. Ware in Browns Valley, Yuba county, Cal. This mortgage was given to secure the payment of the sum of $167.42, with an advance clause therein not to exceed $500 in addition to the sum just mentioned. No action was brought to foreclose the mortgage. Thereafter, and in the month of August, 1930, A. B. Jackson commenced a claim and delivery action against Mrs. J. J. Bast, J. H. Ware, and Bessie B. Ware, and, pursuant to the directions given him by Jackson, the defendant in this action, B. James Chapman, constable of the justice's court of Marysville township, in which said action was instituted, took possession of 22 hogs then on the Ware ranch. Thereafter the plaintiff in this action filed a third-party claim, setting forth that he was the owner of 11 sows which the constable had so taken. The constable refused to deliver the sows to the plaintiff, whereupon this action was instituted.

The court found that the 11 sows so taken by the defendant B. J. Chapman were the property of the plaintiff in this action; were not covered by the chattel mortgage executed and delivered by Mrs. J. J. Bast, J. H. Ware and Bessie B. Ware, and delivered to A. B. Jackson; that the value of the sows at the time of the taking was the sum of $330; and that by the taking of said sows a number of sucking pigs were caused to die, to the further damage of the plaintiff in the sum of $100.

The testimony of A. B. Jackson shows that, prior to the institution of the claim and delivery action, he had already received 46 of the 60 hogs covered by the chattel mortgage. The testimony further shows that two of the mortgaged hogs had died, and that one of the hogs died in transit to market; that the constable took, in addition to the hogs claimed by the plaintiff, 11 head. A simple matter of calculation shows that the number of hogs so taken by A. B. Jackson and sold, the 11 head taken by the constable, other than those claimed by the plaintiff, and the 3 head that had died, just equals the 60 head covered by the chattel mortgage. Jackson's testimony, on cross-examination, is as follows:

"Q. Before you took the mortgage on the hogs or at the time you took the mortgage and as a part of the mortgage, the Wares owed you $167.42? A. Yes.

"Q. And they had some hogs out there that you told them you would advance feed to fatten hogs provided they gave you a mortgage, is that correct? A. Yes.

"Q. And that is why you put $500.00 extra in the mortgage for advances for feed? A. To protect the $167.18 trade acceptance. Been lapsed four months.

"Q. Didn't you expect to advance this feed? A. Not at that time, no. When they couldn't pay the account he came and asked for feed and I offered to advance them to protect the trade acceptance.

"Q. You took a mortgage and set out a note for $167.18, and the same mortgage provided there could be future advances of five hundred dollars? A. Yes.

"Q. You had in mind at that time, fattening these hogs, and selling the hogs and getting your money? A. Yes.

"Q. You were to furnish the feed? A. Yes.

"Q. And you did furnish feed? A. Yes, sir.

"Q. And you know they put some of the hogs up in the pen to fatten them? A. Yes, sir.

"Q. And you went out and got them with your truck and hauled them into town? A. At their request.

"Q. One of the loads was sold to the Valley Meat Company? A. Yes, sir.

"Q. That was twenty-three? A. Yes, sir.

"Q. And of that amount you received $455.35? A. Yes.

"Q. And then a little later on there was another bunch of hogs that was put up there and fattened? A. Twenty-three more.

"Q. And those hogs for which you furnished feed was sold to the California Market? A. Yes, sir.

"Q. That was $387.15? A. Yes sir.

"Q. You actually received from the sale of the hogs they put up and fattened, those two shipments, which would make $842.50?

"By the Witness: That was the amount of the two payments.

"By Mr. Rich: That was the two bunch of hogs you furnished feed to fatten? A. A portion of them.

"Q. What do you mean by that? A. That was one portion of the feed I furnished for those hogs. It wasn't all feed.

"Q. It was all covered by the mortgage? A. Yes.

"Q. That's all."

The testimony of the Wares is to the effect that some years previously sows had been sold to the plaintiff, Dalton, and that Dalton had cared for the same ever since, and that the 11 sows were not covered by the chattel mortgage, were not marked or described as the hogs included within the chattel mortgage and were kept in separate fields. Upon this appeal it is claimed on the part of the appellant that section 3440 of the Civil Code applies, and that there was no change of possession at the time the hogs were sold to Dalton, and no change of possession since said date. The facts, however, as disclosed by the testimony which we have set forth, show that the action instituted by Dalton was that of one to recover mortgaged property, and the testimony set forth in the record is sufficient to support the conclusion of the trial court that the 11 sows taken by the defendant were not included within the chattel mortgage, from which it follows that section 3440 of the Civil Code has no application whatsoever.

The record shows that Jackson received the amount of $842.50 for the sale of hogs, which was considerably more than the amount of the mortgage, including the amount authorized to be advanced thereon. The chattel mortgage by its description did not purport to include even all the hogs owned by the mortgagors therein, nor did it purport to include all the hogs that were upon the Ware ranch at the time of the execution thereof. It simply purported to cover 60 head, and the record shows that Jackson obtained possession of 60 head, outside of those found by the court to belong to the plaintiff in this action. The action instituted by Jackson being simply one of claim and delivery, based upon the chattel mortgage, and the court having found that the 11 sows were not covered by the chattel mortgage, it is evident that section 3440 of the Civil Code has no application, as the question of change of possession or continued change of possession of the 11 sows by Dalton was not, and could not be, an issue. The only question the court had to determine was whether Jackson had obtained all the hogs covered by his chattel mortgage.

While there is some slight conflict in the testimony, there is sufficient evidence, as we have shown, to sustain the findings of the trial court that the 11 sows were not covered by the chattel mortgage, and were at all times the property of the plaintiff in this action.

The judgment is therefore affirmed.

We concur: PRESTON, P. J.; R. L. THOMPSON, J.

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122 Cal.App. 116

LONG v. LOS ALTOS COUNTRY CLUB PROPERTIES, Inc., et al.

Civ. 8180.

District Court of Appeal, First District, Division 1, California.

March 24, 1932.

1. Vendor and purchaser 🔑37(1).

In action to rescind land contract, misrepresentation of single material fact on which plaintiff had right to and did rely will support action.

2. Vendor and purchaser 🔑37(1).

As regards misrepresentations inducing purchase of realty justifying rescission, there is material difference between isolated and uninhabited property and improved property.

3. Vendor and purchaser 🔑37(1).

In action to rescind purchase of lot induced by fraudulent representations, misrepresentations regarding prominent purchasers of adjoining lots, profits to be realized, and planned improvements, justified rescission, notwithstanding representation that purchaser could resell at profit might not alone be sufficient.

> Facts disclosed that trial court found upon ample evidence that plaintiff believed and relied upon each and all of the representations, and that even though the representation regarding the hope of profit to be realized by a resale by plaintiff would not alone be actionable, it was those other representations that induced that hope which rendered the sale to plaintiff unfair in fact and in principle.

4. Evidence 🔑434(8).

Oral evidence *held* admissible to show fraud inducing written contract regardless of wording of contract.

5. Contracts 🔑270(2).

One seeking rescission must act promptly and must not speculate on fraud.

6. Contracts 🔑270(3).

Laches is always question of fact, as is estoppel.

7. Contracts 🔑270(2).

To fairly determine diligence of party rescinding contract for fraud, every circumstance illustrating his actions should be considered.

8. Appeal and error 🔑1010(1).

In action to rescind contract, reviewing court will not disturb reasonably supported holding regarding existence of laches.

9. Vendor and purchaser 🔑123.

In purchaser's action to rescind fraudulently induced contract executed September 23, 1925, evidence sustained finding that purchaser giving notice of rescission June 26, 1926, was not guilty of "laches."

> Facts disclosed that on October 10, 1925, purchaser went abroad and remained away until March 7, 1926; that he gave notice of his rescission on June 26, 1926; and that in the meantime purchaser was not quiescent, but immediately upon his return began to insist upon the fulfillment of the promises made; and that reassuring promises were given him by the conduct of defendant which lulled him into expectation of complete realization of his hopes.
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> [Ed. Note.—For other definitions of "Laches," see Words and Phrases.]

10. Contracts 🔑270(1).

Defense of "laches" bears kinship to "estoppel," both being characteristic of equity.

[Ed. Note.—For other definitions of "Estoppel," see Words and Phrases.]

11. Contracts 🔑270(1).

Generally, in applying rules respecting laches to given facts, court will consider equities, wrong to be prevented, and rights to be secured.

12. Vendor and purchaser 🔑119.

In action to rescind fraudulently induced purchase of realty, vendor who had resold realty for more than plaintiff agreed to pay, and who retained what plaintiff had paid, could not stand on strict contract claims of default and forfeiture, as respects claimed laches in rescinding.

> Defendant vendor claimed no hardship to it, but stood upon a strict claim of default and forfeiture under the terms of a

contract procured by fraud, so that it should not expect a liberal application of equitable remedies to aid in its enrichment.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Frederick Long against the Los Altos Country Club Properties, Incorporated, and others. From the judgment for plaintiff, the named defendant appeals.

Affirmed.

Hankins & Hankins, of San Francisco, for appellant.

Joseph A. Garry, of San Francisco, for respondent.

PER CURIAM.

This action is for the rescission of a certain contract of sale on the ground of fraudulent representations. Judgment went for plaintiff and against the defendant noted in the caption as appellant. The defendant Rhodimer defaulted, and nonsuit was entered as to the nonappealing defendants. By the decree of the court below the contract was rescinded and plaintiff awarded judgment for the return of the moneys paid thereunder. The appeal is based on three main grounds: viz., Insufficiency of the evidence, errors in the admission of testimony, and laches of plaintiff.

[1] The attack upon the sufficiency of the evidence necessitates a brief summary of the facts. Disregarding conflicts, there was sufficient before the court to support the ensuing narration of the transaction. Plaintiff, a physician and surgeon, had for some period of time known defendant Rhodimer, a real estate salesman in the employ of defendant Monroe, Lyon & Miller, Inc.; the latter being selling agents as well as officers and directors of appellant. The relations of plaintiff and Rhodimer were those of close friends and neighbors, and Rhodimer was always endeavoring to interest plaintiff in the property of appellant, which was conducting a large real estate selling campaign. After some persuasion, plaintiff did become interested and visited the properties offered for sale. Eventually a contract of sale was entered into, induced solely by the representations made by the agent. It was represented that another well-known man had but recently purchased a lot adjacent to that offered to plaintiff and had almost immediately resold at a great profit. It was represented that a prominent banker had purchased twenty lots right opposite the same property and was ready to begin the construction of a $20,000 home. Further, it was represented to plaintiff that if he entered into the contract of purchase, which called for a total payment of $5,000, payable $1,000 down and $100 per month, he would not be required to make more than one or two monthly payments for the reason that defendant could and would, within sixty days, resell the property at an advance of $10,000, thus securing for the purchaser a profit of some magnitude. These representations and each of them were false and fraudulent, made for the purpose of inducing plaintiff to enter into the contract. The falsity and fraud of these representations were known to defendant and not known to plaintiff and were the inducing means without which plaintiff would not have made the contract. Appellant argues that the promise to resell was something of an estimate of value and also a promise to do something in the future, and therefore could not be the basis of an action for rescission, inasmuch as no present fraud had been perpetrated. We need not analyze these contentions for the reason that the other representations found to be fraudulent will suffice to support the judgment. It is well settled that the misrepresentations of even a single material fact upon which plaintiff had a right to and did rely will suffice to support plaintiff's cause of action. Harris v. Miller, 196 Cal. 8–16, 235 P. 981, and cases therein cited.

[2, 3] It cannot be gainsaid that there is a material difference between property isolated and uninhabited and property much sought and improved, and common experience has shown that a sale otherwise impossible can be easily induced by a showing of the success of the project and its continuing advancement and improvement. And, incidentally, attention, may be called to the case of Palladine v. Imperial Valley F. L. Ass'n, 65 Cal. App. 727, 748, 225 P. 291, 300, wherein the court quotes approvingly from the case of Haven v. Neal, 43 Minn. 315, 45 N. W. 612, as follows: "When representations which are matter of opinion and not of fact 'are made in connection with others, which are material as tending to establish the plaintiff's case, they should not be ruled out, but the entire statement should be received and considered together.'" Appellant persuasively argues that the whole case must and does center around the promise to resell. However, we have the trial court's specific finding, amply supported, that the plaintiff believed to be true each and all of the representations and so believing did rely upon the same, and in such reliance agreed to purchase the property. This finding, taken with the remaining findings of falsity and intent, amply supports the judgment. Indeed, it might well be that the other representations did induce plaintiff to believe that a resale could be effected and if we concede that perhaps he would not have entered into the contract unless upon the hope of profit, it was those other representations that served to instill the hope. Enough

has appeared to demonstrate that the sale was induced by highly stimulated means, unfair in fact and in principle, and no sophistry should serve to gloss the appearances in order to make the "worse the better reason."

[4] The contention of appellant that oral evidence was inadmissible to vary the terms of a written contract finds its answer in the following cases, among many of like holding: Hunt v. L. M. Field, Inc., 202 Cal. 701, 262 P. 730; Palladine v. Imperial Valley F. L. Ass'n, supra, pages 727–747 of 65 Cal. App., 225 P. 291. The recognized rule of these authorities is that fraud may always be shown, regardless of the wording of the instrument, upon the theory that a chain can be no stronger than its weakest link, and that if the parol evidence rules should effectually bar proof of fraudulent representations, the maxim that fraud vitiates everything would become the exception rather than the rule. The one exception seems to be in cases of fraudulent representations by an agent whose limited authority was made to appear from the contract. The instant case is not within this exception.

Another point is urged on the question of the agency of the person negotiating the sale and his authority to bind the defendant. Conceding a conflict of evidence on this question, the ruling was against appellant's contention and is amply supported.

[5-9] Lastly, we have the question of laches. It is the rule that one seeking a rescission must act promptly and will not be permitted to speculate upon the fraud. Yet laches is always a question of fact, as is estoppel. To accurately and fairly determine the diligence of the party rescinding, every fact and circumstance illustrating his actions should be considered, and after such consideration by the trial court, a reviewing court is loath to disturb the holding if reasonably supported. Hunt v. L. M. Field, Inc., supra, at page 705 of 202 Cal., 262 P. 730, 731. The contract in this case was executed on September 23, 1925. On October 10, 1925, plaintiff departed for Europe and remained away from California until March 7, 1926. Notice of rescission was given on June 26, 1926, being about three months after his return. In the meantime plaintiff was not idle or quiescent. Almost coincident with his return he began to insist upon a fulfillment of the promises made and assurances given. A six months' moratorium in payments was granted him, a hearing was had by the real estate commissioner, reassuring promises were given, and by the conduct of appellant, plaintiff was lulled into an expectation of a complete realization of his hopes. In Hunt v. L. M. Field, Inc., supra, it is said: "While from this conduct it may be technically said that the respondent did not immediately exercise his right of rescission upon the discovery of the falsity of the representations * * * yet it is readily apparent that his delay in giving notice thereof was attributable, not to any inexcusable neglect upon his part, but rather to the indulgence extended to the appellant. A delay in rescinding, which is the result of such indulgence should not be available as a defense to an action for rescission, for the defaulting party by his belated attempt to comply with the fraudulent representations has momentarily lulled his adversary into inactivity."

[10-12] The defense of laches bears kinship to estoppel. Both are characteristic of equity. And, speaking generally, in applying the rules to given facts a court will consider the equities present, the wrong to be prevented, and the rights to be secured. The appellant has retained the moneys paid by plaintiff and has resold the property at a price in excess of the price at which plaintiff agreed to buy. No hardship is claimed to result to it, but it stands upon a strict claim of default and forfeiture under the terms of a contract found to have been procured by fraud. Surely it can expect no liberal application of equitable remedies to aid in its enrichment.

Judgment is affirmed.

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121 Cal.App. 647

WALLDEN v. MARKET ST. RY. CO. et al.

Civ. 8029.

District Court of Appeal, First District, Division 2, California.

March 16, 1932.

Rehearing Denied April 15, 1932. Hearing Denied by Supreme Court May 12, 1932.

1. **Appeal and error** ⚷1002.

Court of review cannot interfere with jury verdict on conflicting evidence.

2. **Damages** ⚷132(3).

$7,500 for permanent sprain of woman's back requiring long stay in hospital, large expenses, and use of crutches, *held* not excessive.

3. **Trial** ⚷129.

Injured plaintiff's attorney could properly argue that defendant furnished free hospitalization because of consciousness of liability and desire to obtain evidence, in answer to argument that defendant was motivated by charity.

4. **Appeal and error** ⚷207.

If argument was improper because unsupported by evidence, but opposing counsel failed to specify such ground and ask for ruling, mere contradiction of opposing counsel presented nothing for review.

5. Damages 🔑210(2).

Instruction limiting award to "damages, if any, sustained and complained of," *held* to restrict plaintiff's claim to damages alleged in complaint.

6. Carriers 🔑321(3).

Instruction in general terms that street railway owes passenger utmost care and diligence and must provide everything necessary for that purpose and exercise reasonable degree of skill *held* correct (Civ. Code, § 2100).

7. Appeal and error 🔑901.

Error must affirmatively appear and is never lightly inferred.

8. Appeal and error 🔑216(2).

Desired qualification of correct general instruction so as to exclude duty of street railway to provide rear-view mirrors must be asked during trial.

9. Trial 🔑260(8).

Refusal of instruction that plaintiff could not recover if proof was as consistent with neglect of plaintiff as with neglect of defendants *held* harmless, where instructions more favorable to defendants-appellants were given.

10. Trial 🔑260(8).

Appellant cannot complain of refusal to give instruction that there are no degrees of contributory negligence, where subject was otherwise fully covered.

11. Carriers 🔑321(23).

Where proof was that car started before plaintiff was fully aboard, refusal of defendants' requested instruction that street car need not be kept waiting because some one manifests intention to become passenger *held* proper.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Doris Isabel Wallden against the Market Street Railway Company and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

Wm. M. Abbott, K. W. Cannon, Cyril Appel, and Ivores R. Dains, all of San Francisco, for appellants.

James F. Brennan, of San Francisco, and Kilpatrick & Goodman, of Oakland, for respondent.

STURTEVANT, J.

From a judgment awarding the plaintiff damages in the sum of $7,500 for injuries sustained in a street car accident the defendants have appealed. They contend: (1) The verdict and judgment are excessive and wholly unsupported by the evidence; (2) counsel for plaintiff was guilty of prejudicial misconduct in his argument to the jury; (3) the court erred in its instructions to the jury; and (4) the court erred in refusing to charge the jury as requested. As a foreword they contend that the amount of the verdict when weighed with the injuries actually sustained demonstrates the prejudicial character of the errors of which they complain.

[1, 2] There was evidence that the plaintiff's injury was slight, if any; that after the accident the corporate defendant furnished her all necessary medical care in a reputable hospital at its expense; and that in a short time the plaintiff had made practically a complete recovery—in other words, that the plaintiff's damages, if any, were negligible. In this connection it should be stated that there was evidence that prior to the accident the plaintiff had suffered from, and at the time of the accident she was suffering from, generalized osteo-arthritis. On the other hand, there was evidence that prior to the accident the plaintiff was in good health, but from the moment of the accident she suffered severe pains in her back; that, at the expense of the corporate defendant, she was a patient in St. Francis Hospital for five weeks; that she was then taken to Fabiola Hospital in an ambulance and remained at that hospital eight or nine days; that she was then taken home, where she remained four weeks; that she then went to the Berkeley General Hospital, where she remained for seventy-three days and was then taken home. She testified that the pain continued the same from the day of the accident until the date of the trial. One witness testified the plaintiff suffered a sprain in the lumbo-sacro region and the injury was permanent. A nurse testified that down to the date of the trial the plaintiff sat in a chair or walked with two crutches. In connection with these matters the plaintiff showed that after leaving St. Francis Hospital she incurred expenses in medical treatment amounting to nearly $1,000. Under these circumstances there was a conflict in the evidence which the jury determined in the plaintiff's favor. That determination may not be disturbed by a court of review. If the jury believed the theory presented by the plaintiff, and from its verdict we must assume it did, then the award was not excessive.

[3] The plaintiff took the depositions of the conductor and of the motorman and read them in evidence. Neither party called as a witness either the conductor or the motorman. The defendants showed that at the time of the trial Mr. Nagel, the conductor, was and for four months had been down in

Fresno county. When the arguments were being made the following took place:

"Mr. Goodman: * * * As far as that is concerned, it (charity) was on the part of the Market Street Railway performed merely and only because they knew that they were legally responsible for this accident; they knew from their own investigation and from their own men that they were liable for the damages in this case, and so, already knowing it, they decide to get this woman into a hospital, where they can put their own physicians on the case; where they might be able to keep her there so that they might be able to suppress her claims with men favorable to themselves when the day of reckoning might come; so that he might have her there perhaps long enough until the astute and capable legal department might get in touch with her and probably make a—

"Mr. Appel: * * * There is no evidence in reference to any of those matters.

"The Court: * * * The portion of counsel's speech referring to the legal department is eliminated and that is understood.

"Mr. Goodman: * * * With all the people who were on the street car that day, I would like to know from Mr. Nagel, if he were here, how many of those cards he passed out, and how many of them he got back, and how many people there were that he knew that actually were witnesses to this accident that may have been called here. I don't know whether more people returned it or not; but I would like to know, and I would like to have asked Mr. Nagel if he knew who that man was that got up and got off of the car and caught this woman's head before it hit the pavement.

"Mr. Appel: Mr. Goodman, you had the opportunity of asking those questions when you personally took Mr. Nagel's deposition, and you didn't do it.

"Mr. Goodman: You wouldn't have let me ask them, counsel.

"Mr. Appel: Oh yes, I would.

"The Court: I think counsel has a right to continue without interruption. He is within his rights.

"Mr. Appel: Yes, but if they violate the true facts of the case, your honor, I have a right, even in view of what your honor said, to call it to the attention of the jury.

"The Court: He has a right to make any deduction within reason he chooses to make.

"Mr. Appel: Pardon me for taking exception to your honor's remarks, but a deduction is one thing, your honor, and a fact is another, and if he is talking facts let him stick to the facts. Deductions are other things, your honor.

"The Court: He can draw his conclusion from his own standpoint.

"Mr. Appel: But he is talking facts.

"Mr. Goodman: That is what is bothering him. I am talking facts.

"The Court: I like to have each counsel make his remarks to the jury, and he can draw his own deductions or give his own conclusions, and, of course, the jury will listen to it all and decide the case after they have heard everything."

The defendants claim the foregoing presents prejudicial misconduct. The defendants state: "It must surely be the law that one whose instrumentalities have occasioned injury to another may voluntarily extend medical assistance without such circumstances being deemed an admission of liability." Conceding without deciding the point, then it would seem to be a two-sided matter and both sides should remain silent. But the plaintiff asserts that in his argument to the jury the attorney for the defendants claimed that the corporate defendant was but doing an act of charity when it furnished free hospitalization to the plaintiff. Continuing, she asserts that her attorney had the right to reply. We think he did and, as the trial court ruled, that he was within his rights.

[4] As to cards signed for and returned to the conductor, the plaintiff took the conductor's deposition. If she wanted to know anything about those cards, she should have asked her questions then. But she says that if she had made the attempt the defendants would have stopped her by an objection. As she did neither, there was no record on which to base an argument which assumed the existence of some witness cards which, perhaps, do not exist. But there was no such objection made by the defendants. If, for the purposes of this case, we assume that counsel's argument constituted error, the point is not properly before us on appeal. Before the point could be presented to a court of review the defendants were bound to present the same point to the trial court in clear language and ask for a ruling. Failing to do so, they may not complain on appeal. In Olsen v. Standard Oil Co., 188 Cal. 20, at page 26, 204 P. 393, 396, the court said: "Defendant's attorneys objected to the remarks, but did not ask the court to instruct the jury to disregard them. This, of itself, is a sufficient answer to the point."

[5] In her complaint the plaintiff alleged the injuries she claimed she suffered in falling and she alleged the damages she sustained and of which she complained. When instructing the jury, the trial court gave an instruction which is very long and which enumerates what are the elements of damage that may legally be considered by the jury. The defendants claim that the instruction was so worded that the jury was told the plaintiff could recover damages for the chronic osteo-arthritis from which, as they claimed,

she had suffered prior to the accident. The point may not be sustained. In her complaint she had not "complained" of injury from osteo-arthritis. But the instruction limits the award to "* * * damages, if any, sustained and complained of." The plaintiff's claim was thus limited by the wording of her complaint.

[6-8] When the deposition of the motorman was taken he was asked: "Q. On the street car you were operating that day, is there on the right front corner what is called a rear view mirror? A. No, there isn't any." At no other place in the record does the word "mirror" appear. Later the deposition was read in evidence by the plaintiff. No objection was made at any time to the question or answer. One of the instructions given by the trial court was as follows: "If you find that plaintiff was a passenger, then I instruct you that a carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill." The defendants now assert that the instruction was in effect a statement by the court to the effect that the corporate defendant was negligent because it did not have its car equipped with a rear view mirror. It will be observed that the instruction does not mention mirrors, directly or, necessarily, indirectly. Error must be made to appear affirmatively. A court of review will not lightly infer error. The instruction was sound law. Civ. Code, § 2100. If defendants wanted the jury advised that the corporate defendant was under no duty to install rear view mirrors, they should have asked for an instruction to that effect.

[9] The defendants asked and the trial court refused to give an instruction that if the proof was as consistent with neglect of the plaintiff as with neglect of the defendants the plaintiff could not recover. As shown by this record the refusal was not error. In instruction XXXVI the court instructed the jury in proper form that the plaintiff could not recover if she was guilty of slight contributory negligence. Then in instruction XXXVII the court instructed the jury that if the plaintiff was guilty of contributory negligence she could not recover no matter how negligent the defendants were. The rule as stated in those two instructions was more favorable to the defendants than the rule as stated in the instruction which was refused.

[10] The defendants requested and the trial court refused an instruction that there are no degrees of negligence or contributory negligence in this state. We think it cannot be said that the subject-matter was not covered by instructions XXXVI and XXXVII. Moreover, instruction XLVIII stated: "The issue involved in this case is not what degree of care the Market Street Railway Company or its employees owed to the plaintiff, Mrs. Doris Isabel Wallden, or what degree of care Mrs. Wallden exercised for her own safety. * * *" These three instruction fully protected the rights of the defendants on the subjects of degrees of care and degrees of negligence.

[11] The defendants asked and the trial court refused an instruction that a car need not be kept waiting because some one manifests his intention to become a passenger. It assumes facts not in evidence—that the plaintiff stood on the sidewalk, signaled the car, and that the car did not wait, but went off and left her. Whereas, it was the claim of the plaintiff that the car came to a stop, that she attempted to board it, that while she was partly but not entirely on board the car was started. If such was the fact, it will not be claimed that the car was, under those circumstances, under no duty to "wait." See instruction XXX.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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121 Cal.App. 576

WOOLSEY et al. v. WOOLSEY.

Civ. 4432.

District Court of Appeal, Third District, California.

March 14, 1932.

Rehearing Denied April 13, 1932. Hearing Denied by Supreme Court May 12, 1932.

1. Jury ⚿13(5).

Complaint by depositor's children against legatee of depositor's husband *held* to state equitable cause of action for enforcement of alleged trust in joint bank account balance at depositor's death, as regards jury trial.

Complaint alleged that plaintiffs became beneficiaries of trust fund, consisting of joint bank account, which was to be paid to them during lifetime of trustee or conveyed to them by terms of trustee's will, and that executor of will of trustee became possessed of trust fund by exercise of fraud and undue influence by means of which he persuaded trustee to make his will in violation of terms of trust agreement. The prayer of the complaint was for money judgment for sum which remained in hands of trustee at time of death of wife to be paid from his estate in due course of administration and for such other and further relief as might be meet and proper in premises.

2. Trusts 🔑359(2).

Equity retains exclusive jurisdiction of actions to establish trusts and those founded on fraud.

3. Pleading 🔑49.

Nature of action must ordinarily be determined from pleadings as whole.

4. Pleading 🔑49.

In ascertaining nature of action, prayer of complaint may be considered, but it is not necessarily controlling; averments of pleadings or even theory upon which cause is mutually tried may determine nature.

5. Jury 🔑13(5).

Where action to enforce trust was equitable in nature, plaintiffs *held* not entitled to jury trial as constitutional right.

6. Trial 🔑374(2).

In equitable action, court could impanel jury to assist in determination of facts, but jury's findings were purely advisory.

7. Trial 🔑374(2).

In equitable action, court could reject general and special findings of jury and adopt contrary findings of its own warranted by evidence.

8. Appeal and error 🔑1040(9).

Sustaining of demurrer to original complaint *held* harmless, in view of issues included in amended complaint.

In suit by children of depositor against sole legatee of depositor's husband to enforce alleged trust in balance which remained in joint bank account at death of depositor, all material issues which were presented by original complaint were included in amended complaint, except allegations with relation to filing of probate claim for amount of joint bank account which remained at time of depositor's death, and since court found that alleged trust agreement was not made and that plaintiffs' mother never created trust fund in bank account, it was immaterial whether estate of mother's husband remained as party to action.

9. Frauds, statute of 🔑75.

Alleged parol trust agreement *held* invalid to extent that it purported to require bequeathing of bank fund by terms of will (Civ. Code, § 1624, subd. 6; Code Civ. Proc. § 1973, subd. 6).

10. Depositions 🔑99.

In suit to establish that deceased held joint bank account in trust, deposition taken in contest of deceased's will on ground of fraud and undue influence *held* properly excluded (Code Civ. Proc. § 2022).

11. Appeal and error 🔑1043(6).

Excluding deposition taken in another case *held* harmless where deponent was examined at length at trial.

12. Joint tenancy 🔑6.

Chief characteristic of "joint tenancy" of real or personal property is right of survivorship to title of property.

[Ed. Note.—For other definitions of "Joint Tenancy," see Words and Phrases.]

13. Joint tenancy 🔑6.

Money deposited in bank to credit of two individuals in joint tenancy becomes property of both persons with right of survivorship to title thereof at death of either depositor (Deering's Gen. Laws 1923, Act 652, § 15a).

14. Trusts 🔑44(1).

In suit to declare trust in joint bank account deposited by plaintiffs' deceased mother, evidence supported finding, in substance, that mother's husband never agreed to hold account in trust for benefit of plaintiffs.

15. Evidence 🔑590.

Trial court had right to take into consideration interest of witnesses in outcome of litigation.

Appeal from Superior Court, Amador County; C. P. Vicini, Judge.

Suit by E. G. Woolsey and others against William Woolsey, individually and as executor of the will of George Woolsey, deceased. From a judgment for defendant, plaintiffs appeal.

Affirmed.

William G. Snyder, of Jackson, for appellants.

Ralph McGee, of San Francisco, for respondent.

Mr. Justice R. L. THOMPSON.

This is an appeal from a judgment which was rendered in favor of the defendants in an action instituted to declare a trust in a joint savings bank account which was deposited by Mary Elizabeth Woolsey, during her lifetime, to the credit of herself and her husband. The cause was tried with a jury, which rendered general and special verdicts favorable to the plaintiffs. On the theory that these verdicts were merely advisory, they were rejected, and adverse findings favorable to the defendants were adopted by the court in accordance with which a judgment was thereupon rendered.

The appellants contend that the complaint alleges an action at law in the nature of assumpsit, and that the findings of the jury were therefore binding upon the court. It is also asserted the findings and judgment are not supported by the evidence, and that the court erred in its rulings in the course of the trial.

The amended complaint alleges that George Woolsey and Mary Elizabeth Woolsey were husband and wife; that the plaintiffs are the children of Mrs. Woolsey as the issue of a former marriage; that in the lifetime of these spouses and during their coverture Mrs. Woolsey "was possessed of * * * separate property consisting of certain cash," regarding which they "entered into a trust agreement * * * whereby it was provided that said property * * * should be placed on deposit in a bank in a joint tenancy trust fund account * * * during her lifetime," subject to her right to draw upon the account or dispose of the balance thereof by will, but "in the event said fund or any part thereof should remain undisposed of at her death * * * he would hold * * * what then remained of said fund in trust for her children * * * and that he should pay said fund over to her children during his lifetime * * * or that he should provide for same in his will, so that, upon his death, the children * * * should receive such fund, and that pursuant to such agreement, said Mary Elizabeth Woolsey placed said property on deposit in a bank account in the name of said George Woolsey and herself." It is then recited that the sum of $3,140 remained in that joint trust account at the time of the death of Mrs. Woolsey; that George Woolsey subsequently died December 15, 1929, and upon proceedings duly had his will was admitted to probate and the defendant William Woolsey was appointed and qualified as executor thereof. Finally, it is alleged that the will of George Woolsey, which named his son, the defendant William Woolsey, as sole legatee and devisee thereof, was procured by fraud and undue influence of the executor, by means of which he persuaded the testator to disregard and violate his said trust. The complaint prayed for a money judgment for the sum which remained in the hands of George Woolsey at the time of the death of Mrs. Woolsey, to be paid from his estate in due course of administration, and "for such other and further relief as may be meet and proper in the premises."

The essential allegations of the complaint were controverted by the answer. The cause was tried with a jury. Six special interrogatories were answered by the jury favorable to the plaintiffs. A general verdict was also rendered in their favor for the sum of $4,824.90. Upon motion of the defendants for a judgment notwithstanding the findings of the jury, the general and special verdicts were rejected. Contrary findings favorable to the defendants upon all the essential issues were adopted by the court. A judgment was rendered accordingly. From this judgment the plaintiffs have appealed.

[1-4] The complaint clearly states an equitable cause of action for the enforcement of an alleged trust in the balance which remained in a joint bank account at the death of the depositor thereof. It is charged the plaintiffs became the beneficiaries of this trust fund, which was to be paid to them during the lifetime of the trustee or conveyed to them by the terms of his will. It is then recited that William Woolsey, the executor of the will of the testator, George Woolsey, became possessed of this trust fund by the exercise of fraud and undue influence by means of which he persuaded the testator to make his will in violation of the terms of said trust agreement.

The essential characteristics of this suit as they are disclosed by the pleadings and the record of the trial clearly indicate that it is an equitable action involving the establishment of an alleged trust fund which was acquired by means of fraud and undue influence. The facts disclosed by the record in Cauhape v. Security Savings Bank, 127 Cal. 197, 59 P. 589, 590, were quite similar to those of the present case. It appears in the case last cited that Cora L. Floyd deposited $3,000 in the Security Savings Bank with instructions to pay the dividends therefrom to Mary Pond. This was done until the death of the depositor, at which time the payment of dividends was discontinued. The representative of Mary Pond brought suit against the bank, claiming title to the fund. The complaint alleged an indebtedness on the part of the bank for money had and received. The answer acknowledged the possession of the fund, but asserted that it was held subject to a trust for the payment of the dividends therefrom. The court said: "It is evident that plaintiff brings suit simply to enforce an equity, and not 'for money claimed to be due upon contract.' * * * The plaintiff seeks to recover a general money judgment *in satisfaction of a trust.* I think, therefore, the relief demanded in the complaint, as against the executors, the issues made by the answer of the executors, the facts disclosed by the evidence, and the issues actually tried, all show that the action is in equity."

This language is peculiarly applicable to the present case.

Equity retains exclusive jurisdiction of actions to establish trusts and those which are founded on fraud. Reay v. Reay, 97 Cal. App. 264, 270, 275 P. 533; 10 Cal. Jur. 475, § 17. The nature of an action must ordinarily be determined from a consideration of the pleadings as a whole. In ascertaining the nature of an action, the prayer of a complaint may be considered, but it is not necessarily controlling. The averments of the pleadings, or even the theory, upon which the cause is mutually tried, may determine its nature.

15 Cal. Jur. 335, § 12; Cree v. Lewis, 49 Colo. 186, 112 P. 326. The prayer of the complaint in the present action is not in conflict with the theory of an equitable cause. The demand for a judgment for a specific sum is dependent upon the equitable establishment of the alleged trust. Moreover, the prayer demands "such other and further relief as may be meet and proper in the premises."

[5-7] Since the present action is clearly equitable in its nature, the plaintiffs were not entitled to a trial by jury as a matter of constitutional right. 15 Cal. Jur. 331, § 11; 16 R. C. L. 209, § 27. The court, in its discretion, was authorized to empanel a jury to assist in the determination of the facts, but the findings of the jury were purely advisory. Brichetto v. Raney, 76 Cal. App. 232, 241, 245 P. 235; Schooler v. Williamson, 192 Cal. 472, 478, 221 P. 195. The court was therefore empowered to reject the general and special findings of the jury and adopt contrary findings of its own which are warranted by the evidence, pursuant to which a judgment was properly rendered. This is precisely what the court did. This procedure was not erroneous.

[8] The sustaining of the demurrer to the original complaint was harmless. All the material issues which were presented by the original complaint are included in the amended complaint, except the allegations with relation to the filing of a probate claim for the amount of the joint bank account which remained at the time of the death of Mrs. Woolsey. These allegations which were omitted from the amended complaint do not change the nature of the action. By the terms of the original complaint the suit was, and still remains, a mere equitable action to establish a trust in a joint bank account. Since the court found that the alleged trust agreement was not made and that Mrs. Woolsey never created a trust fund in that bank account it is immaterial whether the estate of George Woolsey remained as a party to the action. Unless the alleged trust fund were established, the plaintiffs had no interest in the estate of their stepfather. Therefore, the sustaining of the demurrer was harmless. Moreover, the amended complaint upon which the cause was tried reiterated all of the averments of the original complaint with relation to the alleged agreement to convey the bank fund by will to the plaintiffs, and repeats the assertion that the will of George Woolsey was procured by the fraud and undue influence of his son William. Finally it prays for judgment with directions that the amount thereof be paid from the estate in due course of administration. Evidence of the alleged agreement to will the property, together with the asserted illegality of the will, was adduced by the plaintiffs without restriction.

[9] The alleged parol trust agreement is invalid to the extent that it purports to require the bequeathing of the bank fund by the terms of the will of George Woolsey, for the reason that it violates the provisions of subdivision 6, § 1624, of the Civil Code, and subdivision 6, § 1973, of the Code of Civil Procedure, both of which sections provide that: "An [oral] agreement [is invalid] which by its terms is not to be performed during the lifetime of the promisor, or an agreement to devise or bequeath any property, or to make any provision for any person by will."

The foregoing statutes do not apply to written agreements, or to those concerning which "some note or memorandum thereof, is in writing and subscribed by the party to be charged, or his agent." Neither do they apply to oral agreements which were made prior to 1905, at which time they were not required by statute to be in writing. Staples v. Hawthorne, 208 Cal. 578, 583, 283 P. 67. It is neither contended in the present case that the agreement was in writing, nor that it was made before the statute required such contracts to be in writing. Nor was there any such performance of the contract as would relieve it from the application of the statute.

[10, 11] The refusal of the court to permit the appellants to read in evidence the deposition of E. G. Woolsey, one of the plaintiffs, which had been taken in another proceeding, to wit, the contest of the will of George Woolsey, is assigned as error. Section 2022 of the Code of Civil Procedure provides, in part: "A deposition * * * may * * * be read in evidence by either party at any stage of the action or proceeding in which it was taken, or in any other action or proceeding between the same parties or their privies or successors in interest *upon the same subject.* * * *"

This suit was instituted to establish a trust. It involves an alleged oral agreement by the terms of which it is sought to prove that George Woolsey held an equitable title only to a joint bank account in trust for the plaintiffs who claim to be the legal owners thereof. It affects the title to personal property. Upon the contrary, the proceeding in which the deposition was taken was a contest of will upon the grounds of fraud and undue influence. It related only to the validity of a will. It may therefore not be said these two proceedings relate to the same subject-matter so as to authorize the reading of the deposition in the present action under the provisions of section 2022, supra.

Moreover, the exclusion of the deposition was harmless. The witness, E. G. Woolsey, whose deposition was excluded, was examined at length at the trial. The transcript contains fifty pages of his testimony. There is nothing contained in the deposition affecting the merits of this cause which was not testified to by the witness at the trial, except the hearsay statement that the housekeeper told him that the defendant, William Woolsey, came out of his father's room "after a stormy session" and said: "I call this hell. * * * My father just told me that he proposed leaving half of *his property* to Lib's (Mrs. Mary E. Woolsey's) children, * * * and the other half to his children." This is not an admission that he held any of his wife's money in trust. Even though it was received in evidence it fails to supply even an inference which is favorable to the plaintiffs' cause in the present action.

[12-15] Finally the appellants contend that the findings and judgment are not supported by the evidence. The court found, in effect, that Mary E. Woolsey was possessed of the sum of $2,152.88, which was her separate property; that after her marriage with George Woolsey, she voluntarily deposited this money on February 14, 1916, in a joint tenancy bank account to the credit of herself and her husband; that this joint account was not procured by the fraud or undue influence of her husband, or any one else; that it was not subject to a trust for the benefit of her children, or otherwise; that there was no agreement that any part of this fund should be paid by her husband to her children or willed to them after her death; that both spouses drew against this fund at will until, at the death of Mrs. Woolsey, there remained but the sum of $1,140.48; that prior to the death of George Woolsey this entire fund was exhausted by the payment of expenses "for the care and maintenance of the said Mary E. Woolsey"; that the will of George Woolsey was not procured by the fraud or undue influence of William Woolsey or any one else; and that no part of this joint bank account remains in the estate of George Woolsey. Upon these findings, the court rendered judgment that the plaintiffs take nothing by their cause of action.

After a careful reading of the entire record, we are of the opinion there is sufficient evidence to support these findings. It was stipulated that on February 14, 1916, Mary E. Woolsey was possessed of $2,152.88, which she deposited with the American Trust Company Bank of San Francisco in a "joint tenancy account" to the credit of herself and her husband George Woolsey. The chief characteristic of a joint tenancy of real or personal property is the right of survivorship to the title of the property. Words and Phrases, Third Series, vol. 4, 598. Money which is deposited in a bank to the credit of two individuals in "joint tenancy" becomes the property of both persons, with the right of survivorship to the title thereof, at the death of either depositor. McDougald v. Boyd, 172 Cal. 753, 159 P. 168; California Bank Act of 1909 and amendments thereof, 1 Deering's Gen. Laws 1923, p. 153, Act 652, § 15a.

In the absence of satisfactory proof on the part of plaintiffs, of the alleged trust agreement affecting this fund, we must assume George Woolsey owned the balance of the money, at the death of his wife, as survivor of the joint tenancy therein. The record is devoid of direct evidence that he ever agreed to hold it in trust for the benefit of plaintiffs. There is no substantial evidence his wife ever imposed such a condition, or that she ever requested him to do so. Both parties to this joint tenancy account are dead. It is significant that the plaintiffs were in frequent contact with their mother for many years before her death while the joint tenancy was maintained and neither of them pretend to say she ever spoke to them regarding this alleged trust. In truth, they admit that she never did speak of it. All that the record contains in support of plaintiffs' contention that a trust was imposed on this joint tenancy account is confined to two circumstances, first, the testimony of the plaintiff, E. G. Woolsey, that his mother said to her husband just before her death, "My will, my will, George," to which he replied, "Yes, my darling, I have your will, and I will take care of all that." It is claimed this infers that she had either attempted to convey the balance of this fund to her children by will, or that she desired to do so, which would amount to an effort to exercise control over the account. The will, however, was not produced, and its loss is not accounted for. Finally the three children of Mary Elizabeth Woolsey, and their cousin testified to a conversation with George Woolsey, which occurred after the death of his wife, in which each of them say in substantially the same language that he addressed himself to the boys and said: "'Boys, I must have some money, I am short of money. * * * Your mother has some money in the bank. * * * It is in a joint account. * * * I wouldn't use it without your permission. * * * If you boys would consent, I will use that money of your mother's. * * * I am an old man, and if I don't pay this money back to you folks during my life, I will attend to it all in my will.' * * So * * * he used it." It was said that he then admitted there was over $3,000 in the fund. No witness testifies when this discussion occurred. The evidence satisfactorily shows that there was but $1,140.48 in this account at the time of the death of Mrs. Woolsey, November 7, 1924. The balance of the fund was withdrawn by George Woolsey and the entire account was closed by January 22, 1925. This was within a month and a half from the date of her death. The trial court observed the witnesses on the stand, and had a right to take into consideration their interest in the outcome of the litigation. In view of the fact that this statement refers to the "money of your mother's" and also admits "it is in a joint account," the court may have reconciled it with the stipulation that it was a "joint *tenancy* account," by assuming George Woolsey thereby merely acknowledged that his wife originally owned the money and that he was therefore morally obligated to use it only with the consent of her children. Regardless of the construction of this language it merely raises a conflict with the admitted fact that the fund in controversy is the residue of a "joint tenancy account." The inevitable construction of the admitted fact that it was a joint tenancy account refutes the theory that Mrs. Woolsey's estate retained any title to the residue thereof after her death. The evidence of the existence of a trust in this bank account is extremely weak and unsatisfactory. Neither the merits of the case nor the record thereof will warrant this court in upsetting the findings of the trial court.

The judgment is affirmed.

We concur: Mr. Presiding Justice PRESTON; Mr. Justice PLUMMER, J.

215 Cal. 263

SECURITY CO. v. RICE.

L. A. 13209.

Supreme Court of California.
March 29, 1932.

Rehearing Denied April 28, 1932.

1. Eminent domain 🔑320.

Title to property condemned does not vest in public until payment is made and copy of final condemnation order filed (Code Civ. Proc. § 1253).

> Under Code Civ. Proc. § 1253, copy of the final order of condemnation must be filed for record in the office of the county recorder of the county in which the condemned property is situated.

2. Eminent domain 🔑153.

Where deed to property purchased subject to pending condemnation proceeding does not mention it, award money belongs to purchaser.

3. Evidence 🔑441(8).

Parol evidence of agreement that grantor granting property subject to pending condemnation proceeding was to receive award money *held* inadmissible, since varying deed, silent regarding award money.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by the Security Company against Paran F. Rice. Judgment for defendant, and plaintiff appeals.

Reversed.

Superseding opinion in 1 P.(2d) 1006.

William P. Mealey, of Los Angeles, for appellant.

D. Z. Gardner, of Los Angeles, for respondent.

CURTIS, J.

Defendant was the owner of lot 1, block A, of Spence & Falvey's subdivision, city of Monrovia. March 1, 1926, the plaintiff purchased from defendant by grant deed the east 92 feet of said lot. Lot 1 has a frontage of 150 feet on White Oak avenue, which bounds it on the north. It is bounded on the east by Myrtle avenue. At the time of the conveyance to the plaintiff there were pending condemnation proceedings by the city of Monrovia by which the city sought to widen White Oak avenue, and to do so sought to condemn a strip 16 feet in width off of the entire north frontage of said lot 1. These proceedings went to judgment long subsequent to the execution and delivery of said deed, and the defendant received as damages and compensation for this strip of land 16 feet wide and 150 feet in length the sum of $6,400. Plaintiff claimed that it was entitled to $^{92}/_{150}$ of this amount, and brought this action to recover the same. The defendant contended that, at the time of the sale to plaintiff, plaintiff was aware of the pendency of the condemnation proceedings and agreed that all the money to be received by the defendant as damages for the taking of said 16-foot strip of land should belong to the defendant, and that the price finally paid for said land by the plaintiff was fixed in accordance with the understanding that all of the condemnation money was to be paid to and belong to the defendant. On the trial the court admitted parol evidence to prove this agreement between the parties. The court found in pursuance of this oral agreement and rendered judgment in favor of the defendant. The sole point raised on this appeal is directed to the admissibility of the evidence in proof of said parol agreement. Plaintiff contends that, as it acquired the entire east 92 feet of said lot 1, which included said 16-foot strip by a grant deed from the defendant, the effect of the admission of this evidence would be to vary the terms of said grant deed by parol evidence.

This case was originally appealed to the District Court of Appeal, and that court affirmed the judgment on the authority of Russakov v. McCarthy Co., 206 Cal. 682, 275 P. 808. That case involved a controversy between grantees and vendees to certain deeds and contracts on the one hand and their grantor and vendor on the other hand over funds awarded in condemnation proceedings for the taking of portions of the lands conveyed by said deeds and contracts. We think, however, that it can be differentiated from the instant case. In the Russakov Case the deeds and contracts contained certain exceptions regarding the land described therein that might be taken in said condemnation proceedings. These exceptions were not uniform, but they followed some one of the following expressions: "Except any part of said lot within Florence Avenue as widened by the City of Los Angeles"; "less portions in Florence Avenue street widening"; "subject to Florence Avenue widening proceedings"; "except portion of same taken by City in Florence Avenue widening proceedings." The grantor, the McCarthy Company, claimed that, by reason of these exceptions, it was entitled to receive all moneys awarded in the condemnation proceedings for the land taken and which was described in the deeds and contracts. The plaintiffs, however, at the trial undertook to introduce parol evidence in order to explain what the McCarthy Company meant by these exceptions. The trial court sustained an objection by the defendant company to the introduction of such evidence on the ground that such evidence would "alter the terms of the deeds and contracts, which were clear and certain, and free from ambiguity." With this evidence excluded, the trial court rendered judgment for the defendant company. On appeal this court held that the excluded evidence should have been admitted for the purpose of explaining the meaning of these exceptions which rendered the deeds and contracts uncertain and ambiguous.

In the present action the deed to the land involved is free from any exception or any other provision rendering the same uncertain or ambiguous or requiring the admission of parol evidence to explain it. To this extent it differs materially from the conveyances considered in the case of Russakov v. McCarthy Co., supra. It is true that there is language used in that case which would appear to justify respondent's contention that evidence is admissible to establish a parol agreement as to the person entitled to share in the money awarded in the condemnation proceeding, but this language was unnecessary for the decision of the real question presented in that case. As the court construed the deeds and contracts in said action, there was no reservation by the grantor or vendor of the money to become due in the condemnation proceeding. This money, therefore, would go to the grantees and vendees of the McCarthy Company, unless there was some agreement between the parties for a different disposition thereof. It was unnecessary, therefore, for the grantees and vendees of the McCarthy Company to resort to parol evidence to establish their right to said money, inasmuch as the conveyances under which they held their lands were silent in respect thereto. We do not consider, therefore, that, upon the facts of that case, it can be considered as an authority in support of the ruling of the trial court herein admitting parol evidence to prove an agreement between the parties that the money awarded in the condemnation proceedings was to belong to the defendant.

[1] In condemnation proceedings the title to the property condemned does not vest in the public until payment has been made as required by the verdict of the jury or judgment of the court and a copy of the final order of condemnation has been filed for record in the office of the county recorder of the county in which the condemned property is situated. Code Civ. Proc., § 1253.

[2, 3] The universal rule appears to be that, where property is purchased which is subject to pending condemnation proceedings and the deed conveying said property is silent as to the award money to be paid in the proceedings, said money belongs to and is payable to the purchaser. Obst v. Covell, 93 Minn. 30, 100 N. W. 650; Hull v. Phillips, 128 Mo. App. 247, 107 S. W. 21; Gates v. De La Mare, 142 N. Y. 307, 37 N. E. 121; Virginia-Carolina Ry. Co. v. Booker, 99 Va. 633, 39 S. E. 591; Lewis, Eminent Domain (3d Ed.) §§ 894 and 895; Price v. Engelking, 58 Ill. App. 547, 552. In the case of Price v. Engelking, supra, the court said: "When, therefore, appellants, after judgment, conveyed these premises to Henry Engelking, they conveyed all the rights which they had growing out of the ownership of this property. If nothing further was done by the city, Henry Engelking would have remained the owner they made him. As thereafter the city paid into court the amount of the judgment, the administratrix of Henry Engelking is entitled to such money. It was paid for his land, his title, his possession, not that of appellants." If, therefore, the purchaser of property acquiring it pending condemnation proceedings is, under his deed, entitled to the award money paid in said proceedings, where said deed is silent as to the disposition of said money, any attempt to show by parol evidence an agreement that said money was to be paid to the grantor of said property would result in a material variation of the terms of said deed. Such evidence under the statutes and decisions of this state would be clearly inadmissible. While there is not to be found any authority in this state directly in point, there are many cases holding in principle that the admission of such evidence is not permissible. Winchester v. Winchester, 175 Cal. 391, 165 P. 965, 966; Mowry v. Heney, 86 Cal. 471, 475, 25 P. 17; Wilson v. White, 161 Cal. 453, 119 P. 895. Devlin on Deeds, §§ 284 and 314. In the case of Winchester v. Winchester, supra, the trial court admitted evidence to the effect that the deed given by the respondent to the appellant was delivered under the oral understanding and agreement that certain rents were reserved to the grantor as long as he lived. This court reversed the judgment on the ground that the evidence was erroneously admitted. We quote from the opinion therein as follows: "The conveyance from Elliot Winchester to L. E. Winchester, being in form a grant, bargain, and sale deed, its legal effect, according to its terms, was to immediately pass from Elliot Winchester to L. E. Winchester the entire title in fee simple to the land described, the present absolute ownership thereof. Civil Code, §§ 679, 762, 1105. The fee-simple estate thus passed included the present absolute right to all the rents and profits, free from any and every claim of the grantor thereto. The effect of the evidence introduced, if it could have the effect intended by the respondent, would be that instead of the deed being a conveyance of the entire fee, it would be a conveyance with a reservation to the grantor, during his lifetime, of the rents and profits of the land conveyed, to the amount of $300 a year. To the extent of the reservation of the rents during the life of the grantor, which constituted a substan-

tial part of the fee-simple estate which the deed by its terms purported to convey, the agreement shown by parol evidence would have defeated the conveyance. Under the rule above stated it was incompetent and inadmissible for that purpose. The court below erred in so far as its decision was based on this parol evidence."

The other cases cited above contain similar language as that found in Winchester v. Winchester, supra, and just quoted.

Outside of this state we find authorities to the same effect. Among these is the case of Bailey et al. v. Briant, 117 Ind. 362, 20 N. E. 278. In that case the facts are precisely like those in the instant case. The court there held, reading from the syllabus: "A purchaser, to whom city lots are conveyed by warranty deed while a proceeding to condemn a portion thereof for street purposes is pending, is entitled to recover from the grantor any damages that may be awarded in the latter's name, and paid to him by the city by reason of the condemnation, and the grantor will not be permitted to prove by parol that he reserved the damages at a date prior to the execution of the deed."

These authorities are sufficient in our opinion to establish without any doubt that the trial court erred in admitting evidence of the verbal agreement of the parties that the award money should be paid to the defendant. By reason of this error the judgment is reversed.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.; SHENK, J.

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215 Cal. 287

SHARP et al. v. MORTGAGE SECURITY CORPORATION OF AMERICA et al.

L. A. 12422.

Supreme Court of California.
March 30, 1932.

1. Usury 🔑64.

Contract at inception must require payment of usury or it will not violate statute.

Contract may not be judged usurious after some default of borrower, which default alone authorizes penalties or forfeitures which if exacted in the beginning would have been a violation of the statute.

2. Usury 🔑11.

By voluntary default, debtor cannot impose on creditor penalties of usury law not violated at inception of contract.

3. Usury 🔑111(4).

By not pleading tender and refusal before suing of amount then due, plaintiffs claiming usury are precluded from urging that defendants intended to collect interest for whole subsequent forbearance period.

4. Usury 🔑111(4).

Allegation of complaint that, on ascertaining amount due, plaintiffs claiming usury are and will be ready and able to pay same *held* insufficient tender.

5. Usury 🔑95.

Without tendering amount admittedly due, plaintiffs cannot successfully claim that defendants promised to accept lower interest rate, and that promise was fraudulently concealed.

6. Contracts 🔑266(1).

Contract could not be rescinded without offer of restoration preceding suit where husband, on whom wife relied, had sufficient mentality to negotiate transaction (Civ. Code, §§ 38, 39, 1691).

In Bank.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by W. T. Sharp and another, against the Mortgage Security Corporation of America and others. From an adverse judgment, plaintiffs appeal.

Affirmed.

Earl Curtis Peck, of Los Angeles, for appellants.

Woodruff, Musick & Hartke and George W. Tackabury, all of Los Angeles, for respondents.

PRESTON, J.

The third amended complaint in this action is declared by plaintiffs and appellants to state a cause of action in equity for an accounting and for a preliminary injunction against defendants meanwhile, based upon the alleged presence of usury, fraud, and unsoundness of mind of one of the plaintiffs, all respecting a certain loan transaction. Defendants demurred to the complaint on general and special grounds. The demurrer was sustained with leave to amend, but this privilege plaintiffs declined. Judgment therefore passed for defendants; hence this appeal.

Plaintiffs borrowed $27,500 from the defendant Mortgage Security Corporation of America, a foreign corporation, giving therefor a series of thirty promissory notes, all dated May 15, 1926, in amounts of $500 and $1,000, due at stated periods over the years from 1928 to 1936, inclusive, and bearing on their face interest at 5 per cent. shown by interest coupons thereto attached. On the

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

same day a second series of nineteen promissory notes, maturing at quarterly periods between July 15, 1926, and January 15, 1933, were also issued by plaintiffs. These notes aggregated the sum of $4,585; twelve were of the denomination of $297; two of the denomination of $130; two of $135; one of $131; one of $136; and one of $224.

Each note of both series is payable to bearer and is secured by a deed of trust in elaborate form on Los Angeles real property, executed by plaintiffs as joint tenants, naming defendant Security Title Insurance & Guaranty Company, a corporation, as local trustee, and Union Trust Company of Maryland, as foreign trustee. The provision for the payment of said promissory notes is that plaintiffs are to pay to the Mortgage Security Corporation of America, which is in turn to deposit the funds with the Union Trust Company of Maryland, the sum of $286 each month, beginning June 15, 1926, and continuing until May 15, 1936, on which last-mentioned date plaintiffs are to pay the additional and final sum of $11,000. Presumably these amounts, if paid when due, would be sufficient to retire, pay, and discharge the various promissory notes executed by plaintiffs.

The cause of action attempted to be set up in count number one of the complaint here under review is predicated upon the averment that the above-mentioned transaction is usurious. Just how this occurs is not clearly set forth, but it is conceded that, if the contract is lived up to by both parties according to its terms, no usury will result, provided the whole period of forbearance is taken into consideration when testing the transaction for the presence of usury. This test, however, is challenged, and claim arises under the averment that inasmuch as plaintiffs made the monthly payments required, beginning June 15, 1926, and up to and including April 16, 1929, paying a total of $9,438, they paid up to that date the sum of $3,146 in interest, which is usury. How this figure is arrived at does not appear, but it is further alleged that on June 10, 1929, the Mortgage Security Corporation filed with the local trustee its declaration that, under the said written instrument, by reason of plaintiffs' default, all payments called for by said obligation were then due and payable, the total amount due being $27,494.75. A notice of default and election to sell under the deed of trust was duly recorded on June 11, 1929. From this situation it is further contended that usury is present because the amount paid as interest between the making of the obligation and the day of default is more than $12 on each $100 for one year.

The first question is: What is the period to be considered when testing a transaction for the presence of usury? In Haines v. Commercial Mortgage Company, 200 Cal. 609, 625, 254 P. 956, 255 P. 805, 807, 53 A. L. R. 725, this court said: "We intended to hold that the maximum rate allowed for loans coming under the act is at the rate of 12 per cent. per annum for the full period of the loan, and that within such limit the parties may freely contract in respect thereto, if done in writing." While this pronouncement when made may have been open to the observation that it was dictum, yet we based it upon the weight of authority and what was deemed to be the only just rule.

The case of Easton v. Butterfield Live Stock Co., 48 Idaho, 153, 279 P. 716, 718, is an instructive case citing a great many authorities, and the rule is there stated as follows: "In determining whether usurious interest has been charged or collected under a particular contract it is not permissible to consider only a portion of the term. The test is: Did the lender under his contract charge or receive a profit on his investment in excess of the maximum rate for the full period of the loan? If he has, there is usury; otherwise not."

A similar holding is found in Conservative Loan Co. v. Whittington et al., 120 Okl. 137, 250 P. 485, 487, where the court said: "The test as to whether a contract is usurious is: Does the interest charge agreed to be paid under the terms of the contract exceed the amount of interest that would accrue for the term of the loan figured at the full legal contract rate? If it does exceed such amount, it is usurious; otherwise it is not." See, also, Webb on Usury, § 29.

[1, 2] It is also elementary that the contract must in its inception require a payment of usury or it will not be held a violation of the statute and it may not be judged after some default of the borrower, which default alone authorizes penalties or forfeitures which, if exacted in the beginning, would have been a violation of the statute. Conservative Loan Co. v. Whittington, supra; Clement Mortgage Co. v. Johnston, 83 Okl. 153, 201 P. 247; M. Lowenstein & Sons v. British, etc., Co. (C. C. A.) 7 F.(2d) 51, 53; 27 R. C. L. 208; Low v. Sutherlin, Barry & Co. (C. C. A.) 35 F.(2d) 443. The cases above cited are also authority for the proposition that a debtor cannot bring his creditor to the penalties of the usury law by his voluntary default in respect to the obligation involved, where no violation of law is present at the inception of the contract.

[3] Counsel in his brief, although not in his pleadings, seems to make the point that in the case before us, by reason of the acceleration of the maturity date of the obligations, it has been defendants' purpose not only to collect the principal of the sum loaned and the interest accrued up to the time of the default, but that it is also their purpose to collect in addition thereto the entire

amount of interest provided for in the obligation for the whole period of forbearance. Unfortunately, however, appellants do not bring themselves to a position where they may rely upon this assertion. This is because they have not pleaded that prior to the institution of the action they tendered to defendants the correct amount due upon the obligation and that such tender, when made, was refused. This, except under peculiar circumstances not here present, is an elementary requirement before relief of this character can be had. See Kelley v. Owens, 120 Cal. 502, 47 P. 369, 52 P. 797; Hammond v. Wallace, 85 Cal. 522, 531, 24 P. 837, 20 Am. St. Rep. 239; Lupton v. Domestic, etc., Co., 173 Cal. 415, 160 P. 241; Conlin v. Studebaker, etc., Co., 175 Cal. 395, 165 P. 1009; Crouch v. Wilson, 183 Cal. 576, 191 P. 916; Zeller v. Milligan, 71 Cal. App. 617, 625, 626, 236 P. 349.

[4] It is true that plaintiffs' complaint contains this allegation: "That when the amount due to the defendants or any of them under and by reason of the said deed of trust and notes is ascertained the plaintiffs are and will be ready, able and willing to pay the said amount to the parties entitled thereto." This allegation is insufficient. Hammond v. Wallace, supra, at page 532 of 85 Cal., 24 P. 837; Herman v. Haffenegger, 54 Cal. 161.

[5] The last observation also furnishes sufficient ground for the disposition of both the second and third causes of action in plaintiffs' complaint. Cause of action number two purports to claim that plaintiffs were promised by the defendants that the interest rate on said promissory notes would in no event exceed six per cent. per annum, and that the fact that they did was fraudulently concealed from them, due to their ignorance of business transactions. Manifestly plaintiffs are in no position to take advantage of such a defense, were it otherwise good, in the absence of a previous offer to pay the amount admittedly due on the obligation.

[6] Count three purports to be based upon the allegation of unsoundness of mind on the part of plaintiff husband. As already pointed out, the husband and wife held the property as joint tenants. There is no sufficient allegation of any lack of competency on the part of the wife. Moreover, when the allegations respecting competency of the husband are studied, it will be seen that at most they are only sufficient to invoke the provisions of section 39 of the Civil Code and not of section 38 thereof. To make this observation clearer, count three shows that the plaintiff husband was not entirely without understanding, for he had sufficient mentality to negotiate entirely the transaction here involved, and his wife relied upon him, so it is averred, in so doing. It also appears that at least on or about May 1, 1929, the said plaintiff had recovered his understanding entirely. So much so that he appears in this action without a guardian. It is therefore clear that, when the pleading is considered as a whole, it does no more than plead a situation where one of the makers of a joint obligation was so mentally unsound as to authorize a rescission thereof; but under Civil Code, § 1691, and under the authorities above cited upon this subject, a rescission may not be had in a case such as the one before us without a bona fide offer of restoration made previous to the institution of the action, and the complaint contains no such averment.

This discussion might be extended, but our view is to no further purpose, as the complaint appears on its face to be entirely without merit.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.

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215 Cal. 320

PALMER v. LANTZ et al.

L. A. 11464.

Supreme Court of California.
March 31, 1932.

1. Process 🔑145.

Where copy of complaint and summons was mailed to nonresident defendant, receipt of copy of summons is presumed from admission of receipt of copy of complaint.

2. Judgment 🔑142.

Statute providing for opening up of judgment against defendant not "personally served" was not designed to afford relief to one who remained inactive after receipt of summons and complaint through mail (Code Civ. Proc. § 473).

Service by publication and mailing of copy of complaint and summons does not constitute "personal service."

[Ed. Note.—For other definitions of "Personal Service (In Practice)," see Words and Phrases.]

3. Judgment 🔑162(4).

Evidence *held* to show that nonresident defendant not personally served should be relieved of default judgment (Code Civ. Proc. § 473).

In Bank.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by Minnie M. Palmer against Charles Lantz and others. From default judgment, Thomas A. Davis, defendant, appeals.

Reversed.

Charles Lantz and Winslow P. Hyatt, both of Los Angeles, for appellant.

Marshall Stimson and Noel C. Edwards, both of Los Angeles, for respondent.

SEAWELL, J.

Defendant Thomas A. Davis appeals from a default judgment by which a deed to two lots in the city of Los Angeles from plaintiff, Minnie M. Palmer, to said defendant Davis was adjudged null and void and ordered canceled on the ground that it had been procured by false and fraudulent representations made by Charles Lantz, as attorney in fact for Davis, and from an order denying his motion to set aside the default upon which said judgment was based. Said motion was made under section 473, Code of Civil Procedure.

Service was had upon Davis by publication of summons and mailing a copy thereof to him at his residence in Goshen, Ind. In addition to the other ground on which the motion was made under section 473, it is urged that the court never acquired jurisdiction to render the default judgment by reason of certain irregularities in the proceedings for constructive service. We find that the proceedings were sufficient in all respects to confer jurisdiction to enter judgment. The particulars wherein said proceedings are assailed either lack merit to warrant discussion or are covered by what is hereafter said on other points.

The complaint was filed on July 12, 1926, and named Davis, Charles Lantz, and F. C. Huber, as administrator of the estate of B. F. Gallway, deceased, as defendants. Lantz and Huber were personally served on July 12th and 13th, respectively. Plaintiff sued as the daughter and only heir (section 1452, Code Civ. Proc., now section 581, Probate Code) of one Mary J. Gallway, who died intestate in 1915, and at the time of her death was the owner and in possession of the two lots in controversy, according to the complaint. Without reviewing the allegations of the complaint in detail, it is sufficient to say that we are of the view that they state a cause of action for cancellation of the deed to Davis based on fraudulent representations made by Lantz. Davis, as the grantee named in the deed and the holder of the record title, was a necessary party. It is alleged that Lantz falsely stated that he represented Davis, but that Davis was "merely a dummy for Lantz," who was the real party in interest and paid the consideration of $75 given for the deed to said property, alleged to be of a value in excess of $2,500. Lantz and Huber filed answers, identical in substance, denying all allegations of fraud, and also denying that Davis was a mere "dummy" and Lantz the real party in interest. Davis, so far as any fraudulent participation in the transaction is concerned, is expressly exculpated by the allegations of the complaint.

When the action came on for trial on October 2, 1928, no steps had been taken to secure publication of summons against Davis. A continuance was granted to January 15, 1929, on motion of plaintiff's counsel, to enable said counsel to take the deposition of Davis in Indiana, and to locate plaintiff, whose whereabouts was unknown to them. Steps commenced to take the deposition of Davis in 1926 were abandoned. On October 4, 1928, two days after plaintiff's counsel had obtained a continuance to locate their client and take the deposition of Davis, they procured an order for publication of summons, which publication commenced on October 5, 1928. A copy of the summons and complaint was mailed to Davis on October 8th.

No deposition was ever taken, nor was any effort made to take it. On January 14, 1929. the court, upon application of plaintiff, directed the entry of the default judgment against Davis, canceled the deed involved, and ordered the filing of a dismissal as to defendants Lantz and Huber. The court found. contrary to the specific allegations of the complaint, but in accordance with the answers filed by Lantz and Huber, that Davis was the real party in interest.

In support of the motion to set aside said default, Lantz, who is an attorney at law and had a general authority to represent Davis, also an attorney, in all actions in California to which Davis was a party, averred that he first learned of the constructive service on Davis on January 14th, when one Hyatt, on behalf of Lantz, was examining the record in the case to prepare it for trial. Attorney Hyatt immediately prepared an answer and went into the courtroom where plaintiff's counsel were present to take the default. He offered to have said answer filed and served before night. Both court and counsel refused his request to continue the default hearing until the next day. Ten days after the default was entered, Lantz and Hyatt, as attorneys for Davis, filed notice of motion to set it aside, but the motion was by the court denied.

The record shows a letter from Davis to Lantz, written on January 23d, in response to a telegram from Mr. Winslow Hyatt, as follows: "In reply to your telegram of the 22nd would say that last October I received by registered mail copy of *complaint* in the matter of Palmer vs. Charles Lantz, Thomas A. Davis and F. C. Huber, as administrator. When I received it I wrote you a letter about it, but I think it was about the time you were on a trip to South America. Since you were also a defendant I assumed that service had been served on you, therefore paid no attention to the matter until I got a telegram from Mr. Winslow last week, but at the time I was in Grand Rapids so did not get opportunity to send it back. I enclose herewith a copy of the complaint as it was sent to me. As stated the only reason to set aside the default so far as I am concerned would be that I assumed you were taking care of it as you also were a defendant." (Italics supplied.)

[1] Although appellant makes much of the point that this letter does not state that he also received a copy of the summons, we think this fact must be inferred. It appears by the affidavit filed to establish proof of service, that the copy of the "complaint and summons" was mailed. From the fact that the complaint was received it must be presumed, in the absence of evidence to the contrary, that the summons inclosed therewith was also received.

[2] Service by publication and mailing a copy of the complaint and summons is not personal service (Lilly-Brackett Co. v. Sonnemann, 157 Cal. 192, 106 P. 715, 21 Ann. Cas. 1279), however, and by reason of this fact appellant contends that under section 473, Code of Civil Procedure, he is entitled to be relieved from the default as a matter of right without further showing than that he was not personally served. (Daniels v. Colkins, 201 Cal. 10, 255 P. 182, and cases there cited). That this is sufficient to make a prima facie case for relief must be conceded. The law presumes from the fact of constructive service only that the failure to answer is due to lack of notice of the service. Gray v. Lawlor, 151 Cal. 352, 90 P. 691, 12 Ann. Cas. 990. But the provision is not designed to afford relief from a judgment which may be validly entered upon constructive service to those who with full knowledge of such service upon them, by reason of receipt of a copy of the summons and complaint through the mail, remain inactive. Gray v. Lawlor, supra; Boland v. All Persons, 160 Cal. 486, 117 P. 547.

[3] It appears from the above-quoted letter that Davis, upon receipt of the complaint and summons, wrote concerning the matter to Lantz, who was authorized to represent him, and assumed that Lantz was taking care of the matter. Lantz was absent on a trip to South America between October 6, 1928, and December 9, 1928, during which time the letter would have arrived, and never received the letter or learned of the service until January 14, 1929. He then took all measures possible to prevent entry of the default. The failure of Lantz to receive the letter, or of Davis to be informed of Lantz' absence, can be attributed only to the oversight of Lantz' office force.

It should have been plain to both parties that Davis was a necessary party to an action to clear plaintiff's title, or the title of her intestate, of the cloud cast upon it by the deed to Davis, whether Davis was the real party in interest or a "dummy" for Lantz. Only in an action to which Davis, the holder of the record title, was a party, could his rights under said deed be foreclosed. On the other hand, if, as alleged in the Lantz and Huber answers, and also in the answer which Davis now seeks leave to file, and as found by the court, Davis was the real party in interest, Lantz, his agent, was not a necessary party. No claim is made for a money judgment against Lantz on account of the representations alleged to have been made by him. The dismissal as to Huber was clearly proper. It does not appear that his claim as administrator of the estate of B. F. Gallway was based upon or had any connection whatsoever with the Lantz-Davis deed, or that Lantz or Davis claimed any interest in the property through said administrator. Why Davis, whose residence was known to plaintiff to be Goshen, Ind., where he maintained a law office, was not served during the period of two years intervening between the filing of the complaint on July 12, 1926, and the time the action came on for trial on October 4, 1928, does not appear. It is claimed by appellant that it was the unexpressed intention of plaintiff's counsel to serve Davis by publication at the time they moved for a continuance two days before they applied for and obtained the order for publication of summons. Had plaintiff's counsel informed Lantz of this intention in open court when the continuance was granted, or notified him two days later when the order was obtained, the answer would have been filed in time.

Lantz admits that he was authorized to enter an appearance for Davis, and it may be that he acted unconscionably in failing to do so. However, plaintiff's counsel did not inform him when the continuance was obtained that they desired to serve Davis and intended to obtain an order for service by publication. A party is not required by law to appear until served. Upon receipt of the complaint and summons by mail, Davis wrote to Lantz, his authorized agent, and reasonably expected that this would be sufficient to protect his rights, and no doubt would have been had not Lantz been absent in South America. Any dilatory tactics of Lantz preceding the order for publication are not shown to have had the support of Davis. Furthermore, action was taken promptly upon discovery of the constructive service.

Fraud is not made an issue so far as Davis' connection with the transaction appears from the face of the complaint. In fact, the allegations are inconsistent with any such claim and no cause of action is predicated upon his fraud. The complaint merely alleges as to Davis a lack of consideration for the deed naming him as the grantee, and this is the only allegation that makes him so much as a nominal party. As matters now stand, this anomalous situation is presented: Davis, whom plaintiff alleged was *not* the real party in interest, but "merely a dummy for Lantz," and against whom no charge of fraud was made, was found by the decree to be the real party in interest, and the decree further found that the deed conveying said premises to him was obtained by fraud; and that Charles Lantz was *not* the real party in interest. Davis is at least held impliedly guilty of fraud without any allegations tending to support the findings set forth in the decree. The action which charged Lantz with fraud was dismissed by plaintiff as to him and Huber. Fraud is not to be presumed. It must be both alleged and proved.

It may be that the plaintiff will wish to amend her complaint and take such other steps as the situation may suggest. We are of the view that appellant should be relieved of the default.

The judgment and order are reversed.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; PRESTON, J.; CURTIS, J.

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215 Cal. 301

HOWLAND v. SCOTT (three cases).

L. A. 11264–11266.

Supreme Court of California.

March 30, 1932.

1. Appeal and error ⚷475.

Where appeal bond is filed sufficient in form to stay execution, pending justification of sureties, but sureties fail to justify, appellant may not take further proceedings in trial court to stay execution (Code Civ. Proc. §§ 942, 946, 948).

2. Appeal and error ⚷464.

That wives of sureties did not sign appeal bond went to sufficiency of sureties and not to form of bond (Code Civ. Proc. §§ 942, 946, 948).

3. Stipulations ⚷14(12).

That parties stipulated second appeal bond might be filed within five days, did not entitle appellant to file third bond where second was defective (Code Civ. Proc. §§ 942, 946, 948).

4. Execution ⚷70.

Court may issue execution without motion, unless execution is stayed by sufficient undertaking (Code Civ. Proc. §§ 942, 946, 948).

In Bank.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Actions by Charles T. Howland and by Robert S. Howland against Sallie O. Scott, and action by Charles T. Howland against Roy O. Scott, Otis Scott, and another. Judgments for plaintiffs, and from orders granting motions for issuance of execution, defendant in the first two cases and defendants Roy O. Scott and Otis Scott in the last case appeal, and the cases were consolidated.

Affirmed.

Superseding opinion in 2 P.(2d) 416, 418.

See also (Cal. App.) 4 P.(2d) 200.

Crail, Shutt, Penprase & Crail and Claude A. Shutt, all of Los Angeles, for appellants.

M. W. Conkling, of San Diego, and Salisbury & McNeil, of Los Angeles, for respondents.

PER CURIAM.

A hearing was granted in these consolidated cases after decision by the District Court of Appeal, Fourth Appellate District, because of a conflict in the views expressed therein with the opinion of the court in the related case of Howland v. Lampton, 100 Cal. App. 462, 280 P. 173. Upon further consideration, we are satisfied with the correctness of the opinion by Mr. Presiding Justice Barnard in the cases consolidated herein, and we disapprove of any contrary conclusions which appear in Howland v. Lampton, supra. The opinion prepared by Mr. Justice Barnard is hereby adopted as the opinion of this court. It reads as follows:

In this case, a judgment was rendered in favor of the plaintiff and against the defendant, and after a motion for a new trial had been denied, an appeal was taken which is still pending. An undertaking was filed for the purpose of staying execution pending the appeal. The sureties being excepted to, one of them failed to appear at the time and place fixed for their justification. The attorneys for the respective parties then entered into a stipulation that a new undertaking might be filed within five days thereafter, and the sureties might justify within twenty days; it being stipulated that the sureties to the new undertaking would also be excepted to. A new undertaking was not filed within five days, but on the seventh day one was filed. At the time fixed for the sureties on this second bond to justify, the attorneys for the plaintiff objected to the new undertaking as being insufficient in form, which objection was sustained by the court. On the following day the defendant filed a third undertaking which, it is conceded, is satisfactory in form, and on the same day gave notice to the plaintiff that the same was

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

filed. Two days later counsel for plaintiff gave notice of a motion to strike the last undertaking from the files, and also of a motion for the issuance of an execution. These motions were heard on December 6, 1928, and the court struck from the files the plaintiff's motion to strike the third undertaking, but granted the motion for the issuance of an execution. The defendant has appealed from the order for the issuance of an execution and from the whole thereof.

The main point raised by appellant is that the court erred in granting the motion for the issuance of an execution, for the reason that at the time this order was made a good and sufficient undertaking for the purpose of staying an execution was on file. It is contended that whatever the effect of the first undertaking filed, that effect was waived by the stipulation of counsel that a second undertaking might be filed. It is conceded that the second undertaking was not filed within the time mentioned in the stipulation, and also conceded that it was not sufficient in form. It is then contended that under the rule laid down in Bradley Co. v. Mulcrevy, 166 Cal. 326, 136 P. 60, 62, the first undertaking was void, and therefore the third had the effect of staying an execution, since the Code fixes no time within which an undertaking to stay execution must be filed.

Section 946 of the Code of Civil Procedure provides that whenever an appeal is perfected in accordance with the provisions of certain preceding sections, including section 942, all further proceedings in the court below upon the judgment appealed from is stayed. Section 948 of this Code gives to the adverse party the right to object to the sufficiency of the sureties on the undertaking mentioned in section 942, and then provides that unless the sureties on such undertaking or other sureties justify within the time named, "execution of the judgment, order, or decree appealed from is no longer stayed." In Hill v. Finnigan, 54 Cal. 493, the court said: "But section 948 of the Code of Civil Procedure provides that unless the sureties upon the stay-undertaking, or others in their stead, shall *justify*, 'execution of the judgment * * * is no longer stayed.' After a careful consideration of the different sections of the Code, we are convinced that they contemplate but one proceeding to stay the execution below, and that the failure of the sureties to justify, leaves the plaintiff in a position to enforce the execution of his judgment—a position the advantages of which he cannot be deprived by any further act of appellant in the Court below. Otherwise a series of pretended efforts to *justify* might lead to great delay in setting aside the stay, without respondent being afforded any real security for the payment of his judgment in case it should be affirmed."

In Lee Chuck v. Quan Wo Chong Co., 81 Cal. 222, 22 P. 594, 596, 15 Am. St. Rep. 50, the court said:

"Section 946 provides that whenever an appeal is perfected as provided in the preceding sections proceedings shall be stayed. This must be so, without reference to the sufficiency or insufficiency of the sureties. It is only necessary, under these sections, that a bond be given at the proper time and in due form.

"If the sureties are insufficient, pecuniarily, the opposite party has his remedy under section 948. He may, as provided in that section, except to the sureties at any time within 30 days after the filing of the undertaking; and, unless they, *or other* sureties, justify, as therein provided, within 20 days after the appellant has been served with notice of such exceptions, 'execution of the judgment, order, or decree appealed from *is no longer stayed*.' That is, the proceedings are stayed until the necessary exceptions are made, and time given for the sureties to justify, and no longer."

The fact that the Code contemplates but one proceeding in the court below for the purpose of staying execution was again referred to by the Supreme Court in Tompkins v. Montgomery, 116 Cal. 120, 47 P. 1006. In Bradley Co. v. Mulcrevy, supra, the Supreme Court again sets forth this rule, stating the reasons therefor; the court saying: "Where a bond sufficient in form is filed, but the sureties are in fact insufficient, the undertaking does, until the sureties, after exception, have failed to justify, operate as a stay. During the intervening time, which may extend to 50 days (Code Civ. Proc. § 948), the respondent has been prevented from enforcing his judgment, although he may not have had adequate security, or perhaps any substantial security. If, upon the failure of the sureties to justify, the appellant could file a new stay bond, the same condition might again arise, and it would be possible, by a series of successive bonds executed by insufficient sureties who would fail to qualify, to obtain all the benefits of a stay without furnishing to the respondent the security contemplated by the Code. These are the considerations which led the court in Hill v. Finnigan, supra, to the conclusion that the appellant was not authorized, except upon order of the appellate court, to file a second staybond where the sureties upon a first had failed to justify."

The court then differentiates the facts in that case from those existing in Hill v. Finnigan, pointing out the difference between a case where a bond is filed, sufficient in form, but where the sureties fail to justify, the bond actually operating as a stay for a time, and a case where the original undertaking is so deficient in form as not to comply with the statute. It is held that such a bond, so deficient in form, is entirely void and never has the effect of staying an execution at all. In such a case, it is then held that another undertaking may be filed at any time before the judgment has been enforced, since the Code fixes no time within which an undertaking to stay execution must be filed.

[1-3] We understand these cases as establishing the rule that where an undertaking is filed which is sufficient in form to operate as a stay of execution, pending the justification of the sureties thereon, but where those sureties, or other sureties, fail to justify in accordance with the provisions of section 948 of the Code of Civil Procedure, this constitutes the one proceeding to stay the execution which is contemplated by the Code, and a second undertaking may not be thereafter filed or a second proceeding had in the court below. A different situation is presented where the first undertaking is void because of its form, without reference to the justification of its sureties. In the case before us, we find no deficiency in form in the first undertaking filed, and none is pointed out to us. It is conceded that one of the signers of this undertaking failed to justify thereon. While it is suggested that the form of this bond is not sufficient because the wives of the sureties did not sign the undertaking, it neither appears that either of the signers was married, nor, if so, that he was not in a position to justify without her signature. This suggestion goes to the sufficiency of the sureties and not to the form of the bond. Nor do we think the stipulation of the parties that a new undertaking might be filed within five days after one of the sureties on the first undertaking failed to appear, is conclusive under the facts existing. It appears that such a new undertaking was not filed until after the five days had expired, and that when filed it was deficient in form, as is now conceded by appellant. Appellant is not relying upon that second undertaking, but upon a third bond filed still later. Assuming that a bond, sufficient in form, and filed in accordance with the terms of the stipulation, would have been effective to stay execution, the stipulation did not have the effect of permitting an undertaking to be filed at any time in the future, irrespective of the stipulation, or of the statutes. No sufficient bond was filed in accordance with the stipulation, and we think the question of the effectiveness of the undertaking which was later filed, upon which appellant relies, depends upon the statutes. We conclude that the first undertaking being sufficient in form and actually staying execution for a time, and the sureties thereon, after being excepted to, failing to justify in accordance with the statute and no other sureties justifying within that time, the appellant could take no further proceedings in the court below to effect a stay of execution. As has been pointed out in the cases cited, a contrary rule would enable an appellant, by a series of successive bonds executed by insufficient sureties, to stay an execution without furnishing to the respondent the security provided for in the Code.

[4] The only other point raised by appellant is that the court erred in denying her motion to strike the plaintiff's motion for the issuance of execution. In support of this point, it is urged that counsel for the plaintiff had not complied with rule 20 of the Judicial Council Rules, effective August 1, 1928, in that he had not served and filed with said motion a memorandum of his points and authorities. The record neither shows any such motion made by appellant, any ruling thereon by the trial court, nor any appeal from such a ruling. Neither, it may be observed, does it show any compliance by the appellant with the rule of the judicial council referred to. In any event, the issuance of an execution is a matter that may be done by the court without a motion, unless the same is stayed by a sufficient undertaking, in accordance with the provisions of the Code. The only real question here presented is whether, under the facts existing, the third undertaking filed had the effect of staying the execution. For the reasons given, we think this must be answered in the negative.

The orders appealed from are affirmed.

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215 Cal. 296

MERCHANTS' NAT. BANK OF LOS ANGELES v. CLARK-PARKER CO. et al.

L. A. 11715.

Supreme Court of California.

March 30, 1932.

As Modified on Denial of Rehearing April 29, 1932.

1. Set-off and counterclaim ⚷44(1).

Where, under allegations of complaint, defendant's liability on note was joint and several, order striking defendant's several counterclaim *held* improper (Civ. Code, § 3098, subd. 7).

2. Pleading ⚷259.

Refusing to permit defendant to file amended answer, showing liability on note was several and subject to several counterclaim, *held* error.

3. Pleading ⚷138.

Plaintiff cannot by arbitrary statement of facts prevent defendant from setting up valid counterclaim.

4. Pleading ⚷259.

Where court permitted plaintiff to amend complaint to conform to proof that note was signed by firm by individual, refusing to permit individual to amend answer to establish that note was his individual obligation against which he had several counterclaim *held* error.

5. Judgment ⚷240.

In action against defendants jointly indebted, court may render several judgment against those served (Code Civ. Proc. §§ 414, 578, 579).

6. Set-off and counterclaim ⚷44(1).

Regardless of whether note was joint or joint and several, several judgment against defendant served *held* proper, hence several counterclaim was also proper (Code Civ. Proc. §§ 414, 438, 578, 579).

In Bank.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action by the Merchants' National Bank of Los Angeles against Clark-Parker Company, a fictitious firm composed of John Doe and another, S. N. Clark and another, doing business under the name and style of Clark-Parker Company. From a judgment for plaintiff, defendant S. N. Clark appeals.

Reversed.

Superseding opinion of District Court of Appeal in 2 P.(2d) 472.

William C. Ring, of Los Angeles, for appellant.

Freston & Files, of Los Angeles (Ralph E. Lewis, of Los Angeles, of counsel), Rohe & Freston and Page, Nolan, Rohe & Hurt, all of Los Angeles, for respondent.

LANGDON, J.

Plaintiff bank brought an action against the firm of "Clark-Parker Co.," S. N. Clark and John Doe as members of said firm, on a promissory note for $10,000. S. N. Clark was served with summons, and he alone appeared, and filed an answer denying liability, together with a counterclaim for services performed by him. Nearly three years later plaintiff moved to strike out the counterclaim on the ground that the obligation sued upon was *joint* and the counterclaim was *several*. By this time the statute of limitations had run on any right to file a separate action for the value of the services. The motion was granted. Defendant Clark then moved for leave to file an amended answer and counterclaim to allege that the liability on the note was *several*. In this regard he stated that "Clark-Parker Co." was a dissolved partnership, a fictitious party on the note, and that this fact was known to plaintiff. This motion was denied. At the trial, a substantial variance appeared between the note pleaded in the complaint and the note proved. As pleaded, there were two signatures, one below the other: "Clark-Parker Co. S. N. Clark." The actual note offered in evidence read: "Clark-Parker Co. by S. N. Clark." The court permitted plaintiff to amend the complaint to conform to the proof, but denied another motion by defendant to file an amended answer and counterclaim. A *several* judgment was thereafter rendered against Clark, the sole defendant.

[1] It is apparent that the court was in error in its rulings. Taking the note as *pleaded*, it contained the words "I promise to pay," and had two signatures: "Clark-Parker Co." and "S. N. Clark." The Negotiable Instruments Law provides: "Where an instrument containing the words 'I promise to pay' is signed by two or more persons, they are deemed to be jointly and severally liable thereon." Cal. Civ. Code, § 3098, subd. 7. The liability of defendant Clark being *joint and several* under the allegations of the complaint, the first order of the court in striking out the counterclaim was improper.

[2, 3] The second order, refusing permission to file an amended answer and counterclaim to set up facts showing that the liability was *several*, is so obviously erroneous that no discussion is necessary. The plaintiff cannot by an arbitrary statement of the facts of the controversy prevent the defendant from alleging other facts as the basis of a valid counterclaim. Terry Trading Corporation v. Barksy, 210 Cal. 428, 292 P. 474; Story & Isham Commercial Co. v. Story, 100 Cal. 31, 34 P. 671.

[4] The next order of the court permitted plaintiff to amend to conform to proof. As proved, the note read: "Clark-Parker Co. by S. N. Clark." The signature in this form was presumably deemed by the court to make him liable jointly with the partnership. Irrespective of the correctness of this conclusion, it is not clear how the court could again refuse to permit defendant Clark to amend his pleading and to offer evidence to show that the partnership did not exist at the time of execution of the note, and that the note was his individual obligation. Such evidence was unquestionably admissible.

By denying defendant the right to set up the counterclaim in this action, the court denied defendant all relief on it, for the statute of limitations had run on the right to file a separate suit. Thereafter, the court rendered judgment against defendant Clark alone. The error in its previous orders is thus made manifest. If a several judgment could be rendered against him, it necessarily follows that he could set up a several counterclaim.

[5, 6] The judgment must, of course, be reversed; but in view of the possibility of new facts being developed under new pleadings, it may be well to point out the misconception which lies at the basis of the original error. It is assumed by the court that if the liability on the note is *joint*, no several counterclaim can be set up by any one of the joint obligors. Section 438 of the Code of Civil Procedure, which governs the pleading of counterclaims, does not compel such a conclusion. It merely requires that the counterclaim tend to diminish or defeat the plaintiff's recovery and "exist in favor of *a* defendant, and against *a* plaintiff between whom a *several judgment* might be had in the action." The question is, therefore, whether the plaintiff in the instant case could have recovered a *several judgment* against defendant Clark, *a defendant*, if, as the court concluded, said defendant was one of two or more joint obligors. The answer is found in other sections of the Code of Civil Procedure. It is settled in California that when a complaint is filed against a number of defendants jointly indebted on a contract, not all of whom are served, the court may proceed against any defendant or defendants who may be served with summons, and render a *several judgment against each*. Cal. Code Civ. Proc., §§ 414, 578, 579; Shain v. Forbes, 82 Cal. 577, 583, 23 P. 198; Kelly v. Bandini, 50 Cal. 530; Tay, Brooks & Backus v. Hawley, 39 Cal. 93; Davidson v. Knox, 67 Cal. 143, 7 P. 413; Lewis v. Clarkin, 18 Cal. 399. This being so, a several counterclaim is unquestionably proper. The identical situation was presented in Calara Valley Realty Co. v. Smith, 29 Cal. App. 589, 156 P. 369. This was a suit against two defendants jointly indebted to plaintiff corporation for goods sold to them. One defendant appeared and was permitted to counterclaim for services rendered to plaintiff. See, also, Clark on Code Pleading, § 102.

The misconception of the lower court is based upon language in Roberts v. Donovan, 70 Cal. 108, 9 P. 180, 11 P. 599, and Kales v. Houghton, 190 Cal. 294, 212 P. 21. Neither case is in point on its facts. In Kales v. Houghton, a number of *plaintiffs* to whom a debt was jointly owed sued a single *defendant*, who sought to plead a counterclaim against one of the plaintiffs. Clearly his claim against that plaintiff could not defeat the rights of the other obligees. In Roberts v. Donovan, defendant Tobin had become agent for plaintiffs; and defendants Donovan and McGrath had signed as joint sureties a bond for Tobin's faithful performance. In an action on the bond, defendant Donovan set up a counterclaim for money *due Tobin*, based upon an assignment from the latter. The court held that the counterclaim was improper. Two chief reasons appear in the opinion. The first is that one person cannot set up a counterclaim existing in favor of another person. The accuracy of this statement need not be considered since no such fact appears in the instant case. The second reason is thus stated in the opinion, page 114 of 70 Cal., 9 P. 180, 182, 11 P. 599: "* * * Where all of several joint debtors are sued and served with process, all being equally liable * * * a several judgment cannot be entered, but the judgment, like the demand, must be joint." It is at once apparent that this case, in spite of some general language, is not authority for the broad proposition that one of two defendants jointly liable on a contract cannot set up a counterclaim due to him alone. As the court points out, *all* of the defendants had been served with process and were parties to the action. In such case the judgment must be *joint*. Section 414 of the Code of Civil Procedure does not apply if all are served. But where, as in the instant case, one or more defendants but not all are served, a several judgment against those served is expressly permitted by the code, and such was also the provision of the earlier Practice Act. See Shain v. Forbes, and other cases, cited supra. This distinction is recognized in Roberts v. Donovan, where the court says: "So, too, when the cause of action is against several defendants jointly, a portion only of whom are served, judgment may be taken against those served, under section 414 of the Code of Civil Procedure. * * *"

It therefore follows that regardless of whether the note is joint or joint and several, a several judgment against defendant Clark was proper, and the several counterclaim of this defendant was also proper. Any other view would be in plain disregard of our statutes, and would be contrary to the tendency toward a liberal extension of the right to counterclaim which has heretofore been pointed out by this court. Terry Trading Corporation v. Barksy, 210 Cal. 428, 292 P. 474; see, also, Calara Valley Realty Co. v. Smith, 29 Cal. App. 589, 156 P. 369.

The judgment is reversed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

BENTSON v. STATE BAR OF CALIFORNIA.*

L. A. 13040.

Supreme Court of California.

April 1, 1932.

Rehearing Granted April 28, 1932.

1. Attorney and client ⚿57.

In reviewing recommendation that attorney be disbarred, Supreme Court will consider weight of evidence, not being bound by findings or recommendation of board of governors.

2. Attorney and client ⚿44(2).

Evidence of attorney's failure to repay money after nonconsummation of transactions for which it was advanced *held* to warrant disbarment.

LANGDON, J., dissenting.

In Bank.

Application by Victor L. Bentson to review a recommendation of the Board of Governors that he be disbarred.

Disbarment ordered.

Charles A. Sunderlin, of Los Angeles, for petitioner.

Philbrick McCoy and Lucian J. Clarke, both of Los Angeles, for respondent State Bar of California.

PER CURIAM.

In proceedings instituted by a local administrative committee of the state bar of California, this petitioner was charged first, in connection with his employment as attorney for the executor of an estate, with failure to obey an order made by the Superior Court in a probate matter directing repayment of certain moneys found by a referee to be owing by him to the estate, and, second, with converting to his own use and purposes the sum of $450 paid to him to be applied on the purchase price of certain real property which one Jorgensen, proposed to purchase from said estate. Petitioner filed his written answer, and hearings were thereafter had before the local administrative committee and the board of governors of the state bar.

The following is a brief statement of the facts as found by the local administrative committee: Petitioner was the attorney for the executor of the Higson estate. As to the first charge made against him, several hearings in the matter of the accounting between petitioner and said estate were had before a referee. The referee found an indebtedness against petitioner and in favor of the estate in the sum of $2,944.80. He duly made his report, which was later confirmed by an order of court, from which petitioner appealed. Petitioner later stipulated that his appeal should be dismissed, but in the hearing in the instant proceeding he still claimed that said report and court order were incorrect and that he proposed to take further steps to have them modified or corrected. The most that the local administrative committee could say on this subject was that, on the face of said report and order, the matter looked suspicious. But, inasmuch as petitioner proposed to take further steps to have the account straightened out, and had filed a surety bond for the payment of any balance which might ultimately be found to be due from him, and in view of its finding on the second charge, said committee concluded that there was not sufficient evidence to justify a finding adverse to petitioner on this first charge, and it made no finding of improprieties so far as said account alone was concerned.

The second charge involves moral turpitude. It is that petitioner, while acting as attorney for said executor, improperly withheld the sum of $450 admittedly paid him by a Mr. Jorgensen and a Mr. Smith as a deposit on the purchase of certain real property belonging to the estate. Petitioner claimed that he paid the money over to the executor; the executor denied it. Jorgensen and Smith, learning that the purchase could not go through, made repeated demands for their money, and testified that petitioner repeatedly assured them that he would return it. Petitioner denied this. Two documents were produced written by petitioner's attorney, Mr. Milham, which acknowledged petitioner's obligation and promised to return the $450 within a few days. Petitioner testified that Mr. Milham gave these memoranda without authorization so to do and without knowledge that the amount was actually due. The committee properly stated that it was strange, even inconceivable, that any attorney would make and deliver such documents without the express authority of his client or that he could have learned the facts set forth therein without having previously discussed the matter with his client. The committee also took note of the fact that Mr. Milham continued to act as attorney for petitioner even after petitioner learned of the existence of said instruments.

In support of his contention that he had paid the $450 to the executor, petitioner presented to the committee a typewritten paper, signed by said executor, and entitled "Agreement," which purported to grant to Mr. Jorgensen a "Six (6) Months extension in which to pay his Trust Deed on his home," but which also appeared to be in the form of a receipt for certain moneys, including the $450. The executor admitted that he had signed the written extension of payment, but stated that there was nothing else on the document

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⚿For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 13 P.2d 512.

when he signed it. Petitioner testified that the receipts were also on there at said time. The committee found, and we approve the finding, that an examination of the exhibit indicates that the testimony of the executor is correct. Not only are the receipt portions of the document inconsistent with its heading and general language, but inspection thereof indicates clearly that the receipt portions were typewritten on a different machine or at a different time from the remainder of the instrument. We approve the action of the committee in resolving the direct conflict of the above and other testimony touching upon this matter in favor of the conclusion that said document was altered with the knowledge and acquiescence of petitioner. It is also to be noted that upon the accounting petitioner failed to present this alleged receipt to said referee.

Other matters brought out on the hearing, but not included in the formal charges made against petitioner, were also of such a character as to arouse suspicion. For example, said executor accused petitioner of misappropriating $250 given him as expense money in connection with a trip to Canada for the estate. Petitioner explained the fact that he failed to take the trip or repay the money by stating that it was given to him by the executor personally as an independent fee for services rendered by him to the estate in connection with matters involving lands in Canada. Petitioner also claimed that he had paid said executor $600 in cash, although he could not produce any receipt. He explained that the executor might have taken the receipt from his office with an account book and other receipts and papers. The committee, however, stated that the executor appeared to be a kindly and honest man, and it suspected that petitioner's story in this connection was not true. We gather the same impression from our study of the record. In other words, in view of all the circumstances, partially recited in the findings and even more briefly set forth above, we believe that the committee was justified in failing to believe a large portion of petitioner's testimony, in finding him guilty on said second charge, of unethical conduct involving serious moral turpitude and in recommending his disbarment.

The board of governors, after a further hearing, adopted the findings of the committee, and made a like recommendation, and the entire proceeding was then brought before us for review. Petitioner's several claims all relate to his main contention that the evidence is insufficient to support said findings and recommendation and that his disbarment is not warranted.

[1, 2] In a case of this character we will, of course, pass upon the weight of the evidence, not being bound by the said findings or recommendation. Fish v. State Bar (Cal. Sup.) 4 P.(2d) 937. The record here is voluminous, and we do not deem it necessary to make any further review of the testimony adduced upon the several hearings. It is sufficient to say that we have perused the entire record with greatest care, and, giving petitioner the benefit of all intendments in favor of innocence (Bar Ass'n v. Sullivan, 185 Cal. 621, 624, 198 P. 7), we are left in no doubt of his guilt in matters of grave import, involving moral turpitude. We have taken into consideration the advanced age of the executor of said estate, who was the chief witness against petitioner, and also the fact that petitioner, admitting that he finds himself in a peculiar situation, attempts a plausible explanation of each and every irregularity with which he is confronted. We do not find his explanations sufficient to overcome the positive evidence against him. Not only with respect to the matters directly charged, but with respect to other transactions necessarily connected therewith, there appears plainly to have been a breach of trust and good faith on his part. Under the record as presented, there is no escape from this conclusion, and we can do nothing else but approve the findings of said committee. It is not alone the testimony of witnesses adverse to petitioner but also the circumstances themselves which confirm this view.

It is ordered that the petitioner, Victor L. Bentson, be, and he is hereby, disbarred from the further practice of the law in this state as an attorney and that his name be stricken from the roll of attorneys at law of the state of California.

LANGDON, J.

I dissent.

Petitioner was charged with two offenses: Failure to account for certain moneys to an estate for which he was attorney, and misappropriation of the sum of $450 paid to him by Clay F. Jorgensen and one Smith.

With respect to the first charge, it appears that the proceeding before the local administrative committee was commenced prior to the time that the Superior Court had finally determined the amount of attorney's fees due petitioner from the estate. Moreover, the estate was protected by a surety bond in a sufficient sum, furnished by petitioner upon his own initiative. On this first charge the committee failed to find impropriety in petitioner's conduct, and the board of governors based its order solely on the second charge.

The second charge was made, not by the estate, but by Jorgensen and Smith, who had paid $450 to petitioner as attorney for the estate, on the purchase price of certain real property belonging to the estate. The committee found that they had made repeated demands on petitioner for the money and had been unable to secure it. It is unnecessary to follow the detailed course of the evidence, for certain undisputed facts stand out as determinative. Jorgensen testified that petitioner told him the estate could not deliver a clear title to the property; that petitioner offered at this time to return the money; that he (Jorgensen) did not take the money because he wanted petitioner to try to put the deal through; that on several subsequent occasions he made demand on petitioner to pay, but the latter "always put up the plea that he couldn't on account of the conflict with the Higson estate." The record shows that none of these demands were made until after the probate court, upon claim of the estate, had ordered that the money be paid to the executor. Hence petitioner had no authority to comply with the demands. It should be observed that the first charge against petitioner here is that he failed to pay certain sums, including the $450, to the estate; and the second charge is that he failed to pay that same $450 to the other parties. The Superior Court held that he would have to pay it to the estate, and subsequently it was paid. I am unable to see any support for the conclusion of the committee that he committed an offense involving moral turpitude in not paying it to Jorgensen and Smith.

An additional defense of petitioner is that he actually paid the money to James Higson, the executor. He was unable to sustain this contention before the referee of the probate court because of his inability to produce a receipt which he claimed to have. At the hearing before the committee, he offered in evidence a receipt, the authenticity of which was the subject of some dispute. Inasmuch as this matter is concerned solely with the first charge, the failure of the committee and the board of governors to find any impropriety in his dealings with the estate make it unnecessary to deal further with this defense.

The order should be reversed, and the proceedings against petitioner should be dismissed.

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215 Cal. 258

CARSTENSEN et al. v. GOTTESBUREN et al.

L. A. 13280.

Supreme Court of California.
March 28, 1932.

1. Bailment 🔑14(1).

"Bailment for the benefit of both parties" is one wherein person gives another temporary use and possession of property, other than money, for reward, and latter agrees to return it at future time (Civ. Code, § 1925).

[Ed. Note.—For other definitions of "Bailment," see Words and Phrases.]

2. Bailment 🔑22.

Lessee's transfer of interest in lease of fishing barge without required consent of lessor *held* to permit "use of the thing hired in a manner contrary to the agreement of the parties," within statute authorizing termination of lease (Civ. Code, § 1931, subd. 1).

3. Bailment 🔑22.

Lessors' demand through attorney for possession of leased barge *held* sufficient.

4. Partnership 🔑159.

Lessors' demand on either lessee or assignee of interest in lease for possession of leased barge was sufficient; they being partners (Civ. Code, §§ 2332, 2403, 2406).

5. Appeal and error 🔑176.

Defendant assignee of interest in lease of barge admitted allegations of lessors' complaint as to demand on him for return of property by suffering default, so as to preclude codefendant lessee from raising such question on appeal.

In Bank.

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Action by Hans Carstensen and another against E. F. Gottesburen and others. Judgment for plaintiffs, and named defendant appeals.

Affirmed.

Superseding opinion (Cal. App.) 2 P.(2d) 879.

Arthur T. French, of San Diego, for appellant.

Overton, Lyman & Plumb, of Los Angeles, and Wright & McKee and C. M. Monroe, all of San Diego (William R. James, of Los Angeles, of counsel), for respondents.

WASTE, C. J.

From a judgment entered in favor of plaintiffs, the defendant Gottesburen alone appeals.

The complaint contains allegations usual to the statement of a cause of action in claim and delivery and prays for the return of a fishing barge known as the "Point Loma." In his answer the appellant denies plaintiffs' ownership of the property; denies demand for possession by plaintiffs; denies that at the time the action was filed he was retaining possession without the consent of plaintiffs; admits his possession and asserts his right thereto; and also asks for a return of the property with damages. The defendant Sheldon suffered his default to be taken.

It appears that by written instrument bearing date February 1, 1927, the respondents leased the barge in question to the appellant for a period of three years, to be used by him as a fishing barge, and he was to pay to the respondents as rental therefor one-third of the gross receipts collected by him as admission fees charged to persons using the same for fishing purposes. Such sums so collected were to be paid to the lessors on or before the fifth day of each month for the preceding month. The lease also provided that it should not be assignable, and that the lessee should not sublet any part of the barge without the written consent of the lessors.

Appellant obtained possession of the barge under said lease. Within three months thereafter, and in disregard of its provisions, the appellant, by written instrument, sold, assigned, transferred, and conveyed to the nonappealing defendant Sheldon, as a partner, an undivided one-half interest in the lease. Subsequently appellant failed to pay the rent reserved. The lease contained no clause providing for its forfeiture in the event of nonpayment of rent or of an assignment in breach of its provisions. The trial court, upon competent evidence, found that the appellant had breached the lease in the particulars mentioned and thereupon gave judgment decreeing a return of the barge to the respondents; hence this appeal.

[1] The transaction out of which this litigation arises falls within that type of bailment which is for the benefit of both parties thereto, and which has been defined as one wherein a person gives to another the temporary use and possession of property, other than money, for a reward, the latter agreeing to return the same to the former at a future time. Section 1925, Civ. Code; Oakland Barge & Lighter Co. v. Foster, 25 Cal. App. 193, 143 P. 83.

[2] Appellant's principal contention, both upon the trial of the cause and upon this appeal, is that in the absence of a clause in the lease providing therefor, a breach of covenant (as distinguished from a condition) does not work a forfeiture. In support thereof he refers us to section 1931 of the Civil Code as specifying the only conditions and circumstances warranting the termination of a bailment by the lessor before the end of the term. That section reads as follows:

"The letter of a thing may terminate the hiring and reclaim the thing before the end of the term agreed upon:

"1. When the hirer uses or permits a use of the thing hired in a manner contrary to the agreement of the parties; or,

"2. When the hirer does not, within a reasonable time after request, make such repairs as he is bound to make."

By the first subdivision of the foregoing section, the lessor may terminate the hiring when the lessee "permits a use of the thing hired in a manner contrary to the agreement of the parties." Under the terms and provisions of the lease here involved, the barge was placed in the appellant's possession for his sole and exclusive use and operation as a fishing barge. That the parties intended confining its use and operation exclusively to the appellant is established by the clause in the instrument which precludes and prohibits the appellant from assigning the lease or subletting any part of the barge without having first procured the written consent of the respondents. They did not consent to an assignment of the lease, and therefore to permit of the use and operation of the barge by one not a party to the hiring (and one not acting as agent or employee of the lessee) is to permit "a use of the thing hired in a manner contrary to the agreement of the parties" just as effectively and as completely as though the lessee had used the barge for illicit "rum-running" purposes when the provisions of the lease required that it be engaged only as a fishing boat. Therefore, for the appellant to transfer the lease, or any interest therein, to Sheldon, a stranger to the hiring, or to a corporation, a partnership, or any other entity, having no connection therewith, when the lease by its terms forbade such a transfer and engaged only to permit of appellant's use of the barge, constituted, in our opinion, a positive violation of the terms of the hiring and permitted "a use of the thing hired in a manner contrary to the agreement of the parties" within the meaning of subdivision 1 of section 1931, supra. This being so, the respondents, as lessors, were authorized by the cited section to terminate the hiring and reclaim the barge before the end of the term agreed upon. The action of the trial court in decreeing a return of the barge to the respondents was therefore proper.

[3] Appellant next attacks the sufficiency of respondents' demand for a return of the barge. The trial court found, upon competent evidence, that prior to the commencement of suit and while the appellant and Sheldon were in possession of the barge, the respondents had demanded possession thereof, which demand was refused. It was not necessary, as contended by appellant, that the respondents personally make the demand. The demand made for them by and through their duly authorized attorney was sufficient.

[4] Nor do we find any merit in the claim that the evidence fails to show that a demand for possession had been made upon the defendant Sheldon. Inasmuch as the appellant and Sheldon were partners and in possession of the barge, a notice to or demand upon either was sufficient. Section 2406 of the Civil Code provides that, "Notice to any partner of any matter relating to partnership affairs, * * * operate as notice to * * * the partnership. * * *" Moreover, section 2403 of the Civil Code makes an individual part-

ner an agent for the partnership in the transaction of its business, and under section 2332 of the same Code, notice to the agent is notice to the principal.

[5] Appellant's contention that the defendants herein were sued as individuals and not as partners does not assist him. The defendant Sheldon suffered his default to be entered in the trial court and by so doing admitted the allegations of the complaint as to demand being made upon him for a return of the property. Appellant cannot, therefore, raise this question as to the nonappealing defendant Sheldon.

Other matters discussed by the appellant in his briefs are without merit and do not suggest a different conclusion.

The judgment is affirmed.

We concur: CURTIS, J.; LANGDON, J.; PRESTON, J.; SHENK, J.; SEAWELL, J.

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215 Cal. 327

SHELDON v. MAUER.

L. A. 12015.

Supreme Court of California.
March 31, 1932.

Appeal and error 🔑882(19).

Defendant, having declined court's suggestion for appointment of referee to determine allowance to defendant for expenditures, could not complain on appeal.

In Bank.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by Zelda H. Sheldon against A. H. Mauer. Judgment for plaintiff, and defendant appeals.

Affirmed.

James V. Brewer and A. H. Mauer, both of Los Angeles, in pro. per.

Benjamin H. Sheldon, Thomas P. Wickes, Bordwell, Mathews & Wadsworth, Ray W. Bruce, and John H. Mathews, all of Los Angeles, for respondent.

PER CURIAM.

This is an action based upon a rescission of an agreement of exchange and sale of property. Plaintiff agreed to transfer to defendant a ten-year lease of an apartment house in Los Angeles, together with her title to all of the furniture, and the sum of $1,500 cash, for four lots in San Diego. About two months later notice of rescission was given on the ground of fraud. The court found that defendant had misrepresented the character and value of the property, particularly in the statement that the lots were business property in a busy section, each worth $1,500, whereas they were actually waste land of a value not exceeding $50 per lot. The court further found that plaintiff had relied upon defendant's representations and his assumption of superior knowledge, and had made no independent investigation.

There is ample evidence in the record to support each of these findings. The judgment canceled the lease, restored to plaintiff her furniture, the money paid by her, with interest thereon, and rent collected during the period of defendant's occupancy; and restored to defendant title to his lots. The court in its oral decision indicated that it was disposed to make an allowance to defendant for any expenditures incurred by him in cleaning and installing new furnishings, and suggested the appointment of a referee to determine any amount due. The defendant refused to accede to this suggestion, and, under the circumstances, cannot object to the judgment.

The judgment is affirmed.

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215 Cal. 308

JOHN P. MILLS ORGANIZATION, Inc., v. UNGER et al.

L. A. 11756.

Supreme Court of California.
March 30, 1932.

Principal and surety 🔑77.

Surety on bond securing building of houses on lots trust deeded to obligee *held* discharged, where, after default in building and on trust deed, obligee purchased lots at foreclosure sale for full trust deed indebtedness, notwithstanding value of premises did not equal indebtedness.

Surety was discharged since the obligee of the bond securing the building of the houses on the lots trust deeded to it, by purchasing at foreclosure sale for the full amount of the trust deed indebtedness, discharged and satisfied the trust deeds, thus absolving both principal and surety from liability under the trust deeds and building contract; the only purpose of the bond being to give the obligee and holder of trust deeds additional security for the trust deeds which represented its sole interest either in the building contract or trust deeded premises.

In Bank.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by the John P. Mills Organization, Inc., against Robert Unger and the Guardian Investment Corporation of California. From a judgment against the last-named defendant, it appeals.

Reversed.

Superseding opinion in 2 P.(2d) 556.

Lewis Cruickshank and Donald Armstrong, both of Los Angeles, for appellant.

W. I. Gilbert and Howell Purdue, both of Los Angeles, for respondent.

PER CURIAM.

Defendant Guardian Investment Corporation of California appeals from a judgment rendered against it on a surety bond in which defendant Unger was named as principal, and plaintiff was named as beneficiary.

The facts out of which this controversy arose are as follows:

In June, 1926, plaintiff sold to Unger ten vacant lots located in the city and county of Los Angeles. Plaintiff accepted a small down payment on the purchase price, and, as evidence of the balance, accepted ten promissory notes secured by ten deeds of trust. Nine of these notes were in the sum of $1,959.30 each, while the tenth note was in the sum of $1,454.30, making a total of $19,088 due and owing from Unger to the plaintiff on the purchase price. As part of the same transaction, it was agreed that Unger was to erect a dwelling house on each lot to cost and to be reasonably worth at least $3,000. In order that Unger could obtain this sum, plaintiff agreed that its deeds of trust were to be second in point of priority to a first mortgage of $3,500 on each lot. These first mortgages were secured by Unger, the money being advanced by the defendant Guardian Investment Company of California. In order to indemnify itself against Unger failing to build according to the contract, plaintiff required that Unger secure a surety bond from the defendant corporation. This bond was secured by Unger, and is pleaded as an exhibit to the amended complaint. The bond is in the sum of $19,593, naming plaintiff as beneficiary, and recites that Unger has agreed to fully complete within 120 days a five-room dwelling house on each lot to cost and to be reasonably worth not less than $3,000, and further recites the fact of the sale of the lots to Unger by plaintiff, and the nature of the security held by plaintiff to secure the purchase price. It is then provided that, if Unger shall perform the terms and conditions of the building contract, "the above written obligation shall be void; otherwise to run in full force and effect." Unger failed to perform his contract with plaintiff, in that he failed to complete the houses within the time specified, and the houses he did erect cost and were reasonably worth but $2,538.93, instead of the $3,000 contracted for. After the breach of the contract by Unger, and prior to the commencement of this action. Unger defaulted on the notes owed to plaintiff. Plaintiff thereupon caused the trust deeds held by it to be declared in default, and at the trustee's sale plaintiff purchased the lots for an amount equal to the total indebtedness owed by Unger. Plaintiff then brought this action to recover from the surety the full amount of the bond. The trial court found that the total value of plaintiff's equity in all of the lots over and above the amount of the first mortgages was $12,159.30. This finding was made in face of the fact that plaintiff had purchased the lots at the trustee's sale, after breach, for the full amount of the indebtedness owed to it by Unger. Based on this finding, the trial court found that as one item of damage plaintiff should recover from the surety $6,928.70. This sum was arrived at by deducting from the total amount of Unger's indebtedness to plaintiff the value of the equity as found by the trial court. The court also allowed as further damages the sum of $200 expended by plaintiff to satisfy a mechanic's lien; $311.97 expended by plaintiff in replacing various fixtures stolen from the premises by persons unknown; and $1,745.50 expended by plaintiff in altering and repairing some of the driveways which Unger had constructed so as to encroach on adjoining properties. Judgment was therefore rendered against defendant surety in the sum of $9,186.17. From this judgment the surety has appealed.

We are of the opinion that, when plaintiff purchased the properties at the trustee's sale for the full amount of the indebtedness due and owing to it, Unger and his surety were thereby discharged from all liability under the trust deeds and under the building contract. This is so because, although the bond is a guaranty that Unger would build the houses in the time and manner and of the value contracted for, it is obvious that the only purpose of securing the bond was to furnish plaintiff with additional security for the trust deeds held by it. The sole interest of plaintiff either in the building contract or in the property was represented by the trust deeds it held. Plaintiff had conveyed title to the lots to Unger, and all that remained in it was the interest represented by its trust deeds. The sole purpose of executing the bond was to protect that interest. It is obvious that, if Unger had paid the money owed to plaintiff in full, it would have no further interest in the building contract or in the lots. It is likewise obvious that, if Unger had paid plaintiff in full, such payment would discharge the surety of all liability on the bond. This follows from the fact that, if plaintiff had received payment to the full extent of every interest which it possessed, it could suffer no damage by Unger breaching the building contract. If paid in full, there would remain nothing to which the indemnity could possibly apply. The indebtedness owed to plaintiff by Unger and secured by the trust deeds was in the amount of $19,088. As already stated, it was to protect that interest that the bond was given. When Unger breached the building contract, a cause of action arose in favor of plaintiff and against the surety to whatever extent the security of plaintiff had been diminished by the breach. Plaintiff could have immediately brought suit against the surety to have that loss determined. It did not thus proceed, but saw fit to declare the trust deeds in default, and at the trustee's sale purchased the property for the full amount of the indebtedness secured by the deeds of trust. The obligations of Unger under the ten trust deeds were, by such purchase, discharged and satisfied. This would be obvious had some third person purchased at the sale for the full amount of the trust deeds, and had this sum been paid to the plaintiff by the trustee. In that event, plaintiff would have been paid in full for the indebtedness owed to it, and no action could exist against Unger or his surety. The fact that the creditor bought in the property for that amount does not alter the legal effect of the transaction. By purchasing the property for the full amount of the indebtedness, the plaintiff by its own act discharged Unger and his surety from all further liability on the trust deeds or on the building contract.

A case where the factual situation was somewhat similar to the case at bar is Westcott v. Fidelity & Deposit Co., 87 App. Div. 497, 84 N. Y. S. 731. In that case plaintiff sold certain property to one Talbot for $55,000; Talbot giving back to plaintiff a purchase-money mortgage in that sum. As part of the same transaction, plaintiff agreed to make certain advances to Talbot for the purpose of having Talbot erect a building on the premises, and agreed to take a building mortgage to secure these advances. As additional security, plaintiff required that Talbot secure a bond in the sum of $15,000 in favor of plaintiff guaranteeing that Talbot would comply with the building agreement. Talbot secured such a bond from the defendant; the provisions of the bond being somewhat similar to the one in the present case. After plaintiff had made many advances under the building agreement, Talbot refused to complete the building. Plaintiff then foreclosed the building mortgage, and purchased the property at the foreclosure sale, and secured a deficiency judgment against Talbot in the sum of $2,300. Plaintiff then completed the building at a cost in excess of the penalty provided in the bond, and then sued the surety for the full amount of the bond. The trial court granted judgment in favor of plaintiff for that amount. On appeal, this judgment was reversed; it being held that the sole damage suffered by plaintiff was the amount of the deficiency judgment. At page 734 of 84 N. Y. S., 87 App. Div. 497, the court stated:

"The bond, as we have observed, provides for indemnity; and, if the debt cannot be enforced against the principal debtor, it certainly follows that it cannot be against the surety. The interest of the plaintiff was to have his mortgages paid. He had no other. He did not become entitled to receive the profit which might have been made by Talbot, had he completed the contract, and had no interest therein except as the same furnished security for the payment of his mortgages. Suppose Talbot had made no attempt to perform the contract by the erection of the buildings, and had paid the mortgages, principal and interest, in full to the plaintiff; could it be for a moment claimed that he would have a cause of action in addition thereto for the full amount of the penalty of the bond? It is to be borne in mind that the defendant, if it be compelled to pay the amount of the bond, has a remedy over against Talbot or his assignee, or both; and, if judgment pass against it, it may collect the amount thereof from the principal debtor. The mortgages being paid, the plaintiff could enforce nothing against the mortgagor or his assigns, yet liability against them would arise the moment the bond is enforced; and, to the extent of $15,000, the mortgagor or assigns may be made liable, although there is no indebtedness or liability existing against them in favor of the mortgagee. Such liability may not be created by indirection any more than it could be in an action between the mortgagor and mortgagee. The only difference in the present case is the method by which the mortgages were paid; but that is not material, for, when the plaintiff elected to take the property as purchaser, he became chargeable with the value of the land, and was bound to apply it upon his mortgage indebtedness. As the property was worth the amount of the purchase-money mortgage and the amount of plaintiff's bid at the sale, it operated as payment to that extent. Making the application of these sums upon the mortgages, it is found that the amount needed to indemnify the plaintiff for his entire interest is the amount of the deficiency judgment, and for this sum the defendant offered to permit judgment to be taken."

The position taken by the New York court in the above case has been recently approved in McCauslan v. Zoar Holding Co., 131 Misc. Rep. 148; 227 N. Y. S. 75, and in Sautter v. Frick, 133 Misc. Rep. 517, 232 N. Y. S. 529. We are in accord with the theory of those cases.

Counsel for respondent contend that the above principles are not applicable to this case, for the reason that, although the plaintiff purchased the property for the full amount of the indebtedness at the trustee's sale, the trial court found in this action that it did not receive $19,088 in value (the total amount of the indebtedness) at such sale, but only received $12,159.30 in value. We cannot see how that finding can possibly affect the fact that plaintiff bid in the property for the full amount of the indebtedness and thus discharged the obligation of Unger on the trust deeds, and discharged the surety's liability on the bond. When the trust deeds were discharged, the liability of the surety was discharged with them. If plaintiff had only bid $12,159.30 for the property, and had taken a deficiency judgment for the balance, it could undoubtedly have recovered the amount of the deficiency from the surety under the authority of the cases cited, supra. See, also, Hunstock v. Royal Sec. Corp., 51 Cal. App. 769, 197 P. 963. But plaintiff voluntarily at a competitive sale purchased the property for the full amount owed to it. As already stated, this constituted payment in full of the indebtedness the bond was given to secure. Obviously it cannot complain now that it paid too much for the property. Having elected to purchase at the sale for the full amount of the indebtedness, it discharged Unger from any further liability, and likewise absolved the surety from liability on a bond given to secure that very indebtedness.

For the foregoing reasons, the judgment appealed from is reversed.

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215 Cal. 314

SCOTT et al. v. HOLLINGSWORTH.

L. A. 10962.

Supreme Court of California.

March 31, 1932.

1. Usury 🔑139.

Creditor may plead principal debt as offset to action to collect treble damages for usurious interest paid to him (Usury Law, § 3 [St. 1919, p. lxxxiii]).

2. Courts 🔑116(1).

Every court has inherent right to correct its orders to speak the truth.

3. Usury 🔑140.

General receivers of corporation *held* "personal representatives" of corporation and entitled to bring action to collect treble damages for usurious interest paid by corporation to creditor within Usury Law regulating its recovery (Usury Law, § 3 [St. 1919, p. lxxxiii]).

Usury Law, § 3 (St. 1919, p. lxxxiii), provides that every corporation, who for any loan or forbearance of money, goods, or things in action shall have paid any greater sum than is allowed to be received under the preceding sections, may, either in person or its "personal representative," recover in an action at law against the person who shall have taken the same, treble the amount of the money paid.

[Ed. Note.—For other definitions of "Personal Representative," see Words and Phrases.]

In Bank.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action by Joseph Scott and another, as receivers of the Julian Petroleum Corporation, against W. I. Hollingsworth. From a judgment for defendant, plaintiffs appeal.

Reversed, with directions.

Superseding opinion in 2 P.(2d) 571.

Anderson & Anderson and A. G. Ritter, all of Los Angeles, for appellants.

J. Wiseman Macdonald, of Los Angeles, for respondent.

Oscar Lawler and Laurence W. Beilenson, both of Los Angeles, amici curiæ, for respondents.

PRESTON, J.

Plaintiffs, as receivers of the Julian Petroleum Corporation, a Delaware corporation, on August 8, 1927, instituted this action at law in four counts against the defendant, W. I. Hollingsworth, to collect treble damages for usurious interest paid to him as follows: $19,000 on December 11, 1926; $19,000 on January 11, 1927; $19,000 on February 19, 1927; and $19,000 on April 5, 1927. The total amount so paid was $76,000, which, when trebled, aggregates the sum of $228,000. Said sums were paid on an existing promissory note, having a principal sum of $100,000 then due and payable, in consideration of which, in each instance, the period of forbearance was extended one month.

The complaint was amended from time to time, the third and last amended complaint being filed on May 21, 1928. It contained general allegations upon which authority to sue was based and alleged in substance the abovementioned facts. The defendant attacked it by general and special demurrer, which the court sustained with leave to amend. This privilege was not exercised and judgment passed for defendant, from which plaintiffs prosecute this appeal.

[1] The statute (Usury Law [Stats. 1919, p. lxxxiii] § 3), specifically authorizes an ac-

tion at law of the type here even though the principal debt be unpaid. The right, however, carries the privilege in the defendant to plead offsets and counterclaims thereto, and in this case the right to plead the principal debt as an offset. Haines v. Commercial Mortgage Co., 200 Cal. 609, 254 P. 956, 255 P. 805, 53 A. L. R. 725.

This whole controversy turns upon the power of the receivers to sue in this action. It is true that the causes of action counted upon partake both of the nature of penalties and of debts. They are penalties because meant to punish and deter the usurer. They are debts in that they may be treated as such with respect to set-offs and counterclaims and actions in equity between the parties respecting the transaction. Haines v. Commercial Mortgage Co., supra; Esposti v. Rivers Bros., 207 Cal. 570, 279 P. 423.

The plaintiffs, as receivers, derived their power to prosecute the action from a series of orders made under the following conditions: On May 19, 1927, in the District Court of the United States, Southern District of California, Southern Division, the Perkins Oil Well Cementing Company, a California corporation, filed a general creditors' bill against the Julian Petroleum Corporation, a Delaware corporation, and the California-Eastern Oil Company, a Delaware corporation, alleging sufficient grounds for the appointment of a general receiver to conserve the assets and carry on the business of the two corporations. And to that end the court, with the consent of defendants, on said May 19, 1927, made an order in said action appointing plaintiffs as such general receivers and defining their powers. This order was supplemented by a second order under date of July 1, 1927, which latter order, so far as here material, reads as follows: "It is hereby ordered that the said receivers * * * be and they hereby are authorized, empowered and directed, whenever it shall be deemed by them advisable or necessary or proper so to do, to institute in the proper courts of the state of California any and all suits necessary to carry out their powers and duties as receivers and necessary to subject and reduce to their possession any properties, real, personal or mixed, of the Julian Petroleum Corporation or the California-Eastern Oil Company; and the commencement of any such suits by the receivers, as such receivers, already commenced by them, is hereby ratified and approved."

Thereafter and on the 12th day of March, 1928, the court made a third order, purporting to be a nunc pro tunc order amending the original order appointing receivers of the Julian Petroleum Corporation. Said order recited that "It was the purpose and intent of said order of May 19th, 1927, * * * appointing the said receivers * * * to confer upon them power and authority to take full charge and control of all matters and affairs of said Julian Petroleum Corporation, and to confer upon them full power and authority to maintain all actions of every kind and character for the recovery by said receivers, on behalf of said corporation, of each and all and every debt or penalty or other claim of any kind or character existing on behalf of said corporation at the time of the making of said order or thereafter accruing * * *" and said order further provided authority for the enforcing of any debt or penalty arising out of or due to said corporation by reason of the provisions of the said Usury Law of this state.

The language of said section 3 of the Usury Law here involved is as follows: "Every person * * * or corporation, who for any loan or forbearance of money, goods or things in action shall have paid or delivered any greater sum or value than is allowed to be received under the preceding sections, one and two, may either *in person or his or its personal representative*, recover in an action at law against the person * * * or corporation who shall have taken or received the same, or his or its personal representative, treble the amount of the money so paid or value delivered in violation of said sections, providing such action shall be brought within one year after such payment or delivery."

[2] The question presented for our consideration, therefore, is whether or not plaintiffs are "personal representatives" of the corporation within the meaning of the said statute. We approach this discussion with the known fact that the federal court itself has declared its orders to have the effect of creating the plaintiffs such representatives. Even the nunc pro tunc order seems to be effective and binding upon the state court when attacked only collaterally as here. Every court has the inherent right to correct its orders and minutes to speak the truth.

Again, the nature of the receivership is not controlled by California law but is controlled by federal equity practice itself. In speaking of the power of the federal courts over corporations Mr. Clark, on Receivers, volume 2, page 1030, § 702, states the rule as follows: "The jurisdiction of the federal courts is determined by the Constitution of the United States and the laws of Congress and the constitutions and legislatures of the several states cannot add to or take away from such jurisdiction belonging to the federal courts. In other words, the remedies afforded and the modes of proceeding pursued in the federal courts sitting as courts of equity, are not determined by local laws or rules of decision, but by the general principles, rules and usages of equity having uniform operation in these courts wherever sitting." See Guffey v. Smith, 237 U. S. 101, 35

S. Ct. 526, 59 L. Ed. 856; Mississippi Mills v. Cohn, 150 U. S. 202, 14 S. Ct. 75, 37 L. Ed. 1052; Burnrite Coal, etc. v. Riggs, 274 U. S. 208, 47 S. Ct. 578, 71 L. Ed. 1002.

In our state the power to appoint a receiver of a corporation at the instance of a private litigant has been repeatedly denied. Elliott v. Superior Court, 168 Cal. 727, 730, 145 P. 101. We therefore need not look to the California court holdings for aid here.

The power of a receiver in the federal court has been stated to be as follows: "The appointment of a receiver of a debtor's property by a federal court confers upon it, regardless of citizenship and of the amount in controversy, federal jurisdiction to decide all questions incident to the preservation, collection and distribution of the assets. It may do this either in the original suit, Rouse v. Letcher, 156 U. S. 47, 49, 50, 15 S. Ct. 266, 39 L. Ed. 341; or by ancillary proceedings. White v. Ewing, 159 U. S. 36, 15 S. Ct. 1018, 40 L. Ed. 67. Compare Kelley v. Gill, 245 U. S. 116, 119, 38 S. Ct. 38, 62 L. Ed. 185. And it may, despite section 265 of the Judicial Code (28 USCA § 379), issue under section 262 (28 USCA § 377), or otherwise, all writs necessary to protect from interference all property in its possession." Riehle v. Margolies, 279 U. S. 218, 223, 49 S. Ct. 310, 312, 73 L. Ed. 669.

It is true that in Esposti v. Rivers Bros., supra, this court held that a cause of action for the penalties provided by the Usury Law was not assignable. In Peterson v. Ball, 211 Cal. 461, 296 P. 291, 74 A. L. R. 187, this court followed the Esposti Case and held that a cause of action or claim arising out of section 309, Civil Code (imposing liability against directors who have suffered debts to be created in excess of the subscribed capital stock of a corporation), is not assignable because the liability, although remedial so far as the creditor is concerned, is highly punitive as to the directors. There, however, there was an assignment. These cases, therefore, are not controlling in the matter before us for here there is no attempt to assign the cause of action.

It seems clear that if plaintiffs may not bring this action, the corporation itself could not do so; hence the wrong would be without redress unless plaintiffs had authority to institute and maintain the action. It is alleged that the federal court proceeding is still pending and that the office and duties of the receivership still obtain. We are impressed by the reasoning of the case of Barbour v. National Exchange Bank, 45 Ohio St. 133, 12 N. E. 5, 6, where a receiver was appointed to carry on the business of an insolvent corporation, and undertook to prosecute an action on behalf of the corporation, pursuant to section 5198 of the Revised Statutes of the United States (12 USCA § 86), to recover back usurious interest which had been paid by it. Said statute provided: "The taking * * * or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, *or his legal representatives*, may recover back, in an action in the nature of an action of debt, twice the amount of interest thus paid from the association taking or receiving the same. * * *"

[3] Counsel for defendant maintained that the receiver was not the "legal representative" of the insolvent corporation and that usury was a personal matter that could be set up or claimed only by the person himself who had seen fit or chosen to pay it. The court said: "The principles involved in these two propositions are settled by National Bank v. Trimble, 40 Ohio St. 629, where it is held: 'If the payor of such interest, before action brought, was adjudged a bankrupt, his assignee in bankruptcy became his "legal representative," and as such was entitled to bring the action.' The court was construing the section involved in this case. We are content with the disposition there made, and are of opinion that the principle of that case reaches the case of an action by a receiver."

This discussion covers the principal question discussed by both parties and we deem unimportant the discussion of any other questions.

The judgment is reversed, with directions to overrule the said demurrer.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.

MARK v. TITLE GUARANTEE & TRUST CO. et al.

Civ. 530.

District Court of Appeal, Fourth District, California.

April 1, 1932.

As Modified April 19, 1932.

1. Appeal and error 🔑907(3).
On appeal on judgment roll alone, trial court's findings are deemed supported by evidence, and all intendments are in their favor.

2. Husband and wife 🔑267(8).
Statutory presumption of validity of husband's sole lease, sale, or deed of community property to purchaser in good faith without knowledge of marriage relation may be controverted (Civ. Code, § 172a, as amended by St. 1925, p. 84; Code Civ. Proc. §§ 1957, 1959, 1962, 1963).

3. Husband and wife 🔑267(8).
Presumption of validity of husband's sale of community property to innocent purchaser may be controverted only by showing that wife was not informed of and did not consent to or acquiesce in execution of instrument conveying title (Civ. Code, § 172a, as amended by St. 1925, p. 84; Code Civ. Proc. § 1963).

4. Husband and wife 🔑267(9).
Wife, not knowing of, consenting to, or approving, husband's contract for sale of community property, *held* not estopped to question validity thereof.

5. Husband and wife 🔑265.
Wife's interest in community property is mere expectancy without attributes of estate at law or in equity.

6. Husband and wife 🔑267(8).
Husband's conveyance of community property to good-faith purchaser without knowledge of marriage relation was valid transfer, subject only to wife's right to institute seasonably equity action to revoke transfer (Civ. Code, § 172a, as amended by St. 1925, p. 84).

7. Husband and wife 🔑270(8).
Husband's retention of proceeds of his sale of community property did not warrant conclusion that money did not enter into spouses' community property (Civ. Code, §§ 162–164).

8. Appeal and error 🔑842(2).
Trial court's finding that none of proceeds of husband's sale of community property entered into community *held* not fact finding, but legal conclusion not binding on appellate court.

9. Equity 🔑66.
He who seeks equity must do equity.

10. Husband and wife 🔑267(8).
Wife *held* entitled to annulment of husband's sale of community property to innocent purchasers on condition that she refund amount paid by them (Civ. Code, § 172a, as amended by St. 1925, p. 84).

Appeal from Superior Court, Los Angeles County; Raglan Tuttle, Judge.

Action by Ethel Mark against the Title Guarantee & Trust Company and others. Judgment for defendants, and plaintiff appeals.

Reversed.

George S. Hupp and Charles J. Katz, both of Los Angeles, for appellant.

Hyams & Himrod, Aubrey Devine, and Jack Greenberg, all of Los Angeles, for respondents.

JENNINGS, J.

The appeal herein is taken by the plaintiff from a judgment denying to her the relief which she sought by the institution of the action. Plaintiff's complaint, which was filed November 23, 1927, alleged that at all times therein mentioned she was the wife of defendant William Mark; that on April 25, 1923, defendant Title Guarantee & Trust Company, being the record owner of the legal title to lot 69 of tract 5780 in the city of Los Angeles, Cal., entered into a contract with William Mark whereby said owner agreed to sell to William Mark, and the latter agreed to buy, the above-described real property; that William Mark made the payments required by the terms of the contract from moneys earned by him during coverture; that on December 1, 1926, William Mark, without the knowledge or consent of plaintiff, and without her joining in the sale, transfer, or assignment, sold, transferred, and assigned to defendants Carl Siegrist and Caroline Siegrist all his right, title, and interest in and to the contract to purchase said real property theretofore entered into between him and the defendant Title Guarantee & Trust Company, for a specified sum which William Mark retained for his own use and benefit, and that no portion of such sum of money thus received by William Mark entered into the community of plaintiff and defendant William Mark. It was further alleged that the sale and transfer by William Mark was made by him for the purpose of defrauding, and with the intent to defraud, plaintiff of her community rights in the property, and that she was thereby defrauded and deprived of her community rights. The prayer of the complaint was for annulment and cancellation of the assignment and sale to defendants Siegrist, and that the property be declared to be community property of plaintiff and defendant William Mark.

The trial court found that plaintiff was the wife of defendant William Mark; that all payments made by defendant William Mark under the contract of purchase entered into between him and the defendant Title Guarantee & Trust Company were made from earnings of said William Mark during coverture, and that the money so paid had not been acquired by William Mark by gift, bequest, devise, or descent, and that William Mark, without the knowledge or consent of plaintiff, his wife, and without her joining in the sale, transfer, or assignment, did assign, transfer, and sell to defendants Carl Siegrist and Caroline Siegrist all of his right, title, and interest in and to the contract to purchase the real property made by him with the Title Guarantee & Trust Company; that defendants Siegrist paid to William Mark a specified sum of money in consideration of the sale and assignment of the property to them, and that William Mark retained the whole of the money thus received for his own use and benefit, and that no portion thereof entered into the community of plaintiff and defendant William Mark; that, at the time of the sale to defendants Siegrist, William Mark represented to them that he was unmarried, and the Siegrists accepted the transfer believing that William Mark was unmarried; that William Mark so represented himself to be unmarried for the purpose of inducing the Siegrists to accept the transfer without the necessity of having his wife join therein and for the further purpose of transferring the property without his wife knowing of the same and with the intention of obtaining the money paid to him by the Siegrists and of applying such money to his own use, and that he then had in mind the filing of an action for divorce against his wife, which action he did institute on December 4, 1926, and in his complaint in such divorce suit he did not include the contract or the proceeds obtained by him from its sale and assignment as community property; that plaintiff did not learn of the sale and transfer of the contract until after the institution of the divorce suit; that the plaintiff did not know of the assignment and transfer to the Siegrists at the time it was made, nor did she consent to or approve of it; that the issues involved herein were not adjudicated adversely to plaintiff in the divorce action, and that the moneys received by defendant William Mark from the sale of the contract were not adjudicated in said divorce suit. From the findings thus made the court drew the following conclusions: First, that defendants Siegrist were purchasers in good faith and for value and without notice that defendant William Mark was married; second, that plaintiff was not estopped or precluded from questioning the validity of the sale of the contract; third, that, by reason of defendants Siegrist being purchasers in good faith and for value, they acquired good and legal title to the contract under the provisions of section 172a of the Civil Code, and that the sale and transfer to them is conclusively presumed to be valid, and that they thereby acquired all right, title, and interest of plaintiff and defendant William Mark in and to said contract. In accordance with the findings thus made and the conclusions of law drawn therefrom, judgment was rendered denying to plaintiff the relief which she sought.

[1] Since the appeal is taken on the judgment roll alone, the findings of the trial court are deemed to be supported by the evidence and all intendments are in their favor. Porter v. Hilton (Cal. Sup.) 298 P. 501, 7 P.(2d) 301. No such sanctity, however, attaches to the conclusions of law which the court draws from the findings. As above noted, the court drew three conclusions: First, that respondents Siegrist were purchasers in good faith, for value, without notice; second, that appellant was not estopped from questioning the validity of the transfer to respondents Siegrist; third, that the sale and transfer to respondents Siegrist is conclusively presumed to be valid. No objection is offered to the first and second of the above-mentioned conclusions, but it is urged that the third conclusion is incorrect.

[2-4] The conclusion of the court that the purchase of community property by a third person in good faith without knowledge of the marriage relation from a husband who, without the knowledge or consent of his wife, alone executes the instrument by which the property is conveyed is conclusively presumed to be valid, is based upon the provisions of section 172a of the Civil Code. Upon the interpretation which is to be placed upon the language of this section, therefore, the correctness of the trial court's conclusion depends. On December 1, 1926, the date of the transfer by respondent William Mark to respondents Siegrist, this section read as follows: "*Management of Community Property.* The husband has the management and control of the community real property, but the wife must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered; provided, however, that nothing herein contained shall be construed to apply to a lease, mortgage, conveyance, or transfer of real property or of any interest in real property between husband and wife; provided, also, however, that the sole lease, contract, mortgage or deed of the husband, holding the record title to community real property, to a lessee, purchaser or encumbrancer, in good faith without knowledge of the marriage relation shall be presumed to be valid; but no action to avoid such instrument shall be commenced after the expiration of one year from the filing for record of such instru-

ment in the recorder's office in the county in which the land is situate." St. 1925, p. 84.

It is to be observed that the section states that the sole lease, contract, mortgage, or deed of the husband to a lessee, etc., in good faith without knowledge of the marriage relation, shall be presumed to be valid. The section does not say that such conveyance shall be conclusively presumed to be valid. Nevertheless, in Rice v. McCarthy, 73 Cal. App. 655, 662, 239 P. 56, 58, Presiding Justice Finlayson of the District Court of Appeal for the Second Appellate District, Division 2, in discussing the language of the proviso which is here under consideration, used the following language: "The word 'presumed,' as used in the declaration of the proviso that every lease, contract, mortgage or deed which is under its protecting ægis 'shall be presumed to be valid,' is doubtless used in the sense that it is conclusively presumed that every such lease, contract, mortgage, or deed is valid. We have, then, in this part of the section, what is tantamount to an express statutory recognition of the passing of the title to the lessee, grantee, vendee, or mortgagee whenever those conditions exist which are defined in the proviso."

The learned author of the opinion then proceeded to analyze the concluding clause of the section which provides that "no action to avoid such instrument shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate," and arrived at the conclusion that the language of this clause is to be interpreted as referring back to and modifying the language in the first part of the section, wherein it is said: "The husband has the management and control of the community real property, but the wife must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered." The interpretation thus placed upon the language of the concluding clause of section 172a of the Civil Code, as this clause read until it was recast by the amendment in 1927 (St. 1927, p. 827), differs from the interpretation given by the Supreme Court in McKay v. Lauriston, 204 Cal. 557, 564, 269 P. 519, 522, wherein Justice Curtis, in discussing the 1917 amendments to sections 172 and 172a of the Civil Code, uses the following language: "All that the Legislature by these amendments did do or attempt to do was to cast about the interest of the wife in both the real and personal property of the community during the continued existence of the marriage relation added safeguards and protection against the fraudulent or inconsiderate acts of the husband in the exercise of his control and dominion over these properties of the nature of those already provided for in earlier statutes and especially in and by the 1891 amendment to section 172 of the Civil Code. It follows, to our minds, irresistibly that the same reasoning which was applied to the earlier amendment of section 172 of the Civil Code equally applies to those changes in and revision thereof accomplished by the Legislature in 1917. Additional force is, if needed, given to this conclusion when the particular provisions of section 172a as added to the Code in that year are subjected to careful consideration; for it is made to therein appear that the sole lease, contract, mortgage or deed of the husband holding the record title to community real property to a lessee, purchaser or incumbrancer in good faith, without knowledge of the marriage relation, shall be presumed to be valid *and shall be so unless an action to avoid such instrument shall be commenced within one year from the recordation thereof.* [Italics ours.] This provision renders the conveyance of the whole of the community real estate to a purchaser or incumbrancer thereof in good faith voidable but not void. * * * "

However, careful reading of the decision in Rice v. McCarthy, supra, leads to the conclusion that the language stating that the presumption of validity declared by the proviso in section 172a, Civil Code, to attach to the sole transfer of community real estate by the husband to a purchaser in good faith without knowledge of the marriage relation is a conclusive presumption is dictum, and that the language interpreting the concluding clause of the section relative to the institution of an action to avoid the instrument whereby the husband alone has transferred real property of the community is likewise dictum. The question which was presented to the court for decision was whether or not the trial court had erred in failing to make findings upon the facts which were pleaded by the defendant in the action as constituting estoppel upon the plaintiff wife. It was urged that the doctrine of estoppel was not invocable by the husband's transferee. The decision was that the doctrine of estoppel was invocable and that the trial court had erred in failing to make findings upon the facts pleaded by the defendant which it was claimed raised an estoppel in his favor. It was not necessary to the decision to consider whether the presumption of validity declared by the proviso is a conclusive presumption or a disputable presumption. Furthermore, it may be noted that, if the presumption of validity is conclusive, there was no point in considering the doctrine of estoppel, since there is no possibility of the wife in any manner avoiding the sole transfer of community property by her husband to a purchaser in good faith without knowledge of the marital relation. Once these facts are established, any attempt on her part to avoid her husband's sole conveyance must fail, if the presumption is conclusive. It may likewise be conceded that the above-quoted language of Justice Curtis in McKay v. Lauriston, supra, is dictum. Under these circumstances, therefore, it is proper to consider whether the language of the proviso declaring that the sole lease, contract, mortgage, or deed of the husband to a lessee, purchaser, or incumbrancer, in good faith, without knowledge of the marriage relation, shall be presumed to be valid, is a conclusive presumption or merely a disputable presumption. A presumption is defined in section 1959 of the Code of Civil Procedure as a deduction which the law expressly directs to be made from particular facts. Section 1957 of the same Code classifies presumptions as indirect evidence. Section 1962, Code of Civil Procedure, specifies certain presumptions which are exclusively deemed to be conclusive. This section contains seven subdivisions. The first six specify certain presumptions, none of which directly or by implication relates to the presumption mentioned in the proviso of section 172a, Civil Code, here under consideration. Subdivision 7 is in the following language: "Any other presumption which, by statute, is expressly made conclusive." Section 1963, Code of Civil Procedure, is entitled "All other presumptions may be controverted." The language of the first part of this section is as follows: "All other presumptions are satisfactory if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence." Then follow forty specifications of presumptions which are described as being of the character of disputable presumptions. Since section 172a of the Civil Code does not expressly declare that the presumption of validity which attaches to the sole lease, contract, or deed of a husband holding record title to community property to a lessee or purchaser in good faith without knowledge of the marriage relation is a conclusive presumption, it logically follows that, under the language of the above-mentioned sections of the Code of Civil Procedure, the presumption is one that may be controverted.

Section 164 of the Civil Code provides that "whenever any real or personal property, or any interest therein or encumbrance thereon, is acquired by a married woman by an instrument in writing the presumption is that the same is her separate property. * * *" If the statute contained no further reference to the presumption, it would undoubtedly be held to be not a conclusive presumption, but a disputable presumption capable of being controverted by evidence showing that, although the written instrument conveying the property ran to the wife alone, nevertheless, in fact, the property was community property. This was the holding of the court in Pabst v. Shearer, 172 Cal. 239, 242, 156 P. 466. To the same effect are the decisions in Stafford v. Martinoni, 192 Cal. 724, 221 P. 919, and Goucher v. Goucher, 82 Cal. App. 449, 255 P. 892. But there is further reference in the section to the presumption, and it is expressly declared that as to a purchaser, incumbrancer, payor, or any other person dealing with a married woman, in good faith and for a valuable consideration, the presumption is conclusive. In view of such express legislative declaration, there can be no doubt that, in favor of one dealing with a married woman in good faith and for a valuable consideration, it would be held that the presumption that she was the sole owner of property conveyed to her by written instrument was incapable of being controverted. Section 172a, Civil Code, does not, however, contain such express declaration evidencing legislative intent that the presumption of validity shall be incapable of being controverted. The question which naturally suggests itself is: "How may the presumption be controverted?" Not, of course, by a showing that the husband who had held himself out to the innocent purchaser as being unmarried was in fact married, since the existence of the marital relation is a fact essential to the creation of the presumption; not by a showing of knowledge of the marital relation by the innocent purchaser or lack of consideration for the language of the proviso presupposes the existence of consideration and lack of knowledge of the marital relation in order that the presumption of validity shall apply. By a process of elimination it may be reasonably deduced that the only escape from the presumption of validity lies in a showing by the wife that she was uninformed of the execution of the instrument conveying title to or an interest in the community property, and that she did not consent to, or acquiesce in, its execution. In other words, she must be able to avoid the working of the doctrine of estoppel. This is expressly recognized in Rice v. McCarthy, supra, where the decision was that the trial court had erred in failing to find upon the facts claimed by the innocent purchaser to have raised an estoppel against the wife who sought to avoid her husband's sole contract for sale of the community real property. But in the instant case the trial court has specifically found that the wife "did not at the time of making said sale of said contract know of the same, nor did she ever consent thereto or approve the same." By this finding, which we must assume is not lacking in evidentiary support, the possiblity of an estoppel being claimed against the wife is removed, and the court rightly concluded that the wife was not estopped from questioning the validity of the sale of the contract. Inasmuch, therefore, as we are of the opinion that the presumption of validity established by the proviso of section 172a, Civil Code, is a disputable presumption, it necessarily follows that we entertain the view that the trial court's conclusion that the presumption of validity is conclusive against appellant was incorrect.

[5-10] In view of the determination thus reached, it is apparent that the judgment in favor of respondents should be reversed. Since the findings as herein noted successfully negative the existence of facts that would constitute an estoppel against appellant, and it further appears from the findings that the action was instituted within a period of one year from the date of the assignment by the respondent William Mark to respondents Siegrist, no good reason appears why judgment should not be directed to be entered in accordance with the prayer of appellant's complaint. The prayer of the complaint seeks cancellation of the transfer by respondent William Mark to respondents Siegrist and that the property which was the subject of the transfer be declared to be community property of appellant and respondent William Mark. The ultimate effect of a decree setting aside the transfer by the respondent William Mark to respondents Siegrist will be to restore the property to the status that it occupied prior to the transfer, i. e., community property of appellant and her husband, William Mark. The effect cannot be to vest title to the property in appellant. Since the property was community property, the interest of appellant therein was a mere expectancy, possessing none of the attributes of an estate either at law or in equity. Stewart v. Stewart, 199 Cal. 318, 335, 249 P. 197; McKay v. Lauriston, supra. The conveyance by appellant's husband, respondent William Mark, was not, under the decisions, a void conveyance, but a valid transfer, subject only to the right in appellant to institute, seasonably, in equity, an action to revoke the transfer and reinstate the property as community property with the title vested in the husband. Lahaney v. Lahaney, 208 Cal. 323, 281 P. 67. But equity in its zeal to protect the inchoate expectancy of the wife against injurious invasion on her husband's part is not blind to the obvious equity that exists in favor of innocent purchasers in good faith from the husband without knowledge of the marriage relation. If an unconditional decree is rendered herein in conformity with the prayer of appellant's complaint restoring the property to the status of community property, the necessary effect will be to restore to the husband, respondent William Mark, the legal title to the property at the expense of those who have been deceived by his false representation that he was unmarried. The opportunity is thus afforded to him to deal again with the property as though it were his sole and separate property and to mulct other innocent purchasers who may be induced to part with money on the faith of his representation that he is unmarried. That a court of equity should lend its aid to the production of such a result is incredible, but the difficulty of protecting the expectancy of the innocent wife and at the same time of safeguarding the rights of innocent purchasers is apparent. The trial court has found that the money received by the husband was retained by him for his own use and benefit, and that no part of it entered into the community of appellant and her husband, William Mark. As to that part of the court's finding that the husband retained the whole of the money received by him from the sale of the property for his own use and benefit, it must be assumed that it has evidentiary support, and its correctness may not therefore be questioned. It is, however, doubtful whether the remainder of the finding, declaring that no part of the proceeds of the sale entered into the community of appellant and her husband, is in reality a finding of fact.

Sections 162 and 163, Civil Code, define the separate property of wife and husband, respectively, as property which either spouse owned before marriage or which was afterwards acquired by gift, bequest, devise, or descent. Section 164, Civil Code, declares that all other property acquired after marriage by either spouse or by both is community property. The court's findings leave no doubt that the property which was the subject of transfer by the husband was community property. The proceeds of the sale of this property must have been of the same character. A conclusion that, because the husband retained for his own use money received by him from the sale of community property, therefore the money thus received did not enter into the community property of the spouses, is not warranted. The fact that the wife derived no benefit from the transaction and that the husband expended the whole of the proceeds for his own sole benefit did not change the complexion of the property. Its character was not altered because the husband, instead of conserving the money, used it for his own purposes. That portion of the finding wherein the court found that no part of the proceeds of the sale by the husband "entered into the community" would seem, therefore, not to be a finding of fact but a legal conclusion which the court drew from the fact that the husband retained the proceeds for his own use, and, as suggested, the conclusion was incorrect. Since the proceeds of the sale were community property, and did enter into the community estate of appellant and her husband, it is apparent that the community estate, having once profited through the husband's act in selling the property without the wife's knowledge and consent, will again profit if the property is unconditionally restored to its former status.

and that it will profit at the expense of innocent purchasers. Appellant has sought the aid of equity to protect her expectancy. She is an actor appealing for equitable relief. The relief sought is only indirectly for her benefit. It is directly for the benefit of an estate in which she has an expectancy. The effect of unconditionally granting the relief sought by appellant will be to work a manifest injustice upon innocent persons who possess equitable rights growing out of the subject in controversy. The situation thus presented warrants the application of the equitable maxim that he who seeks equity must do equity. If, therefore, appellant's prayer is to be granted, and the property restored to its former status of community property, it should be accomplished only upon condition that the innocent purchasers shall be restored to the position which they occupied when, without knowledge of the marriage relation, and relying upon the husband's representation that he was unmarried, they parted with their money in return for his sole transfer. The trial court has found that the amount paid by the innocent purchasers, respondents Siegrist, was $2,076.88, and that it was paid on December 1, 1926.

The judgment is reversed.

We concur: BARNARD, P. J.; MARKS, J.

Upon stipulation of the parties it is ordered that the remittitur issue at once.

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122 Cal.App. 192

BRYSON v. LUSE et al.

Civ. 536.

District Court of Appeal, Fourth District, California.

March 28, 1932.

1. Evidence ⚿546.

Trial court has wide discretion in determining whether witness is qualified to testify as expert.

2. Appeal and error ⚿1170(7).

Where, under findings and evidence, plaintiff in action to annul deed was entitled to judgment, exclusion of testimony of qualified expert concerning value of lease received therefor, though erroneous, *held* not reversible error (Const. art. 6, § 4½).

3. Trusts ⚿95.

Defendant, in action to annul deed obtained by fraud, holds land as involuntary trustee of plaintiff from whom it was obtained (Civ. Code, §§ 2223, 2224).

4. Cancellation of instruments ⚿57.

Where defendant fraudulently obtained land from plaintiff, judgment requiring either its return or payment of its value *held* proper.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by Frank Bryson, administrator of the estate of Carrie E. Caunter, against A. F. Luse and others. From a judgment for plaintiff, named defendant appeals.

Affirmed.

Rupert B. Turnbull, of Los Angeles, for appellant.

J. L. Murphey, of Los Angeles, for respondent.

LAMBERT, Justice pro tem.

Carrie E. Caunter, now deceased, brought this action for the purpose of annulling a deed and an assignment of a contract to purchase, covering certain property in Los Angeles, Cal., on the grounds of fraud and forgery of deed and assignment, also to annul a deed to defendant and appellant herein, covering 160 acres of land in Hale county, Tex., on the grounds of fraud and lack of consideration.

The action was brought against A. F. Luse, W. T. Blalock, Jennie M. Blalock, and Rae L. Everest. The court made elaborate findings of fact and conclusions of law, and entered judgment against all the defendants other than Luse as to the Los Angeles county property and against A. F. Luse as to the property in Texas.

We are concerned on this appeal only with the appeal of the appellant Luse from the judgment affecting him as to the property in Texas. All the defendants filed notices of appeal, but Luse appealed separately from the judgment as to him, and the appeal of the other defendants, apparently, has never been presented. The plaintiff died pending this appeal, and Frank Bryson, administrator of her estate, has been substituted as plaintiff and respondent, in her place. The evidence and the findings show that appellant Luse obtained a deed from the plaintiff for 160 acres of land in Hale county, Tex., of the value of $35 per acre, on the false promise to convey her certain other lands in Texas. What he actually gave her was an assignment of an oil and gas lease which required her to perform onerous covenants. The lease was more of a liability than it was an asset. The original judgment of the court as to Luse was entered on July 6, 1928, and read:

"It is further ordered, adjudged, and decreed that the deed made by the plaintiff, Carrie E. Caunter, to the defendant, A. F. Luse for the 160 acres of land in the county of Hale, state of Texas, and described as follows, to-wit, 'The N. W. ¼ of Survey No. 31, Block A, Certificate 294, E. L. & R. R. Ry. Co., situate in the County of Hale, State of Texas,' is hereby canceled and made void and of no effect; and that the defendant A. F. Luse reconvey the said property to the plaintiff within ten (10) days from the entry of this judgment, and that the said conveyance shall contain a recital that the said property is free and clear from any conveyance of the same by the said defendant, and free and clear of any and all liens that may be existing upon the same, or any part thereof, made or suffered to be made by the said defendant A. F. Luse; and if, for any reason, the said defendant A. F. Luse cannot convey the same to the plaintiff, and give her a good, free and unincumbered title to the same, plaintiff shall have judgment against the said defendant A. F. Luse in the sum of Five thousand six hundred dollars ($5,600.00), with interest on the same at the rate of seven per cent (7%) per annum from this date; and that plaintiff have execution for the collection of same.

"It is further adjudged and decreed that this case be kept open for the purpose of making any further order herein relating to the said Texas land, and for the collection of the value thereof, said Five Thousand Six Hundred Dollars ($5,600.00). * * *"

On October 5, 1928, the court, after due notice, entered what was denominated "Order amending judgment." This document, after reciting the terms of the judgment of July 6, 1928, hereinbefore set forth, was as follows:

"And it further appearing to the court that the said defendant A. F. Luse has not complied with the terms of said judgment, in any manner, but has wholly failed to convey the said land in Hale County, Texas, to the plaintiff herein; and

"It further appearing to the court that the said A. F. Luse, together with his wife, Mary E. Luse, conveyed the said land to C. A. Cantrell and his wife, Ada Cantrell, for the sum of Four Thousand Dollars ($4,000.00), by a deed dated at Los Angeles, California, on the 8th day of March, 1928, which deed was filed for record on March 14, 1928, and recorded on the 20th day of March, 1928, by the clerk of said County of Hale, State of Texas, in Volume 87, page 306, Deed Records of Hale County, Texas; and

"The court, being fully advised in the premises, does hereby order that said judgment be amended, and that the following be added thereto:

"That the plaintiff, Carrie E. Caunter, have judgment against the defendant A. F. Luse in the sum of Five Thousand, Six Hundred ($5,600.00) Dollars, with interest thereon at the rate of seven per cent (7%) per annum from the 30th day of June, 1928; and that she have execution therefor, including the costs of this action."

The notice of appeal of appellant herein was served and filed on October 15, 1928. Respondent raises the point that we should not consider this appeal for the reason that the judgment was not amended by the order of October 4, 1928, and hence the appeal was taken too late. It is not necessary to decide whether the judgment was amended or not, for, if it was not, then the order of October 4, 1928, was an order made after judgment and is probably appealable under section 963, Code of Civil Procedure. At all events, we shall dispose of the case on the merits.

The appellant relies for a reversal of the judgment solely on two errors of the court in ruling on the admission and rejection of evidence, the assignments being specifically that the court permitted the witness Switzer to testify to the value of the land in Hale county, Tex., when he was not qualified to give his opinion, and refused to permit the witness Haas to testify as to the market value of the oil lease assigned to plaintiff, at the time it was assigned, for the reason that he was not qualified, when he was in fact qualified.

Neither appellant nor respondent has favored us with any authorities on the subject. However, the rule is clearly stated in Re Estate of Ross, 171 Cal. 64, at page 66, 151 P. 1138, 1139, as follows: "The party calling a witness to give his opinion on value may qualify him by showing his familiarity with the property and with other property in the neighborhood, his experience in the business, his familiarity with the state of the market and with sales of similar property in the vicinity, and any other facts tending to show his knowledge of the subject and capacity to give an opinion thereon. But while the fact that he knows of sales made and of the prices obtained may be elicited, the prices given in any particular instance are not admissible, except as stated, on the cross-examination of the opposing party, if he sees fit to make the inquiry."

[1] In determining whether or not a witness is qualified to testify as an expert, the trial court is allowed a wide discretion. Howland v. Oakland C. Street Railway Co., 110 Cal. 513, 42 P. 983. We think the witness Switzer was qualified to give his opinion on the value of the land. However, there was other evidence from which it could easily be inferred that plaintiff's land was worth $35 an acre. In Elliott Federated F. & V. Growers, Inc., 108 Cal. App. 412, at page 416, 291 P. 681, 682, it is said: "The appellate court must accept as true all evidence tending to establish the correctness of the finding as made, taking into account as well all inferences which might reasonably have been thought by the trial court to lead to the same conclusion."

[2, 3] However, the exclusion of the testimony of the witness Haas on the ground that he was not qualified was clearly erroneous, for, under the rule as stated in Re Estate of Ross, supra, he was well qualified to give his opinion, but we may not reverse the judgment for an error unless it is so prejudicial as to result "in a miscarriage of jus-

tice." Section 4½, art. 6, Constitution of California. We think the error was harmless. Plaintiff under the findings and evidence was entitled to her land back. The appellant, Luse, in his answer, admitted that he held the land that he obtained from plaintiff. The plaintiff, not having received what she bargained for by reason of appellant's fraud, and having offered to return the lease, was entitled to a reconveyance of her land, that is, to be restored to her original position. Paolini v. Sulprizio, 201 Cal. 683, at page 685, 258 P. 380. Therefore, the value of the lease, at the time of its assignment, became immaterial. This lease had no value at the time of the trial. Furthermore, the appellant, Luse, was a trustee under the evidence in this case and held the land in Hale county, Tex., for the benefit of plaintiff. Section 2223 of the Civil Code provides: "One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner."

And section 2224 provides: "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

[4] By the judgment of the court the appellant was required to reconvey the land or pay the plaintiff its value. This was proper. We have consumed considerable time and labor in going over the record in this case. It is not necessary to follow the appellant through all the ramifications of his nefarious transactions. Sufficient it is to say that the judgment is amply supported by the facts and the law.

The judgment appealed from is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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122 Cal.App. 73

SILVERSTEIN et al. v. OAKLAND TITLE INS. & GUARANTY CO. et al.

Civ. 8125.

District Court of Appeal, First District, Division 1, California.

March 23, 1932.

Rehearing Denied April 22, 1932.
Hearing Denied by Supreme Court
May 19, 1932.

1. Chattel mortgages 🔑8.

Assignment of money as security for payment of obligation is pro tanto "payment" and not "chattel mortgage" (Civ. Code, § 2957).

[Ed. Note.—For other definitions of "Chattel Mortgage" and "Payment," see Words and Phrases.]

2. Assignments 🔑12.

Future earnings and profits under existing contracts are assignable (Civ. Code, § 1045).

3. Landlord and tenant 🔑57(1).

Assignment of rents, without being in any particular form, is valid even though it be for purpose of security (Civ. Code, § 1045).

4. Account 🔑22.

In action for accounting by creditor of one who recently conveyed apartment house, to determine amount owing grantee, decree ordering accounting, directing marshaling of creditor's assets, and temporarily enjoining grantee from selling house, *held* proper.

5. Appeal and error 🔑839(1).

Portions of judgment not appealed from *held* unaffected by appeal and became final.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Sydney J. Silverstein and another, individually and as copartners doing business under the firm name and style of Silverstein & Silverstein, and another, against the Oakland Title Insurance & Guaranty Company, and others. From the judgment for defendants, plaintiffs appeal.

Affirmed.

Silverstein & Silverstein, of Oakland, for appellants.

Robinson, Price & MacDonald, of Oakland, for respondent Oakland Title Ins. & Guaranty Co.

M. J. Rutherford and Breed, Burpee & Robinson, all of Oakland, for respondent R. Whitehead.

PER CURIAM.

Preliminarily it is to be noted that since the appeal herein respondent Whitehead has died and Olin D. Jacoby and Rowena C. Martin, the duly appointed executors of the last will and testament of said decedent, have been by order of court substituted for said respondent. The nature of the action and the scope of the review will more fully appear from a recital of the facts.

On and prior to June 18, 1928, defendant Porter was indebted to Central National Bank in the sum of $1,650 and was also indebted to appellants in the sum of $2,500. Porter owned at that time certain real property in Alameda county. She owned one house and lot on Grand avenue, subject to an $8,000 incumbrance, and another property referred to as the apartment house property, which was subject to a first incumbrance of $24,000 and a second of $2,500. Defendant Whitehead was the holder and owner of a note in the sum of

$22,500, secured by a deed of trust on certain property in Sonoma county. On June 19, 1928, a transaction of exchange was effected between Porter and Whitehead whereby Porter purchased the said note and deed of trust on the following terms: Porter agreed to give Whitehead a note for $10,000 secured by a second deed of trust on the apartment house and subject only to the first $24,000 incumbrance; Porter also to convey to Whitehead the Grand avenue house and lot, subject to the $8,000 incumbrance; the equity of Porter to be accepted at an agreed value of $10,000. In addition, Porter was to pay Whitehead $2,500 in cash, making the total of $22,500 the face of the exchange note. Porter was to secure a loan on the note, which loan was to realize $7,500 and the note and deed of trust was to be delivered as security for the new loan. Accordingly, transfers were made between the parties. Porter borrowed from Whitehead the said $7,500 and evidenced the loan with a promissory note to secure which he made an assignment to Whitehead of the $22,500 note and trust deed. This assignment provided also that the said $22,500 note should be held by Whitehead as additional security for the payment of the $10,000 note hereinbefore mentioned and which was secured by a junior incumbrance upon the apartment house. The foregoing reflects the contractual relationship between Porter and Whitehead.

On July 28, 1928, one Maze, holding as assignee the claim due Central National Bank, commenced an action against Porter to recover the said sum of $1,650. Attachment was issued and levied against the apartment house property on said date. On August 3, 1928, appellants commenced an action against Porter to recover on their claim of $2,500. On the same date attachment issued and was levied upon the apartment house. Maze recovered judgment on August 27, 1928, for $1,850.45. On August 3d of the same year appellants recovered judgment against Porter for $2,530.15. Thereafter Maze took out execution, and after proceedings thereon, the validity of which is not questioned, the apartment house property was sold to one Mosher for the sum of $100. The date of the sale was October 22, 1928. Thereafter the appellants proceeded by writ to execute their judgment against Porter and the writ issued was returned unsatisfied, the judgment debtor holding no property upon which execution could be levied. Thereafter, on October 31, 1928, appellants filed with the sheriff a notice of redemption of the property sold under execution to Mosher. The unassailed finding is that by reason of the redemption by appellants, they are the owners of the apartment house property subject only to the right of redemption thereof as provided by law. On February 26, 1929, Whitehead recorded a notice of intention to sell the apartment house property, and thereafter on June 24, 1929, respondent Oakland Title Insurance & Guaranty Company, as trustee, caused to be published a notice of the sale of the said property. This sale, however, awaited the determination of this action. The sale was enjoined by the court below, the order of injunction reading "until the further order of this court." A further order, made on April 24, 1930, dissolved this injunction. On June 21, 1929, the Sonoma county property, which was subject to the $22,500 note and deed of trust, was sold by the trustee under said deed of trust. At such sale, Whitehead bid in the property for $6,000, which sum was returned to him as holder of the note and deed of trust, less the usual expenses of sale.

The foregoing details the facts. The present action was brought to secure an accounting of the indebtedness between Porter and Whitehead, and to determine the rights of appellants as creditors and redemptioners. Included within the relief sought was a marshaling of assets and restraint of further or any sales of property belonging to the debtor Porter. The case having been heard, the court below entered its judgment and decree ordering an accounting directing the marshaling of assets and temporarily enjoining the sale of the apartment house. In this decree it was adjudged that Whitehead was entitled to retain the rents by him received from the apartment house. This decree was entered on January 16, 1930. On April 24, 1930, the court below, after a hearing, made its order dissolving the injunction in the sale of the apartment house. This appeal is from the following portions of the judgment: First, from that portion of the judgment awarding to Whitehead the rentals from the apartment house; second, from that portion of the judgment restraining the trustee from selling the apartment house until the further order of the court. A separate appeal, by stipulation submitted on the same bill of exceptions, is taken from the order made after judgment, which order dissolves entirely the injunction theretofore made restraining the sale of the apartment house.

We will first take up the question of the rentals. The trial court found that on or about June 19, 1928, Porter did execute and deliver to Whitehead a written assignment of the rents due and to become due for any, either or all of the apartments contained in the building, as additional security for the payment of the $10,000 note. Appellants attack this assignment as being void under the provisions of section 2957 of the Civil Code. This section relates to the execution of chattel mortgages. Appellants argue that the rentals due are but personal property; that a transfer of personal property by way of security is but a mortgage. The argument of appellants is to the effect that this assignment of rents was an assignment of the lease. Then much authority is cited to the point that a lease for years is personal property and its transfer is governed by the rules regarding the transfer of personal property. The argument presented has academic merit provided the premise is conceded in all respects. However, we cannot accept as absolute the notion that an assignment of rents is in all respects identical with an assignment of the lease.

[1] Without going further into the question, the circumstances here present are somewhat peculiar. To assign money as security for the payment of an obligation is pro tanto a payment. In such a case an analytical argument, dissecting each element of the transaction, might disclose features of mortgage in as far as the intent might be expressed as one of securing another obligation. But it would go beyond the needs and even hamper the possibility of modern business to hold that where one assigns a fund or sum of money to secure the payment of an obligation, that such assignment is in reality a chattel mortgage.

[2, 3] The further claim is made that the rents were not assignable inasmuch as a mere possibility, not coupled with an interest, is not transferable under section 1045 of the Civil Code. There is no showing here sufficient to invoke this statute. For aught the record discloses, these rentals assigned were all due or to become due under existing leaseholds or contracts of tenants in the apartment house. Future earnings and profits under existing contracts are assignable. An assignment of rents, without being in any particular form, is valid even though it be for the purposes of security. 36 Cor. Jur. 368. It is further to be noted that the trial court found, upon testimony the sufficiency of which is unquestioned, that prior to redemption the appellants had full notice of the assignment of rents.

Next we approach the question of the court's action in the order of injunction and the dissolution thereof. Appellants' first contention is that there was no default in the obligation of the note or deed of trust. The evidence is sufficient to demonstrate the default and a detail of the record could serve no purpose, useful, interesting, or instructive.

[4] The entire decree was in a sense interlocutory, in that it ordered an accounting to determine the exact amount due Whitehead and contemplated a marshaling of the assets of Porter, in an equitable effort to provide satisfaction for all claims. If the accounting disclosed any possibility of Whitehead being fully compensated without the sale of the apartment house, such a contingency was provided for in the decree. We think the order as made was not only proper but most favorable to appellants.

As to the order thereafter made dissolving the injunction, being the order made after final judgment and after appeal, discussion of this point would be more or less aimless. If the order of injunction was properly interlocutory, and we have so held it, no harm can possibly result from its being dissolved.

[5] Another unusual feature is presented from the fact that the present appeals are from portions of the judgment. The remaining portions, providing for accounting, marshaling of assets, etc., are unaffected by the appeals and have become final.

The effect of an order reversing the action of the court below in dissolving the injunction after appeal would simply be to leave the court with the power to again forthwith dissolve the same, and no possible effect could be had upon any rights of appellants.

By way of repetition, perhaps, the main relief sought is being attained in the process of execution of the court's order for accounting, and the record discloses that the entire procedure relative to the injunction was in aid of the entire judgment. The proceeds of the sale are still the subject of the court's action in accounting.

The judgment and order appealed from are affirmed.

121 Cal.App. 703

In re CONNELL'S ESTATE.

CONNELL v. UNITED STATES NAT. BANK.

Civ. 8152.

District Court of Appeal, Second District, Division 2, California.

March 18, 1932.

1. Executors and administrators ⚿194(5½).

Court, passing on question of family allowance, which is dependent on estate being solvent, can adjudicate validity of claim against estate essential to conclusion estate was solvent (Code Civ. Proc. § 1466).

2. Motions ⚿45.

Prayer for specific order includes request for determination of all questions necessarily preliminary to granting or refusing relief sought.

3. Executors and administrators ⚿194(5).

Evidence supported court's finding, in passing on family allowance, that claim against estate had been settled, and that estate was solvent (Code Civ. Proc. § 1466).

4. Executors and administrators ⚿241.

Claim allowed against husband's estate, not having been passed upon on settlement of former account, could be contested by wife (Code Civ. Proc. § 1636).

5. Executors and administrators ⚿244, 245.

Court must, at suggestion of any person or on own motion, protect estate against unlawful claims.

6. Executors and administrators ⚿190.

Wife's partial payment of judgment against her individually on deceased husband's note, and foregoing of right of appeal, *held* satisfaction of judgment, precluding unpaid balance thereof from being claim against husband's estate, hence did not render same insolvent as respects order for family allowance (Code Civ. Proc. § 1466).

Facts disclosed that bank's note of $15,000, signed by deceased husband, was allowed as valid claim against husband's estate, inventoried at $4,000, and that bank procured judgment on note against wife individually, and that, on wife's paying $9,000 of judgment and foregoing her right of appeal, bank entered satisfaction of judgment, and that thereafter wife filed claim for family allowance, and bank contested on ground unpaid balance of note constituted claim against estate, making it insolvent, and precluding court from making order for family allowance.

7. Executors and administrators ⚿194(7).

Trial court's finding on conflicting evidence in passing on family allowance is conclusive.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Petition by Mary E. Connell for family allowance in the estate of J. F. Connell, known also as John F. Connell, deceased, opposed by the United States National Bank. From an order granting family allowance, contestant appeals.

Affirmed.

Patterson, Bailey & Montgomery and Charles C. Montgomery, all of Los Angeles, for appellant.

Holbrook, Taylor, Tarr & Horton, of Los Angeles, for respondent.

FRICKE, Justice pro tem.

The estate of the deceased inventoried at a little over $4,000. Appellant filed a claim, evidenced by a promissory note signed by the deceased, in the sum of $15,000, which claim was allowed. Thereafter United States National Bank, payee of said note and appellant herein, brought an action upon the note against Mary E. Connell, who also happens to be the administratrix of the estate herein, as an individual. The complaint in this action alleged that the note in question was executed by J. F. Connell, the deceased, as the agent of said Mary E. Connell; that the money borrowed was applied to the improvement of property held by deceased and Mary E. Connell as joint tenants; that the latter had accepted the benefits of the money borrowed; and that the plaintiff had filed a claim against the estate of J. F. Connell which had been approved, but that such estate was insolvent. After hearing the evidence, the court, in that action, held that Mary E. Connell was liable to the plaintiff in the sum of $15,000 with interest and attorney's fees, and judgment for the total amount was entered in favor of the plaintiff. Defendant served a notice of intention to move for a new trial, and very shortly thereafter a satisfaction of the judgment, reciting that "payment having been made" the clerk of the court was directed "to enter and we acknowledge full satisfaction of the judgment in the above entitled action," signed by the plaintiff judgment creditor's attorneys, was filed. It appears that about $9,000 was paid in satisfaction of the judgment. While there was a conflict in the evidence as to the negotiations and agreement preceding this payment and the satisfaction of the judgment, there was credible evidence that it was agreed that the settlement of the case was a settlement in full of the note and the claim against the estate, and that the payment of the $9,000 and the surrender of the right of appeal furnished the consideration.

There is no question but that the court below could not grant a family allowance more than one year after granting letters of admin-

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⚿For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes istration, if the estate is insolvent. Code Civ. Proc. § 1466. Appellant contends that the allowance of its claim rendered the estate insolvent, thus precluding the making of the order for family allowance, made three years after letters of administration were granted. Respondent contends that, after the settlement, the appellant was no longer a creditor of the estate, and that, its claim having been discharged, the estate was no longer insolvent, and therefore the court had the power to make the order for family allowance.

[1, 2] The trial court found that "the claim of the United States National Bank against the said estate has been heretofore compromised and settled," but appellant claims that the court was without power to adjudicate the validity of the claim. The power of the court to make the family allowance was dependent upon the estate being solvent, and the finding that appellant no longer had any claim against the estate was necessary to the conclusion that the estate was solvent. While the prayer of the petition was merely for an order for a family allowance, such an order could only be made, in view of the fact that more than a year had elapsed after the granting of letters of administration, if the estate was solvent. A prayer for a specific order must be construed to include a request for a determination of all questions necessarily preliminary to the denial or granting of the relief sought. Furthermore, the petition specifically alleged that appellant's claim was paid and satisfied by the settlement reached between the parties to the civil action and the satisfaction of the judgment, and the affidavit filed in opposition to the petition specifically raised the issue by denying that any part of appellant's claim against the estate was ever satisfied. The latter denial of appellant was later modified to a contention that the claim of $15,000 and interest, less the $9,000 paid in the settlement, in other words, a balance of about $8,000 was still a claim against the estate. If this be true, its assets having a value of less than $4,000, the estate was insolvent.

[3] The testimony that the amount paid in the civil suit and the foregoing of the right of appeal was consideration in full and a settlement of the note and claim against the estate, as well as in satisfaction of the judgment, supports the finding of the trial court herein that the claim of appellant against the estate "has been compromised and settled," and also gives support to the further finding that the estate is solvent.

[4-6] The allowance of appellant's claim was not conclusive or final, since allowed claims not passed upon on the settlement of any former account may be contested by the heirs for cause shown (Code Civ. Proc. § 1636; Wise v. Williams, 88 Cal. 30, 25 P. 1064); and where, as here, upon the trial of issues of fact between the interested parties the court has evidence from which it finds the fact to be that a claim made against the estate has been settled and satisfied, it may then proceed as though such claim did not exist. It is the duty of the court at the suggestion of any person or on its own motion to protect the estate against unlawful claims. Estate of Spanier, 120 Cal. 698, 701, 53 P. 357. Had the judgment in the civil action been paid in full, appellant could not have recovered anything further under the claim filed in the estate. Here we have a situation in which, by an accord and satisfaction, the consideration being the payment of one-half the amount of the judgment on or before a date specified and the further consideration that the judgment debtor would not prosecute an appeal, the judgment was satisfied, and, by the agreement, the transaction included a settlement not only of the judgment but of the note and the claim in the estate. We hold that, under these conditions, appellant ceased to have any further rights to the recovery of money by reason of the note, and that the settlement extinguished the claim in the estate as fully as though the judgment had been paid in full.

[7] Appellant raises the further point that there was an abuse of discretion in the making of any order for a family allowance, because no need therefor was shown. As the evidence on this point was conflicting, the finding of the trial court, supported as it is by evidence, is conclusive here.

The order is affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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122 Cal.App. 360

PEOPLE v. DE ANGELO.

Cr. 62.

District Court of Appeal, Fourth District, California.

April 5, 1932.

1. Criminal law ⚷1186(4).

In arson prosecution, error, if any, in giving instruction regarding principals in commission of crime, *held* not to justify reversal (Pen. Code, § 31; Const. art. 6, § 4½).

2. Criminal law ⚷775(3).

Instruction on defense of alibi to effect that it need only raise reasonable doubt of guilt of defendant in minds of jurors *held* proper.

3. Criminal law ⚷775(3).

Giving of cautionary alibi instruction *held* not to require reversal, in view of further instructions.

Cautionary alibi instruction did not require reversal, since court gave proper instruction on defense of alibi, and also repeatedly instructed on questions of burden of proof and reasonable doubt.

4. Criminal law 🔑941(1).

Refusing new trial for newly discovered evidence, cumulative evidence of uncontroverted facts, *held* not error.

5. Criminal law 🔑956(4).

Where trial court might easily have concluded that statements in affidavit were so contrary to established facts that affiant was not worthy of credit, denying new trial, *held* proper exercise of discretion.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Frank De Angelo was convicted of arson, and he appeals.

Affirmed.

W. E. Balcom, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

MARKS, J.

Appellant was accused by an information, filed by the district attorney of San Bernardino county, of the crime of arson alleged to have been committed on or about the 15th day of July, 1931. He was convicted before a jury, and his motion for new trial denied. He has appealed from the judgment and the order denying this motion.

On July 15, 1931, appellant was living with his wife and child in a small four-room house which he had built on property leased from Fred L. Hunt, and situated about six miles southeasterly from the city of Ontario. He had insured the house and its furnishings in a sum greatly in excess of their value. On the above date, a payment became due from appellant to his landlord which he did not have the money to make, and the two went to the city of Pasadena to interview the agent of a finance company which had already loaned appellant money on his contract with Hunt; their purpose being to request a further loan to appellant of a sufficient amount to pay his indebtedness then due to Mr. Hunt. No more money could be obtained from this source, and they returned to appellant's house in the afternoon of this same day, Mr. Hunt continuing on a business errand which took him to a point near the city of Riverside, returning to his home at about the hour of 11:30 o'clock that same evening.

Appellant took his wife and child to visit his father-in-law in the city of Corona on this same evening, leaving his home between 7 and 7:30 o'clock. He was not then on good terms with his father-in-law, and went to a picture show in Corona, where he stayed between the hours of 8 and 10 o'clock, when he returned to the house of his father-in-law for his wife and child, and proceeded to his own home, arriving there between 10:30 and 11 o'clock to find that the house and its contents had been damaged by fire. After having discussed this happening with certain of his neighbors, and particularly Mrs. Fred L. Hunt, he and his wife and child went to the city of Ontario, where the three spent the balance of the night in a rented apartment. Appellant arose at about 6 o'clock the following morning, had his breakfast, and returned with his wife and child to his residence, reaching there at about 6:30 o'clock. The three then went to the home of a Mrs. Ida Buccura to secure her services in the packing of corn which was then being harvested by appellant. The four returned to appellant's house, reaching there after 8 o'clock, and found that it had again been on fire, and, with its contents, quite seriously damaged.

R. S. Woodard, a neighbor of appellant residing about a quarter of a mile to the west, saw smoke and fire issuing from appellant's house at about five minutes past 8 o'clock on the evening of July 15th. The smoke was black, and resembled that which would come from burning oil. He went to the house, and with a friend succeeded in extinguishing the flames. Some of the furniture was partially burned, and it was removed to the front yard by the two men. This fire originated within the rooms on the westerly side of the house. At about ten or fifteen minutes past 7 o'clock on the following morning neighbors again saw that the house was on fire; the fire originating in the rooms on the easterly side. The flames had gained such headway that it was necessary to call the fire department from Ontario, which extinguished it. Oil and kerosene soaked rags, together with oil and kerosene in cans and other containers, were found in numerous places in the house. Oil had been smeared on the interior walls, evidently with a brush which was found the morning of the 16th in a can partially filled with oil mixed with kerosene. At the rear of the house appellant had three storage tanks in which were separately kept lubricating oil, gasoline, and kerosene. The tanks were locked, and the locks were not disturbed after the fire on the morning of July 16th. It is admitted by both parties that both fires were of incendiary origin.

Two other circumstances in the evidence deserve mention. One was that a blue or green sedan was seen in the yard near appellant's house after the time appellant left with his wife and child for Corona and before the first fire was discovered. Appellant's brother-in-law owned such an automobile. The second was that appellant failed to report the first fire to any officer, even though he knew from his inspection before he went to spend the night in Ontario that it was of incendiary origin, and that he made immediate efforts to collect his fire insurance after the fire of July 16th, though he knew that both fires were of such origin.

Appellant urges as grounds for a reversal of the judgment, first, that the trial court erred in giving two instructions to the jury, and, second, that the trial court erred in denying his motion for new trial on the ground of newly discovered evidence.

[1] One of the instructions of which appellant complains contained the substance of section 31 of the Penal Code defining who are principals in the commission of a crime. He urges that this instruction was not applicable to the facts of the case, and was therefore erroneously prejudicial. We cannot agree with him in this contention. While it might have been better to have omitted the giving of this instruction, still, on the record before us, we cannot conclude that it was entirely unjustifiable. There was no direct evidence as to who prepared and lighted the incendiary fires in appellant's house. He and his wife had equal opportunities, and might have had the same motives, and certainly would have received the same advantages from the insurance to be received following their losses from the fire. It is not beyond the realm of possibility that the two might have acted jointly in this crime of arson. Appellant made evasive, untrue, and incriminating statements in attempting to explain the fire during the time its origin was being investigated by the officers of the law and before criminal charges were preferred against him. No such statements were made by his wife. These statements furnish the evidence pointing more strongly to the guilt of appellant than to an implication of his wife in the commission of the offense. In view of these circumstances, we do not believe that the error in giving this instruction, if it be assumed to be error, is sufficient to justify us in a reversal of the judgment under the provisions of section 4½ of article 6 of the Constitution and the many decisions interpreting and applying its provisions.

[2, 3] The court gave a cautionary instruction on the defense of alibi which has been given by many trial judges and generally criticized by appellate courts in this state. It is not necessary to review the numerous decisions in which it has been held that this instruction should not be given but which have refused to reverse the judgments of conviction where the instructions taken as a whole were fair and correct. The trial court in the instant case gave a proper instruction on the defense of alibi to the effect that it need only raise a reasonable doubt of the guilt of appellant in the minds of the jurors. It also repeatedly instructed the jury on the questions of burden of proof and reasonable doubt. These instructions bring the case without the rule in the case of People v. Garrett, 93 Cal. App. 77, 268 P. 1071, and within the rule of the cases cited in 8 Cal. Jur. 377, and in the two supplements to this volume. Under the circumstances of the instant case, we do not believe that the giving of this cautionary instruction requires us to reverse the judgment. Similar instructions might better be omitted by trial judges in the future.

[4] Upon his motion for new trial appellant presented his own and the affidavits of three others containing what he maintains to be newly discovered evidence upon which the trial court should have granted his motion for new trial. Two of these witnesses were prepared to testify that they saw appellant in a moving picture theater in the city of Corona between the hours of 8 and 10 o'clock on the evening of July 15, 1931. After carefully reviewing the record, we have concluded that the evidence in the court below rather conclusively establishes that appellant was in this theater during the hours stated. The fact of his being there was not seriously questioned by the prosecution. This newly discovered evidence was not of sufficient materiality or weight to require a new trial of the case, as it was merely cumulative of other evidence admitted during the trial and proving a fact not controverted by the respondent.

[5] Appellant also submitted the affidavit of one Tony Sartello in which it was stated in effect that Sartello called at appellant's home between the hours of 8 and 8:30 o'clock on the evening of July 15, 1931; that he went to the house and knocked upon the door but that no one answered; that he returned to his automobile, turned on his lights; and that a man passed in front of his car within the illuminated area, whom he subsequently identified as probably being F. L. Hunt. The trial court exercised a proper discretion in denying a motion for a new trial upon the ground of the newly discovered evidence set forth in this affidavit under the rule announced in 8 Cal. Jur. 442, as follows: "A motion for new trial is addressed to the sound legal discretion of the trial court, and its action will not be disturbed upon appeal except in an instance manifesting a clear and unmistakable abuse of such discretion. This rule is peculiarly applicable to an application based upon the ground of newly discovered evidence, as to which an enlarged discretion is committed to the trial court, because of the disfavor with which such applications have always been regarded. This discretion is to be exercised in determining the diligence shown, the truth of the matters stated and the materiality and probability of the effect of them if believed to be true. The question as to whether the evidence produced on the motion is such as to render a different result probable is one peculiarly addressed to the discretion of the trial judge."

The evidence rather conclusively shows that between 8 and 8:30 o'clock on the evening of July 15, 1931, F. L. Hunt was a number of miles distant from the scene of the fire. It is also very evident that the first fire was started some minutes prior to 8 o'clock on this evening. It had progressed to such an extent that at five minutes past 8 o'clock black smoke was issuing from the house and flames had broken out through one of the windows on the west side and were burning upward to the roof. If Sartello had been at the house between 8 and 8:30 o'clock on this evening it is quite certain that he did not see F. L. Hunt, and it is also quite certain that he must have seen that the house was on fire. The trial court might easily have concluded that the statements in this affidavit were so contrary to establish facts that the witness was not worthy of credit and that the contents of the affidavit should be disregarded as inherently improbable.

The judgment and the order appealed from are affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

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122 Cal.App. 329

O'NELLION v. HAYNES.

Civ. 8137.

District Court of Appeal, First District, Division 2, California.

April 2, 1932.

1. Automobiles ⚷244(20).

In action by guest for injuries sustained when autoist, while going about 50 miles an hour at night, side swiped car, evidence of autoist's excessive speed *held* to show gross negligence.

2. Damages ⚷132(3).

$25,000 for injuries to woman resulting in permanent total disability and total paralysis and lack of sensation from breast down *held* not excessive.

3. Witnesses ⚷246(1).

Juror's asking defendant on witness stand, after both sides had completed examining witnesses, whether defendant carried liability insurance, and defendant's affirmative reply, *held* no ground for reversal.

Neither plaintiff nor her counsel played any part in bringing such testimony before the jury, and defendant could not predicate a reversible error upon a situation arising out of his act in giving this information to the jury. Furthermore, the record did not disclose any reasonable probability that such irregularity had any effect upon the verdict.

4. Appeal and error ⚷977(5).

Trial court's conclusion in denying motion for new trial should not be disturbed unless plainly wrong.

5. Trial ⚷260(1).

Failure to give proposed instruction which was covered by instructions given *held* no error.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Martha O'Nellion against Clifton Haynes. From the judgment for plaintiff, defendant appeals.

Affirmed.

Ford & Johnson and Fletcher A. Cutler, all of San Francisco, for appellant.

A. S. Whitmore and Paul A. McCarthy, both of San Francisco, for respondent.

SPENCE, J.

Plaintiff sued for damages for personal injuries received while riding as a guest in the automobile driven by defendant. Upon a trial by jury plaintiff recovered judgment in the sum of $25,000, from which judgment defendant appeals.

Before discussing the main contention of appellant, we will first consider other points raised in the briefs. In the opening brief appellant contended that the evidence was insufficient to support the implied finding of gross negligence. This contention is without merit. We believe that counsel for appellant practically so conceded in his oral argument, as he indicated at that time that the evidence was set forth in the briefs only to show that the case was a close one, and that the jury should have been discharged because of the incident to which reference will be hereinafter made. However, we cannot even agree that the case was a close one.

[1] The accident happened at night while appellant was driving his automobile in a southerly direction along the Skyline boulevard about four miles south of Daly City. Respondent and two other guests were riding with appellant in his car, which "side swiped" another car proceeding in the opposite direction. The paved or oiled section of the highway was 29 feet in width with a shoulder about 3 feet in width on either side. The col-

lision occurred on a straight stretch between a curve in the highway and a culvert approximately 650 feet south of said curve. This stretch of road had a 6 per cent. drop toward the south. The evidence showed that appellant was driving his car between 50 and 60 miles per hour over the protests of all three of his guests, and that the machine was swaying from side to side as the result of the excessive speed. Appellant admitted that he had been asked not to drive so fast, but had continued at the same speed. He further admitted that he was going between 40 and 50 miles per hour when he first saw the other car at a distance of 450 feet; that he kept his foot on the accelerator all the time going down this 6 per cent. grade: and that he did not know whether his car went over the left side of the road while driving between the curve and the point of collision. The testimony showed that prior to the accident the other car was on its right side of the highway and that appellant's car was straddling the white line marking the center of the highway. Appellant's testimony on this subject was rather uncertain and unsatisfactory. He would not testify that the other car was on its left side of the highway, but his testimony only went as far as to indicate that just prior to the collision it was running in a straight course "right on the center line." He was asked, "You mean by that that the car was over the center line, or the car was on the center line." To which he answered, "The left wheel was running, I would say, almost on the white line." In our opinion the conduct of appellant in continuing to drive at an excessive rate of speed as he approached in close proximity to the on-coming car shows an entire want of care on his part and a clear case of gross negligence.

[2] In view of the question hereinafter discussed, a few words should be said regarding the amount of the verdict, even though appellant makes no claim that the verdict is excessive. Respondent was thrown from the automobile before it turned over at the side of the highway and she sustained injuries which permanently and totally disabled her. There was no conflict whatever regarding her injuries, respondent's doctor being the only expert witness testifying on the subject. Respondent had suffered severe injuries to her cervical and thoracic spine with serious damage to the spinal cord. These injuries resulted in total paralysis and lack of sensation in her body from the breast down. She was entirely without control of her bowels or urinary system. Despite operation, no improvement had been made and the doctor was definitely of the opinion that the condition was permanent. He stated that she was 100 per cent. disabled so far as the ordinary pursuits of life were concerned, and that "all she could do would be to lie in bed or sit in a chair and use her hands and brains." We need not consider respondent's special damage, which was large in amount, for even in absence of evidence of special damage, the award was amply sustained by the evidence to which reference has been made.

From what has been said, we conclude not only that there was ample evidence to sustain a verdict in favor of respondent, but also that the only rational conclusion which the jury could have drawn from the evidence was that appellant was grossly negligent, and that respondent was entitled to a verdict. We further conclude that the verdict was not excessive, but on the contrary the amount awarded was fully justified by the uncontradicted evidence of the frightful injuries which respondent had sustained.

We now come to appellant's main contention, which is that "there was a mistrial and the jury should have been discharged on the motion of appellant." This contention is based upon a rather unusual incident occurring upon the trial. Appellant was on the witness stand as the last witness called. Counsel for both sides had completed their examination. One of the jurors propounded a question to appellant which he answered and then propounded the following question: "You carry liability insurance, don't you?" To which appellant answered: "I do." No objection was made to the question, but it appears probable that appellant answered the question before his counsel had an opportunity to object. Counsel for appellant immediately moved that the jury be discharged, which motion was denied. Counsel for respondent then moved that the question and answer be stricken out and the jury admonished. This motion was granted, and thereupon the court instructed and admonishéd the jury in a most thorough and painstaking manner.

[3, 4] The question here presented is a novel one. Neither respondent nor her counsel played any part in bringing the testimony regarding insurance before the jury and appellant seeks to predicate reversible error upon a situation arising out of his own act in giving this information to the jury from his own lips. There may be cases in which a reversal would be required by the very fact that such information was conveyed in any manner to the jury, but in our opinion such action is not required in the present case. As above stated, the evidence pointed unerringly to a verdict in favor of respondent, and the verdict rendered was not excessive in any sense of the word. The trial court's action in denying appellant's motion for new trial indicated its opinion that the irregularity referred to did not result in prejudice to appellant. This conclusion of the trial court should not be disturbed unless it is plainly wrong. La Fargue v. United Railroads, 183 Cal. 720, 192 P. 538. We cannot so declare in the present case, for, after a

review of the entire record we cannot say that there is any reasonable probability that the irregularity mentioned had any effect whatever upon the verdict of the jury.

[5] Appellant further complains of the trial court's failure to give his proposed instruction covering section 124(a) of the California Vehicle Act (St. 1923, p. 557, § 124(a), as amended). Counsel had no doubt overlooked the trial court's instruction No. XXIII, which covered the entire subject-matter of the proposed instruction.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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122 Cal.App. 229

RICHMOND SANITARY CO. v. FRANKLIN et al.

Civ. 7298.

District Court of Appeal, First District, Division 2, California.

March 30, 1932.

Mechanics' liens 🔑157(1).

That lien claim stated contract price to be $393.66, whereas proof showed contract price of $692.46, credit of $300 and balance of $392.46, *held* not to require nonsuiting of claimant on ground of variance, absent fraud or intervention of third parties' rights (Code Civ. Proc. §§ 1187, 1203).

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Richmond Sanitary Company against Julius L. Franklin and others. From an order granting a nonsuit, plaintiff appeals.

Reversed.

Bianchi & Hyman, of San Francisco, for appellant.

R. L. Husted, of San Francisco, for respondents.

STURTEVANT, J.

From an order granting a nonsuit in favor of the owner in an action to foreclose a mechanics' lien the plaintiff has appealed.

As stated in the plaintiff's opening brief and conceded in defendant's brief, the appeal involves only one question, which is: "* * * Whether or not there is a material variance between the pleading of the contract and the proof thereof and also whether or not there is a material variance between the contract set up in the notice of lien and the contract attempted to be proven at the trial." However, the defendant adverts to the fact that there was no proof that the price was agreed on, nor was there any proof of the reasonable value. The latter proposition is true, but its truth arises by reason of the opening statements made by the respective attorneys. In both statements it was conceded that the price was agreed upon. In its complaint the plaintiff alleged: "That the defendants agreed to pay for said plumbing fixtures the sum of $393.66 to be paid at once to plaintiff herein at the market value of the same and all of the same and that the reasonable charge for said plumbing fixtures was the sum of $393.66 above mentioned. * * * That there is a balance now due, owing, payable and unpaid on account of the matters herein alleged from said defendants to said plaintiff in the sum of $393.66." In the claim of lien, among other recitals are to be found the following: "* * * That under and by virtue of the terms of said contract said Charles Schuldt was to pay Richmond Sanitary Company the sum of three hundred ninety-three and 66/100 dollars ($393.66) * * * that the amount [balance?] of the said contract price of said materials furnished, as aforesaid, was and is the sum of three hundred ninety-three and 66/100 dollars ($393.66) lawful money of the United States; that no part of said sum has been paid and the whole thereof, to-wit, the sum of three hundred ninety-three and 66/100 dollars ($393.66) is now due, owing, payable, and unpaid thereon to said Richmond Sanitary Company, a corporation, after deducting all just credits and offsets." (Brackets ours.) The undisputed proof was that the plaintiff's entire bill amounted to $692.46; that there was paid on account $300, and that the balance due was $392.46. At the end of the plaintiff's case the defendant made his motion for a nonsuit and based it on the fact that as he claimed the notice of lien alleged a contract for $393.66, whereas the proof showed a contract for $692.46, a credit of $300, and a balance of $392.46. In support of his motion he cited and relied on Santa Monica L. & M. Co. v. Hege, 119 Cal. 376, 379–381, 51 P. 555. That case was decided in 1897. In 1911 our statutes on the subject of mechanics' liens were wholly revised. Stats. 1911, p. 1313, chap. 681. Section 1187 of the Code of Civil Procedure, among other things, provides: "* * * Every person save the original contractor * * * may file for record with the county recorder * * * a claim of lien containing a statement of his demand after deducting all just credits and offsets. * * *" Section 1203 of the Code of Civil Procedure, among other things, provides: "Mistakes in statement not to invalidate lien.

No mistake or errors in the statement of the demand * * * shall invalidate the lien, unless the court finds that such mistake or error in the statement of the demand, * * * was made with the intent to defraud, or the court shall find that an innocent third party, without notice, direct or constructive, has since the claim was filed, become the bona fide owner of the property liened upon, and that the notice of claim was so deficient that it did not put the party upon further inquiry in any manner." In the instant case there was not a particle of evidence purporting to be fraud, and there was no claim that the rights of third parties have intervened. Looking back at the claim of lien, it will be noticed that the only possible error was the use of the word "amount" instead of the use of the word "balance." Other expressions may be said to be ambiguous, but may not be said to be untrue. Even prior to the amendment of the Code, in a well-considered case, it was said: "Whether the full amount of the contract price was stated, with credits, or the true amount due after deducting credits, is immaterial, provided the facts were correctly stated." Star Mill & Lumber Co. v. Porter, 4 Cal. App. 470, 473, 88 P. 497, 498. Since the enactment of section 1203 of the Code of Civil Procedure many cases have been decided on the authority of that section. No one of them has followed the harsh rule stated in the case of Santa Monica L. & M. Co. v. Hege, supra. It will suffice to cite Jarvis v. Frey, 175 Cal. 687, 689, 690, 166 P. 997, and cases there cited. It follows there was no material variance between the notice of lien and the proof.

As between the proof and the complaint, we find no actual variance. Be that as it may, the variance, if any, was not prejudicial to the defendant because he was not prevented from setting up and availing himself of any defense. Acme Lumber Co. v. Wessling, 19 Cal. App. 406, 413, 414, 126 P. 167.

The order appealed from is reversed.

We concur: NOURSE, P. J.; SPENCE, J.

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122 Cal.App. 357

RITTIGSTEIN v. DIGNAN.

Civ. 8399.

District Court of Appeal, First District, Division 2, California.
April 5, 1932.

1. Specific performance ⟹114(2).

Complaint, stating no facts showing that consideration for contract to sell realty was adequate or that contract was just, fair, and reasonable as to vendor, stated no cause of action for specific performance (Civ. Code, § 3391).

2. Appeal and error ⟹1009(3).

Trial court's finding on conflicting evidence in suit for specific performance of contract to sell realty for stated price, subject to bank loan, that such price alone was inadequate, *held* conclusive on appeal.

3. Specific performance ⟹28(1).

Contract must be certain as to subject and consideration to enforce specific performance thereof.

4. Specific performance ⟹28(1).

Uncertainty as to parties' true intentions as expressed in contract renders specific enforcement thereof inequitable.

5. Specific performance ⟹8.

Equities of specific enforcement of contract are addressed to chancellor's discretion.

Appeal from Superior Court, City and County of San Francisco; Harry W. Falk, Judge.

Suit by Ella M. Rittigstein against M. H. Dignan. Judgment for defendant, and plaintiff appeals.

Affirmed.

Roy L. Daily, of San Francisco, for appellant.

Sullivan, Roche, Johnson & Barry, of San Francisco, for respondent.

NOURSE, P. J.

Plaintiff sued for the specific performance of a contract to sell real property. Defendant had judgment, from which the plaintiff has appealed on typewritten transcripts.

The contract was in writing upon a form generally used by members of the San Francisco Real Estate Board. When presented to the defendant for signature it read (in part): "Received from Bruce Painter, hereinafter designated as the purchaser, the sum of Five Hundred ($500.00) Dollars being deposited on account of Twenty Thousand ($20,000.00) Dollars lawful money of the United States of America, the purchase of the following described property in the City and County of San Francisco, * * * Subject to: Bank loan of twelve thousand ($12,000.00) Dollars to one subsisting lease," etc. Before signing the contract the defendant drew a line in ink through the words and figures "twenty thousand ($20,000.00) Dollars" and inserted the figures "$21,000.00" and then added after the word "dollars" the words "net cash to be paid to seller." The contract, as thus altered, was then presented to the purchaser, who gave his approval and deposited the sum of $9,000, which he claimed to be the full purchase price upon the assumption of the bank loan of $12,000. The defendant refused to accept the payment and refused to go further with the contract upon those terms. His claim was that the words "net cash to be paid to seller" meant that he was to receive $21,000 in cash, and that the purchaser was to assume the bank loan and all other incumbrances to which the sale was specially made subject. The purchaser thereupon assigned his interest to the plaintiff, who brought this action.

[1, 2] The judgment must be affirmed. First, because the complaint does not state facts sufficient to constitute a cause of action in that it does not state any facts showing that the consideration was adequate or that the contract was just, fair, and reasonable as to the respondent. Section 3391, Civ. Code; Joyce v. Tomasini, 168 Cal. 234, 237, 142 P. 67; Salisbury v. Yawger, 184 Cal. 783, 795, 195 P. 682; Miller v. Gusta, 103 Cal. App. 32, 35, 283 P. 946; Walker v. Clark, 80 Cal. App. 520, 523, 252 P. 334. Notwithstanding this defective pleading, evidence was taken on the subject and the trial court found that the price of $21,000 was not a fair or reasonable value of the property described, and that the contract as construed by the court, in harmony with respondent's contention and calling for the payment of $21,000 in addition to the bank loan of $12,000, was "fair, just and reasonable in all its parts, but said sum of $21,000 is not now and was not at the time mentioned in said complaint an adequate price for said property not subject to the mortgage thereon." This finding, supported as it is by conflicting evidence, does not present a debatable question on this appeal.

[3-5] Second, because it is a fundamental principle respecting the remedy of specific performance that the contract must be certain in its terms—as to the subject—as to the consideration. 25 R. C. L., pp. 17, 18. The construction of the contract contended for by appellant was rejected by the trial court upon evidence which fully supports the trial court's finding. The most that can be said of appellant's case is that it is one in which there may be some uncertainty as to the true intentions of the parties as expressed in the contract sought to be enforced. This factor demonstrates the inequity of appellant's cause, for to enforce a contract which the trial court finds one of the parties did not intend to make would not be equitable. And the equities of enforcement are addressed to the discretion of the chancellor.

Judgment affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

122 Cal.App. 313

BENNINGTON v. NATIONAL PACKING CO.

Civ. 704.

District Court of Appeal, Fourth District, California.

April 1, 1932.

1. Appeal and error 🔑981.

To reverse trial court's order denying new trial for newly discovered evidence, it must affirmatively appear that trial court abused its discretion.

2. New trial 🔑106.

Denial of new trial for newly discovered evidence merely contradicting evidence of prevailing party was not abuse of discretion.

3. New trial 🔑102(4).

New trial for newly discovered evidence of witness whom defendant attempted to locate before trial merely by telephone calls *held* properly refused for lack of diligence.

4. New trial 🔑102(9).

Absolute forgetfulness of witness' name is no reason for granting new trial to present his testimony.

5. Appeal and error 🔑977(5).

Trial court's denial of new trial will not be interfered with on appeal, if case presents reasonable or even debatable justification for ruling.

6. Appeal and error 🔑110.

Order denying new trial is not appealable.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by T. A. Bennington against the National Packing Company, a copartnership consisting of L. A. Chudacoff and another. From a judgment for plaintiff and an order denying a new trial, defendant appeals.

Appeal from order denying new trial dismissed, and judgment affirmed.

Greenberg & Beilenson, of Los Angeles, for appellant.

George H. Moore and Gerald O'C. Egan, both of Los Angeles, for respondent.

LAMBERT, Justice pro tem.

In this case the plaintiff and respondent, T. A. Bennington, brought an action against defendant and appellant, National Packing Company, a copartnership consisting of L. A Chudacoff and Max Goldring, for injuries sustained in a collision with an automobile belonging to the defendants, and driven at the time by L. A. Chudacoff. The case was tried by the court sitting with a jury, and the jury returned a verdict in favor of plaintiff for

$15,000. The defendants made a motion for a new trial on all the statutory grounds; the motion was denied. Appellants appealed from the judgment and order denying the new trial. The sole point made on this appeal, and for which we are asked to reverse the judgment, is that the trial court abused its discretion in not granting a new trial on the grounds of newly discovered evidence.

The only witnesses as to how the accident happened were the plaintiff and the defendant Chudacoff, and each claimed it was the other's fault. The accident took place at the intersection of Sixth and St. Louis streets, in the city of Los Angeles. Sixth street runs east and west and St. Louis street runs north and south. The plaintiff was driving a Ford coupe west on Sixth street and defendant was driving a Ford sedan on St. Louis street. Sixth street slopes downward towards the intersection and St. Louis slopes upward towards the intersection, so that just prior to the accident plaintiff was going downhill and defendant Chudacoff uphill. Sixth street, east of St. Louis, is forty feet from curb to curb, and west of St. Louis street is twenty feet from curb to curb. St. Louis street, both north and south of Sixth street, is forty feet from curb to curb. The plaintiff's testimony was to the effect that when he was thirty-five or forty feet east of the intersection he first saw the defendant Chudacoff three hundred and twenty-five feet north of the intersection, and that he was traveling forty-five miles an hour, and that he slowed down very little as he approached the intersection. That plaintiff, when he first observed the defendant, was traveling five to ten miles per hour; that he was going five miles per hour when he entered the intersection and was going about seven miles per hour at the center of the intersection. He kept his eye on defendant until he reached the center of the intersection, at which time the defendant was still forty or sixty feet north of the northerly curb line of Sixth street. Before the car reached the westerly curb line of St. Louis street it was struck by defendant's car.

The defendant's testimony was, when his sedan was about ten feet from the intersection the plaintiff's coupe was about fifty feet from the intersection. That his car was going fifteen to twenty miles per hour, slowed down as he approached the intersection, and had almost stopped at the time of the accident; that his sedan was first in the intersection; that plaintiff's coupe was coming at a speed of forty miles per hour, swaying from side to side as though the driver had lost control of it, and did not slow down at all, and, still going at this high rate of speed, struck his sedan.

On the motion for new trial the defendants presented the affidavit of James Hoag, who claimed to be an eyewitness of the accident, and whose affidavit corroborated, in all particulars, the testimony of the defendant Chudacoff. There was also presented the affidavits of Mrs. Kitty Manheimer, Leonard A. Chudacoff, and Rose Chudacoff, his wife. These affidavits set forth the facts and circumstances showing the defendant's reasons for not producing the witness Hoag at the trial. The affidavit of Kitty Manheimer set forth in substance that she conducted a rooming house at 812 West Tenth street, in the city of Los Angeles; that she was personally acquainted with James Hoag and that he lived at her rooming house in June, 1926, and left her place September 1, 1926; that while Hoag lived at her house, somebody unknown to her called her on the telephone a number of times and asked for James Hoag, and that on each occasion he was not at home; that thereafter a man called at her house looking for a man who had witnessed an automobile accident at Sixth and St. Louis streets, but that she could not recall his name; that on September 28, 1927, a woman, stating she was Rose Chudacoff, came to her rooming house and talked to her at length; that in the course of the conversation affiant mentioned the name of Jimmie Hoag, and that Rose Chudacoff immediately said, "Jimmie Hoag, that was the name of the witness"; that affiant then told Rose Chudacoff where the witness Hoag could be located; and that she recognized Leonard E. Chudacoff as the man who had previously called at her home making inquiry about Jimmie Hoag.

Leonard E. Chudacoff in his affidavit deposes, among other things, that he was in the hospital about eleven weeks following the accident; that while in the hospital he learned that one of the employees of the hospital was an eyewitness to said accident, but he did not learn his name before he left the hospital; that when he left he requested the manager of the hospital to ascertain the name of the witness, if possible, and advise him at his office; that about two months after he left the hospital somebody telephoned the name of the eyewitness was Jimmie Hoag and that his address was 812 West Tenth street, Los Angeles, and also gave the telephone number at said address; that the name and address were taken by his secretary and written on a piece of paper and given to him; and that he took it home and placed it in a dresser drawer, and that it afterwards became lost. Here an extract from the affidavit is as follows: "* * * Affiant was never able thereafter to find said paper and was not able to remember the name of said witness; that before losing the name and address and telephone number of said Jimmie Hoag affiant called said telephone number several times but was unable to get in touch with Jimmie Hoag, it being stated on each instance that he was away; that affiant stated to the party who answered the telephone at the said address that he wanted to talk to said Jimmie Hoag about the accident which had occurred at Sixth and St. Louis streets; that a short time after receiving said name and address affiant drove past the address given on said paper and at said time affiant's said wife, Rose Chudacoff, was with him, and affiant pointed out the said house, stating that it was the house where the man who had witnessed his accident lived; that thereafter affiant lost said paper, containing the name and address of said witness; that the time when affiant drove past said house was a very short time after receiving said name and address; that shortly thereafter, upon looking for said name and address, affiant discovered that he had lost said name and address, and on numerous occasions thereafter affiant endeavored to find said paper, containing said name and address, but was unable to do so; that after losing said name and address affiant could not remember the name of said witness and therefore called at said address, 812 West Tenth street, being able to recall the house on account of having previously driven past there and noted said house, and made diligent inquiry from the landlady at said address in an endeavor to locate the man who had witnessed his said accident; but, although affiant made such diligent inquiry, said landlady was not able to enlighten him as to the identity of the said witness; that affiant had never seen said Jimmie Hoag, to know him by name, and was not even able to describe him to said landlady, and that the only information he could give the landlady was that affiant was looking for a man who had witnessed his automobile accident and who worked at the Santa Fe Hospital. * * *"

The rest of the affidavit is not material, being merely a corroboration of Kitty Manheimer's affidavit. The affidavit of Rose Chudacoff corroborated the affidavit of her husband and Kitty Manheimer in some particulars.

[1] In order that we may reverse the order of the trial court it must affirmatively appear to this court that the trial court abused its discretion in denying the motion for new trial. The rule governing appellate courts in passing on the action of the trial court in denying a motion for new trial upon the ground of newly discovered evidence is thoroughly settled and clearly stated in Baule v. Drobatz, 6 Cal. App. 594, at page 596, 92 P. 666, 667, as follows: "It is sufficient to say that the question of whether the newly discovered evidence could with reasonable diligence have been discovered and produced at the trial, and the question whether, if it had been produced, a different conclusion might have resulted, were questions addressed to the sound legal discretion of the trial court, and its action will not be disturbed unless it appears that its discretion has been manifestly abused. Oberlander v. Fixen, 129 Cal. 690, 62 P. 254; People v. Buckley, 143 Cal. 392, 77 P. 169; People v. Sing Yow, 145 Cal. 4, 78 P. 235."

In Wood v. Moulton, 146 Cal. 317, at page 322, 80 P. 92, 94, it is said: "There is not a sufficient showing of diligence, and the evidence itself is, in its nature, cumulative and designed to contradict the plaintiff's witnesses, and the rule is that newly discovered evidence which is merely cumulative or designed to contradict witnesses is not of a character to warrant granting a new trial. People v. Anthony, 56 Cal. 397; Chalmers v. Sheehy, 132 Cal. 459, 64 P. 709, 84 Am. St. Rep. 62."

Also, in Re Estate of Walden, 166 Cal. 446, at page 450, 137 P. 35, 37: "We cannot say that the court below abused its discretion in denying the motion for a new trial so far as it was based on newly discovered evidence. All of the new evidence presented comes within the well-established rule that the trial court may, in its sound discretion, refuse a new trial upon this ground, where the new evidence is merely cumulative, or where it tends merely to impair the credibility of the evidence of the prevailing party. Chalmers v. Sheehy, 132 Cal. 462, 84 Am. St. Rep. 62, 64 P. 709; People v. Goldenson, 76 Cal. 352, 19 P. 161; Wood v. Moulton, 146 Cal. 322, 80 P. 92; Stoakes v. Monroe, 36 Cal. 388; People v. Weber, 149 Cal. 350, 86 P. 671."

In this connection it must be borne in mind that the accident happened on April 27, 1926, and the case was tried September 27, 1927, and that the witness was found one day after the trial, and also that the defendants asked for no continuance before the case was tried on account of the missing witness.

[2] Now, the evidence of Hoag only contradicts the evidence of the prevailing party, and comes squarely within the rule above stated. It shows, not new evidence, but a new witness with the same evidence as given by the losing party. We have examined the record, and while the appellant made a better showing before the trial court than is usually the case in such matters, it would be merely speculation on our part to attempt to say that at another trial, with this new witness, a different result would ensue.

[3, 4] Furthermore, the court was justified in refusing to grant a new trial, for lack of diligence. The defendant was not justified in relying merely on the telephone calls to locate what, to him, seemed to be such an important witness, and it also seems rather unusual, to say the least, that although he made several telephone calls, on each occasion asking for the witness Hoag, that he should then entirely forget the name, yet remember the street address; also absolute forgetfulness of the witness's name is no more excusable than absolute forgetfulness by a witness of matters to which he might have testified at the

trial, and is no reason for granting a new trial. Fresno Estate Co. v. Fiske, 172 Cal. at page 600, 157 P. 1127.

[5] However, we are not required to speculate as to just what actuated the trial court in his ruling. So long as the case presents a reasonable or even debatable justification under the law for the ruling of the court, such action will not be interfered with here, irrespective of what our own ideas might be as to the propriety of the court's action. Obviously the trial court is in a much better position to reach a just conclusion on the hearing of such a motion than we could possibly be. He has seen and heard the witnesses and observed the jury, and we will not attempt to set our judgment against his so long as the question is debatable.

[6] We have not overlooked the cases cited by appellant, but they are not applicable to the instant case. The appeal from the order denying a new trial not being an appealable order, is dismissed.

The judgment appealed from is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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121 Cal.App. 639

WRIGHT v. SALZBERGER et al.

Civ. 8183.

District Court of Appeal, First District, Division 1, California.

March 16, 1932.

Rehearing Denied April 15, 1932. Hearing Denied by Supreme Court May 12, 1932.

1. **Constitutional law 🔑278(7).**
Fraudulent conveyances 🔑3.

Statute making insolvent's voluntary transfer fraudulent and void as to existing creditors does not violate due process clause of Federal Constitution (Civ. Code, § 3442; Const. U. S. Amend. 14).

> This is so, since a rational connection exists between insolvency followed by voluntary conveyance and an intent to defraud, justifying the state, under its police power, in declaring that when such facts appear the attempted transfer shall be void as to existing creditors, regardless of the transferror's intent.

2. **Fraudulent conveyances 🔑265.**

Complaint, in action to set aside alleged fraudulent conveyance, containing prayer for general relief, entitled plaintiff to any relief appropriate under evidence.

3. **Fraudulent conveyances 🔑300(7).**

Stipulation respecting cash distributed and distributee's verified accounts proved value of personalty of estate fraudulently transferred to her.

4. **Fraudulent conveyances 🔑312(3).**

Judgment against transferee for amount of fraudulently transferred property *held* proper after transferee's sale or conversion thereof to own use.

5. **Fraudulent conveyances 🔑316.**

In action to vacate fraudulent conveyance, creditor without other resources for collection may have accounting against transferee for rents and profits.

6. **Fraudulent conveyances 🔑313(1).**

Judgment that creditor owns property fraudulently transferred *held* improper; merely vacating conveyance being proper.

7. **Fraudulent conveyances 🔑314.**

In creditor's action based on fraudulent transfer by one against whom judgment was recovered, money judgment against transferor *held* improper.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by Thomas Osborne Wright, a minor, by Joseph S. Wright, his guardian ad litem, against Robert Salzberger and another. From an adverse judgment, defendants appeal.

Reversed and remanded with directions.

William M. Abbott, K. W. Cannon, Cyril Appel, and Ivores R. Dains, all of San Francisco, for appellants.

Ostrander & Carey, W. F. Ostrander, and Marvin B. Sherwin, all of Oakland, for respondent.

PER CURIAM.

An appeal from a judgment in favor of plaintiff in an action to set aside a transfer by defendant Robert Salzberger of his undivided one-fourth interest in the estate of Julius Salzberger, deceased, to defendant Sophia Salzberger.

On October 19, 1921, plaintiff, a minor, was injured when a coaster on which he was riding came in collision with an automobile driven by defendant Robert Salzberger. An action for damages was commenced by plaintiff against Salzberger & Son, a copartnership consisting of the defendants above named and said Julius Salzberger. The action was dismissed as to Sophia Salzberger, and Julius Salzberger died on December 25, 1921. The transfer in question, which was executed on July 10, 1922, was in terms a grant of the transferor's interest in all the property of the estate, and on October 9, 1923, pursuant thereto there was distributed to said Sophia Salzberger in the matter of the estate the interest transferred. On August 28, 1922, a trial of said action was had, which resulted in a verdict and judgment in favor of Robert Salzberger. An order for a new trial was granted, and the action was again tried, and on November 16, 1923, a judgment was entered against defendant last named in the sum of $15,000. The present action was commenced on January 11, 1924, and was brought to trial after said judgment became final.

The trial court found that the transfer was voluntary and not made for a valuable consideration; that said Robert Salzberger was then and continues to be to the knowledge of defendant Sophia Salzberger insolvent and unable to pay his debt; and that the transfer was made and received with the intent to defraud and delay his creditors, and in particular the plaintiff, in the collection of their debts.

The estate of the decedent consisted of real and personal property, and in this connection the court found that the value of the interest of the transferor in the personal property thereof was $2,263.75; that the same was converted into cash by the transferee and that she received therefrom the sum of $1,976; also that the net income received by her from the transferor's interest in the real estate amounted to $2,425, a total of $4,401.

A decree was entered adjudging the transfer to be fraudulent and void, awarding plaintiff said sum of $4,401 as a personal judgment against both defendants, and also adjudging plaintiff to be the owner of an undivided one-fourth interest in the real property of the estate (describing it) theretofore distributed to defendant Sophia Salzberger.

[1] The trial court held that in view of the facts the transfer was void under the provisions of section 3442 of the Civil Code; but appellants contend that the provision of this section making certain transfers void is violative of the due process clause of the Federal Constitution (Amendment 14); further, that the complaint is insufficient to sustain the findings or judgment, that certain findings are not supported by the evidence, and that the judgment erroneously awards plaintiff a money judgment against both of the appellants and an interest in the real property mentioned. They concede that the testimony establishes the fact of insolvency and that the transfer was voluntary. The evidence also shows sufficiently that there was no valuable consideration for the transfer; but appellants claim that the above provision of the section being violative of the Constitution, they were entitled to prove, and that the evidence shows, an absence of a fraudulent intent on the part of the transferor.

Before the adoption in 1895 (Stats. 1895, p. 154) of the provision attacked, insolvency alone was insufficient to make a voluntary conveyance void as to creditors. Bull v. Bray, 89 Cal. 286, 26 P. 873, 13 L. R. A. 576; Hawley v. Harrington, 152 Cal 188, 92 P. 177. But insolvency was held to be persuasive of fraud and, with other facts, sufficient to justify a finding of fraudulent intent. Wolters v. Rossi, 126 Cal. 644, 59 P. 143; 12 Cal. Jur., Fraudulent Conveyances, § 60, p. 1018. The amendment, however, makes any transfer or incumbrance of property made or given voluntarily or without a valuable consideration by a party insolvent or in contemplation of insolvency fraudulent and void as to existing creditors; and under this provision it has been held that the intent of a transferor is immaterial. Atkinson v. Western Development Syndicate, 170 Cal. 503, 150 P. 360; Tobias v. Adams, 201 Cal. 689, 258 P. 588; Lefrooth v. Prentice, 202 Cal. 215, 259 P. 947.

Appellants contend that it was not competent for the Legislature to provide that the facts recited in the section should be conclusive as to fraudulent intent, and that the section is to that extent void. As urged by them it has been held that to justify a rule that one fact shall constitute presumptive proof of another there must be a rational connection between them (Clem v. Evans [Tex. Com. App.] 291 S. W. 871, 51 A. L. R. 1135), and that the Legislature cannot constitutionally make one fact conclusive of another if the former is not in and of itself conclusive. State v. Potello, 40 Utah, 56, 119 P. 1023; Vega S. S. Co. v. Cons. Elevator Co., 75 Minn. 308, 77 N. W. 973, 43 L. R. A. 843, 74 Am. St. Rep. 484; Hammond v. State, 78 Ohio St. 15, 84 N. E. 416, 15 L. R. A. (N. S.) 906, 125 Am. St. Rep. 684, 14 Ann. Cas. 732; People v. Falk, 310 Ill. 282, 141 N. E. 719; Taylor v. Anderson, 40 Okl. 316, 137 P. 1183, 51 L. R. A. (N. S.) 731. However, the provision is not merely a rule of evidence, but of substantive law (Wigmore, Evidence, § 2492; Mix v. Board of Commissioners, 18 Idaho, 695, 112 P. 215, 32 L. R. A. (N. S.) 534; Heiner v. Greenwich Sav. Bank, 118 Misc. Rep. 326, 193 N. Y. S. 291), and like enactments have frequently been held to be within the police power of the state. While no cases directly bearing upon the provision in question have been called to our attention, statutes regulating sales in bulk, containing similar provisions, and that of California the identical declaration (Civ. Code, § 3440), have been uniformly held not to be violative of the due process or the equal protection clauses of the Fourteenth Amendment. Lemieux v. Young, 211 U. S. 489, 29 S. Ct. 174, 53 L. Ed. 295; Kidd, Dater, etc., Co. v. Musselman Grocer Co., 217 U. S. 461, 30 S. Ct. 606, 54 L. Ed. 839; Marlow v. Ringer, 79 W. Va. 568, 91 S. E. 386, L. R. A. 1917D, 619. As stated, it was the rule before the amendment that insolvency, while persuasive of a fraudulent intent, was insufficient alone to avoid a voluntary conveyance. There is, nevertheless, a rational connection between the fact of insolvency followed by a voluntary conveyance and an intent to defraud, which is sufficient to justify the state in the exercise of its police power in declaring that when such facts appear the attempted transfer shall be void as to existing creditors regardless of the intent of the transferor. Lemieux v. Young, supra; James-Dickinson, etc., Co. v. Harry, 273 U. S. 119, 47 S. Ct. 308, 71 L. Ed. 569.

[2] The complaint, which contained a prayer for general relief, was sufficient to entitle plaintiff to any relief appropriate under the evidence. Rogers, etc., Co. v. Southern California, etc., Co., 159 Cal. 735, 115 P. 934, 35 L. R. A. (N. S.) 543.

[3] As to the finding of the value of the personal property of the estate this is fully supported by the stipulation of the parties as to the cash distributed, and by the verified first and final account of Sophia Salzberger, which she herself offered in evidence and which was competent as an admission of value. Estate of Bauer, 79 Cal. 304, 21 P. 759; Estate of Huntoon, 174 Cal. 282, 163 P. 52.

[4] Distribution of the estate was had in October, 1923, and the personal property was disposed of shortly thereafter. The court added interest to the amount for which said Sophia Salzberger disposed of the transferor's interest in the personal property of the estate. The interest period was about five years, and the interest allowed amounted to $691.60. The court also calculated the transferor's proportion of the net income from the real property for the same period to be the sum of $1,733.40; the total, as stated, being $4,401.

While the record discloses evidence of rent received, that question, in view of what is hereinafter said, is not for the present material.

Where property alleged to have been fraudulently conveyed is shown to have been sold by the grantee or converted to his own use a personal judgment for the value thereof may be entered. Davis v. Winona Wagon Co., 120 Cal. 244, 52 P. 487; Henderson v. D. S. Denehy, etc., Co., 48 Cal. App. 41, 191 P. 558; Ohio Elec. Car Co. v. Duffet, 48 Cal. App. 674, 192 P. 298. Consequently the judgment against Mrs. Salzberger for the amount received by her for the transferor's interest in the personal property with interest thereon was proper. Swinford v. Rogers, 23 Cal. 233; 27 Cor. Jur., Fraudulent Conveyances, § 462, p. 671.

[5] The complaint in the present case prayed for a decree setting aside the transfer; that the interest of Robert Salzberger in the property be sold and the proceeds applied to the payment of the judgment; and for general relief. As stated, the decree adjudged that the transfer be canceled, and declared plaintiff to be the owner of an undivided one-fourth interest in the real property of the estate; also judgment was entered against both defendants for the amount of the estimated rents and profits received therefrom by said Sophia Salzberger.

With respect to the latter portion of the decree, while the question seems not to have been passed upon in this state, elsewhere the rule is well established that if the creditor has no other resources for the collection of his debt, or his claim is not fully satisfied by a sale of the property fraudulently conveyed, he may, if the conveyance be set aside, have a decree against the grantee for an account of the rents and profits while the property was in his possession to the extent necessary to satisfy the claim (27 Cor. Jur., Fraudulent Conveyances, § 460, p. 670, and cases cited), and such accounting may be had in the suit to set aside the fraudulent conveyance. Lee v. Cole, 44 N. J. Eq. 318, 15 A. 531; Mead v. Combs, 19 N. J. Eq. 112; Burne v. Partridge, 61 N. J. Eq. 434, 48 A. 770.

[6, 7] Nor has our attention been called to any authority for the decree that plaintiff is the owner of an interest in the property. No sale of the interest of the transferor was had under execution in the original action, and while such execution was issued the same was returned wholly unsatisfied. The rules governing the entry of judgments setting aside fraudulent conveyances are that judgment may be rendered simply setting aside the conveyance, in which event plaintiff can proceed to enforce his judgment by a sale of the land under execution; or the court may proceed to do complete justice by ordering a sale of the property under its own direction. 27 Cor. Jur., Fraudulent Conveyances, §§ 812, 813, pp. 851, 852, and cases cited: Hills v. Sherwood, 48 Cal. 386; Emmons v. Barton, 109 Cal. 662, 668, 42 P. 303; First Nat. Bank v. Maxwell, 123 Cal. 360, 371, 55 P. 980, 69 Am. St. Rep. 64. Likewise a money judgment in the present case as against defendant Robert Salzberger is unsupported by the pleadings or the evidence, and is not sustained by reason or authority.

Appellants cite the case of Hopkins v. White, 20 Cal. App. 234, page 249, 128 P. 780, where the court in this case doubts the right to attack a decree of distribution which has become final, and which was entered pursuant to the transfer of an interest in the estate of a decedent, although the assignment was procured by fraud; but in denying a rehearing this portion of the opinion was disapproved.

The pleadings and findings are sufficient to support a judgment against the defendants under the rules above referred to, and no other questions require discussion.

For the foregoing reasons the judgment must be reversed and a new judgment entered on the findings in conformity with the views expressed.

The judgment is accordingly reversed, and the cause remanded, with directions to the trial court to enter its decree as follows: That the transfer from defendant Robert Salzberger to defendant Sophia Salzberger is void as to the plaintiff so far as necessary to liquidate the latter's claim; that plaintiff have judgment against defendant Sophia Salzberger for the amount received by her for Robert Salzberger's interest in the personal property of the estate, with interest thereon, a total of $2,667.60, said sum, when paid, to be applied in satisfaction to that extent of the judgment recovered by plaintiff in the previous action against Robert Salzberger; that the trial court, if it deem such course advisable, provide in its decree for a sale under its direction of the interest of said Robert Salzberger in the real property described in paragraph 8 of the findings, or remit the plaintiff to his execution at law upon his judgment against said defendant; and that the decree also provide that in either case if the amounts realized from such sale and from the money judgment against defendant Sophia Salzberger be insufficient to satisfy said previous judgment against defendant Robert Salzberger the said Sophia Salzberger account for the rents and profits received by her from said real estate to the extent necessary to satisfy plaintiff's claim, not to exceed, however, one-fourth of such rents and profits.

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122 Cal.App. 105

CONNER v. UNION AUTOMOBILE INS. CO.

Civ. 4487.

District Court of Appeal, Third District, California.

March 23, 1932.

1. New trial ⊂⇒155.

Motion for new trial was deemed automatically denied on expiration of 60 days after service of notice of entry of judgment on defendant by mail, hence subsequent order purporting to grant new trial was invalid (Code Civ. Proc. §§ 660, 1012, 1013).

Since this notice of entry of judgment was duly served, defect in affidavit did not extend statutory period for passing on motion for new trial, since jurisdiction of court does not depend on proof of service, but rather on date of the actual service of the notice, and the fact that such service has actually been made.

2. Insurance ⊂⇒398.

Insurer *held* not estopped from denying liability for automobile collision damages occurring when automobile was towing trailer, although subsequently insurer's agents directed making of repairs to automobile.

The automobile policy recited that policy did not cover damages or expenses while automobile was operated, maintained, or used for towing or propelling any trailer. Such provision was not waived, nor was the insurer estopped from setting up such provision, because of subsequent conduct of insurer's agents in having repairs made to automobile because of their misconstruction of policy in that respect, since insured was not prejudiced by such conduct.

3. Estoppel ⊂⇒52.

"Waiver" is voluntary abandonment of known existing right.

[Ed. Note.—For other definitions of "Waiver," see Words and Phrases.]

4. Insurance ⊂⇒371.

Under doctrine of waiver, contract may not be reformed to create liability for condition specifically excluded by very terms thereof.

5. Insurance ⊂⇒371.

If automobile insurance contract is procured by fraud or insurer's conduct misleads insured to his prejudice, insurer may be estopped from denying liability.

6. Estoppel ⊂⇒58.

"Estoppel" is equitable bar to enforcement of claim when claimant's conduct misleads adverse party to his prejudice.

[Ed. Note.—For other definitions of "Estoppel," see Words and Phrases.]

7. Insurance ⊂⇒424.

Automobile policy provision exempting insurer from liability when automobile is operated with trailer is valid because of added hazard.

8. Insurance ⊂⇒377(2).

Automobile insurer *held* not reasonably charged with knowledge that insured intended to operate automobile with trailer, so as to make insurer liable in absence of inquiry.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by F. J. Conner against the Union Automobile Insurance Company. Judgment for plaintiff, and defendant appeals.

Reversed.

Wakefield & Hansen, of Fresno, for appellant.

William N. Graybiel, of Turlock, for respondent.

Mr. Justice R. L. THOMPSON.

This is an appeal from a judgment against a surety company to recover damages which were sustained as the result of an automobile casualty.

The plaintiff secured a judgment against the defendant surety company for the sum of $1,340 as indemnity for damages sustained in an automobile collision. The insured machine was towing a trailer at the time the accident occurred. The policy contains the following exemption clause: "This policy does not cover * * * (b) damage or expense while the automobile * * * is operated, maintained or used * * * for towing or propelling any trailer, vehicle or implement."

[1] The judgment was rendered January 26, 1931. Notice of the entry of judgment was served on counsel for the defendant by mail February 4th, pursuant to section 1012 of the Code of Civil Procedure. The receipt of this notice is not disputed. The affidavit of service was defective. A new and adequate affidavit of service of the notice of entry of judgment was subsequently filed. This amended affidavit is not certified as a part of the record on appeal. The respondent now asks for a diminution of the record to include this amended affidavit. This motion should be granted. The amended affidavit may be filed in this court and considered as a part of the record on appeal. A notice of intention to move for a new trial was filed February 11, 1931. This motion for a new trial was subsequently submitted on briefs to the court for decision. On April 11th the court made an order granting the new trial.

This order granting a new trial is ineffectual and void. The statutory limitation of time within which the court was authorized to pass upon the motion for a new trial had elapsed. The last paragraph of section 660 of the Code of Civil Procedure provides: "The power of the court to pass on motion for a new trial shall expire sixty (60) days from and after service on the moving party of written notice of the entry of the judgment, or if such notice has not theretofore been served, then sixty (60) days after filing of the notice of intention to move for a new trial. If such motion is not determined within said sixty (60) days, the effect shall be a denial of the motion without further order of the court."

Since written notice of the entry of judgment was duly served on the defendant by mail pursuant to sections 1012 and 1013 of the Code of Civil Procedure, on February 4th, the motion for a new trial is deemed to have been automatically denied upon the expiration of sixty days thereafter. The subsequent order purporting to grant the new trial is therefore invalid. The court was without jurisdiction to make that order.

The respondent contends that because the affidavit of service of notice of the entry of judgment was defective and that the court had no actual knowledge of the time of service of this notice, the time for determining the motion was extended by section 660, supra, to sixty days from the date of filing the notice of intention to move for a new trial. This construction is at variance with the clear import of the language of the statute. The limitation of time within which the court is authorized to decide a motion for new trial does not depend upon mere proof of service of notice of the entry of judgment, nor upon the court's actual knowledge of this service. The statutory period of sixty days from the filing of the notice of intention to move for a new trial is allowed only on condition that written notice of the entry of judgment "has not theretofore been served." In the present case this notice was duly served, but the proof of service was defectively made. This defect in the affidavit does not extend the statutory period for passing on the motion for a new trial. The jurisdiction of the court does not depend upon proof of service, but rather upon the date of the actual service of notice. The syllabus in the case of Heinlen v. Heilbron, 94 Cal. 636, 30 P. 8, correctly states the principle which is decisive of this contention on the part of respondent, as follows: "The jurisdiction of the supreme court of an action appealed thereto does not depend upon the proof of service of the notice of appeal, but upon the fact that service has been made; and a motion to dismiss an appeal upon the ground that the record does not show a sufficient service will be denied if the appellant can show by other proof that the notice was properly served, even though the transcript be defective in that regard."

The motion for new trial must therefore be deemed to have been denied. This brings us to the merits of the cause.

The fact that the insured automobile was towing a trailer at the time of the accident is undisputed. The exemption clause of the policy as above quoted is not controverted. The respondent, however, asserts this exemption clause was waived by the conduct of the defendant in ordering the repair of the machine and assuming the liability to pay the expenses incurred in the performance of this service.

The evidence shows that when the insurance on the automobile was applied for the plaintiff asked the agent to transfer the insurance from a Reo truck which he had formerly owned to the new truck for which he had recently traded. At that time the insured said: "I believe that truck has full coverage." To which the agent replied: "Yes * * * it has; that is, the little ton and a half truck (is fully covered)." This reply infers the former insurance on the Reo truck did not cover an attached trailer. The question regarding the insurance of a trailer was not discussed. It appears the agent had no knowledge of the use of a trailer by the plaintiff. There is no evidence that the policy insuring the Reo truck from which the contract was transferred also covered a trailer. The company was accustomed to charge an additional premium for insuring a trailer. In the event the insurance of a trailer was desired, in consideration of an additional premium, a rider covering the trailer was attached to the policy. This was not done in the present case. There was no request for it to be done. There was no discussion regarding the use or insurance of a trailer. Regarding this subject, the agent, Honeywell, testified:

"Q. Do you remember Mr. Conner asking you when the policy was taken out, if he had full insurance? A. No sir. * * *

"Q. You didn't call his attention to anything in the policy that might void it? * * * A. No sir, I don't have any recollection.

"Q. He didn't make any representations to you that he was not using a trailer? A. No sir.

"Q. In fact you knew that he was using trailers? A. No sir.

"Q. You didn't know at any time he was using trailers? A. No sir.

"Q. You never saw him around town with a trailer on his truck? A. Never noticed a trailer on (any) one of his trucks."

It further appears that after the collision occurred the local agent, Mr. Honeywell, promptly notified the general agent, Reed, of the accident. He went to Turlock and inspected the damaged machine. He then learned for the first time that the automobile was towing a trailer at the time of the accident. In spite of this information he determined what repairs were necessary, estimated the probable cost thereof, and directed that the machine be taken to a particular garage in Tracy for repairs. The insurance company delivered to the owner of the garage its check for $125 toward the payment of this bill. The general agent explained that he authorized this work to be performed assuming that the insurance company was liable under the terms of the policy for "collision damages," which means injury to the car of the insured as distinguished from "personal injury and property damage," which means injury to individuals or to the other man's car. In other language, the general agent assumed his company was liable for actual damage to the insured car. He testified that their policy formerly so provided, but that it had been changed about a year previous to the issuance of this policy. About three weeks after the accident occurred the insurance company repudiated its liability entirely. This action was then commenced.

[2-6] The appellant contends that the plaintiff's automobile was not covered by the insurance policy which is here involved, because it was towing a trailer when the accident occurred. It is asserted the insurance was specifically limited to the machine while it was operated without a trailer. The respondent does not dispute the existence of this clause, nor its effect. But it is claimed the defendant waived this exemption by authorizing the repairs to be performed after it secured knowledge of the fact that the automobile was towing a trailer when the accident occurred.

The question is squarely presented on this appeal as to whether an insurance company may be estopped from denying its liability for damages to an automobile incurred in an accident under conditions specifically exempting the company from liability under the unambiguous terms of the policy, by reason of subsequent acts or conduct of the insurer. This case does not involve the waiving of conditions which are required by the terms of the policy as a prerequisite to the establishment of liability, such as prompt notice of the accident. It involves the construction of a contract of insurance which specifically limits the liability to the use of an automobile without an attached trailer. The exemption clause provides: "This policy does not cover * * * damages or expenses while the automobile * * * is operated, maintained or used * * * for towing or propelling any trailer." A "waiver" is a voluntary abandonment of a known existing right. By means of the doctrine of waiver a contract may not be reformed so as to create a liability for conditions which are specifically excluded by the very terms of the instrument. If the contract is procured by fraud or the conduct of the insurer is such as to mislead the insured to his prejudice, then the insurer may be estopped from denying liability. "Estoppel" is an equitable bar to the enforcement of a claim when the conduct of the claimant misleads the adverse party to his prejudice. There was nothing in the conduct of the agent for the defendant in the negotiations for the issuance of the policy which could warrant the plaintiff in claiming he was deceived regarding the coverage of the trailer. Neither did the agent's subsequent instructions to make the necessary repairs deceive the insured to his prejudice. The plaintiff was undoubtedly disappointed when the insurance company repudiated its liability, but he was not prejudiced by its original assumption of liability, for undoubtedly the same repairs would have been required at the same cost, if he had made all arrangements himself. Certainly the plaintiff was not prejudiced by the voluntary contribution of $125 by the insurer, which he could not have otherwise secured.

It therefore appears the conduct of the agents of the insurance company, in subsequently misconstruing the policy, constituted neither a waiver nor an estoppel.

[7] The attachment of a trailer to the automobile while it was being operated is clearly an added hazard. There appears to be good reason why an insurance company may lawfully limit its liability to the operation of the insured machine free from the use of an attached trailer which increases the hazard. An automobile is not ordinarily used with a trailer. It is reasonable to expect the owner of a machine who desires to obtain insurance for his automobile with a trailer attached to so inform the insurer.

In the case of Coolidge v. Standard Accident Ins. Co. (Cal. App.) 300 P. 885, 888, the same exemption clause of a policy respecting an attached trailer was construed, which is involved in this case. In the Coolidge Case it was claimed this exemption clause was waived by failure to plead in the answer of the insurance company, pursuant to section 437a of the Code of Civil Procedure, that the presence of the attached trailer contributed to the cause of the accident. The court said: "It was not necessary to make these allegations. The defendant's exemption from liability does not depend upon the attached trailer becoming the cause of the accident or even contributing to the casualty. The very fact that the trailer was being towed at the time of the accident relieved the defendant from liability according to the specific terms of the insurance policy. The company was entitled to protect itself against this added hazard. The unambiguous terms of the policy did exempt the company from liability while the automobile was towing a trailer."

The liability of an insurance company is ordinarily measured by the express terms of its written contract. A policy may lawfully exempt the insurance company from liability while the automobile is being operated by a driver under the age which entitles him to a chauffeur's license. Sears v. Illinois Indemnity Co. (Cal. App.) 9 P.(2d) 245. So, also, the policy may exempt the insurer from liability while the car is being used under a contract for hire. Brown v. International Indemnity Co., 121 Kan. 406, 247 P. 432. The breach of a condition in a policy to the effect that the insurer shall not be liable for loss or damage while the vehicle is incumbered by lien or mortgage, will defeat the right of recovery. 13–14 Huddy's Ency. of Auto. Law, 143, § 123. At page 151 of the volume last cited, it is said: "In such a case there is no forfeiture, but simply a suspension of a coverage while the car is being" so used.

[8] In support of his contention that the appellant waived the exclusion clause with relation to the trailer, the respondent relies chiefly on the case of Sam Wong v. Stuyvesant Ins. Co., 100 Cal. App. 109, 279 P. 1050, 1051. This was a suit upon a fire insurance policy which contained the provision that, "This entire policy shall be void * * * (C) if the subject of insurance be a building on ground not owned by the insured in fee simple." The plaintiff owned the insured building which was constructed on leased premises. No inquiry regarding the title to the land was made by the agent. The insured was not guilty of fraud or misrepresentation in procuring the policy. The court said: "[Since] the insurance company made no inquiry concerning his [the insured's] interest, and issued a policy to him, and accepted and retained the premium, *the company must have been presumed to have knowledge of the condition of the title*, and to have assured the property with such knowledge."

Applying this principle to the present case, the respondent claims that because the appellant failed to inquire about the use of a trailer, that this exemption clause was waived. There appears to be a clear distinction between these cases. In the Sam Wong Case the entire policy depended upon the insured having title to the real property. The policy became absolutely void and valueless without this title. The entire contract depended upon the title to the real property. The title to this property was a matter of public record, which charged every one contracting with relation thereto, with knowledge of the title. In the absence of title in the insured person, the agent was selling him a valueless contract, and collecting premiums without consideration. Under such circumstances the court properly said the insurance company was charged with knowledge of the absence of title to the real property.

In the present case, the circumstances are quite different. The policy was intended to insure a particular automobile, which was specifically described. Neither party mentioned the use or purpose of insuring a trailer. Ordinarily an automobile is operated without a trailer. Certainly the insurer could not reasonably be charged with knowledge that the insured intended to operate his machine with a trailer. The policy is perfectly valid so long as the machine is operated without a trailer. This is the specific purpose for which it was insured. The use of the trailer increased the hazard. The insurance company had a right to provide against this hazard. The insurer had no knowledge or intimation that the machine was to be used with a trailer. There is no logic or justice in assuming that the appellant in this case should be charged with knowledge of the fact that the insured intended to use his machine with a trailer.

The judgment is reversed.

We concur: Mr. Presiding Justice PRESTON; Mr. Justice PLUMMER.

HANDLEY v. LOMBARDI.

Civ. 7881.

District Court of Appeal, First District, Division 1, California.

March 21, 1932.

Rehearing Denied April 20, 1932. Hearing Denied by Supreme Court May 19, 1932.

1. Automobiles 🔑245(91).

Where only rear 6 feet of slowly departing truck was in intersection when struck on side by swift automobile on clear day, last clear chance doctrine was properly given to jury.

Plaintiff riding in truck and truck driver going west had observed automobile coming from north when it was some 300 feet distant. They paid no further attention to it until automobile was about 50 feet away. Truck never attained greater speed than 10 or 12 miles per hour. Automobile was traveling between 40 and 45 miles per hour.

2. Automobiles 🔑246(58).

Mere testimony of motorist that on clear day he did not see truck, which he ran into from side in intersection, until too late to avoid collision, did not render last clear chance instruction inapplicable.

3. Negligence 🔑93(1).

Negligence of truck driver was not imputable as matter of law to superintendent riding with him in superintendent's action against colliding motorist (Civ. Code, § 2351).

Facts disclosed that plaintiff was superintendent for owner of the truck and was traveling from one warehouse to another within scope of his employment, driven by his son, who was also employed by owner of the truck as a truck driver, and that plaintiff as superintendent had power to direct and control the driver of the truck, though plaintiff was not the master or principal of the driver but only an intermediate and superior employee or agent.

4. Appeal and error 🔑1033(5).

Instruction that truck driver's negligence was imputable to superintendent riding with driver if latter had power to control *held* favorable to motorist colliding with truck.

5. Negligence 🔑141(11).

In action by superintendent for injuries sustained when truck in which he was riding collided with another, instruction *held* not erroneous as telling jury that control or supervision was not exercised by plaintiff over operation of truck.

Instruction to the effect that negligence of driver of the truck would not in itself bar superintendent's right of recovery was concluded with statement to effect that instruction assumed not only that plaintiff did not exercise or assume or endeavor to exercise control or supervision over operation of the truck, but also that he had no power or authority to do so.

6. Automobiles 🔑246(20).

Instruction *held* not erroneous as requiring jury to find defendant negligent if it found that at speed at which he was driving he was likely to crash into other vehicles, even though collision was caused solely through fault of driver of other vehicle.

Instruction which stated that, if motor vehicle operated by defendant at rate of speed allowed by law upon application of its brakes was likely to crash into other vehicles, then defendant was not exercising proper care, was concluded with statement that it was not purpose of court to suggest to jury what its finding or conclusion should be.

7. Trial 🔑296(13).

Appellate court will not pass on correctness of instruction which court explicitly withdrew before completing.

8. Trial 🔑296(3).

Court's modification of defendant motorist's instructions on proximate cause under misapprehension that they related to contributory negligence *held* not prejudicial, in view of other instructions and jury's verdict.

9. Trial 🔑295(1).

Instructions must be considered as a whole.

10. Trial 🔑133(6).

Reference to defendant as "this rich dairyman" *held* not prejudicial misconduct, where court upon objection promptly instructed jury to disregard reference.

11. Evidence 🔑263(2).

Where motorist's oral admission of liability included statement as to insurance coverage, entire conversation was admissible.

12. Evidence 🔑558(7).

Parts of letter by plaintiff's medical witness, stating that plaintiff was keeping his symptoms alive because of pending litigation, *held* properly excluded on cross-examination, where examination as to whether symptoms were subjective was permitted.

13. Pleading 🔑236(3).

Allowance of trial amendment alleging hernia resulting from injury was within court's discretion.

14. Damages 🔑208(2).

Plaintiff's evidence that after automobile accident hernia developed while he was confined to bed in hospital *held* sufficient to take question of cause of hernia to jury.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Hugh Handley against Sebastian Lombardi, also known as S. Lombardi. From judgment for plaintiff, defendant appeals.

Affirmed.

Daniel W. Burbank, C. F. Laumeister, William M. Abbott, K. W. Cannon, Cyril Appel, and Ivores R. Dains, all of San Francisco, for appellant.

Carey & Gorfinkel, of San Francisco, for respondent.

DOOLING, Justice pro tem.

This is an appeal from a judgment for plaintiff following a jury verdict. Plaintiff and respondent was injured in a collision between an automobile truck in which he was riding and an automobile driven by appellant. There is evidence from which the jury might find that the truck in which respondent was riding was being operated on the extreme northerly or right-hand side of Twenty-Third street in San Franciso approaching its intersection with Folsom street from the east; that upon arriving at the easterly property line of Folsom street the truck was brought to a stop; that it then started to cross Folsom street in second gear and never attained a greater speed than ten or twelve miles per hour; that the driver of the truck and respondent both saw appellant's automobile, about the time the truck started across Folsom street, approaching them from their right along Folsom street at a distance of about three hundred feet; that neither of them looked to the right again until appellant's automobile was within fifty feet of them and at a time when it was too late for them, by anything that they could do, to avoid being struck. There was likewise evidence that appellant's automobile was traveling at the rate of forty or forty-five miles per hour and struck the right rear wheel of the truck when it was almost across Twenty-Third street, only six feet of the rear portion of the truck then extending into that street; and that the weather was clear and there were no obstructions to vision between appellant's automobile and the truck from the time the truck started to cross Twenty-Third street.

[1] The court instructed the jury on the last clear chance doctrine and appellant claims error on that ground. The case is on all fours with Smith et al. v. Los Angeles Ry., 105 Cal. App. 657, 288 P. 690, 691, wherein it was held that the jury was properly instructed on the doctrine of last clear chance. In the Smith Case a horse-drawn vehicle traveling at the rate of three miles per hour was struck by an electric car traveling at the rate of twenty-five miles per hour. Substitute slow-moving truck for slow-moving horse and wagon, and rapidly moving automobile for rapidly moving street car, and the cases are not distinguishable on their facts, with the exception that appellant had the additional opportunity to avoid a collision afforded by his ability to turn his automobile so as to pass to the rear of the truck which is denied to a street car confined as it must be to its own tracks.

[2] Specifically, appellant claims that since appellant testified that he did not see the truck until he was almost upon it, there was no evidence from which the jury could find that he had actual knowledge of the danger of collision before it was too late to avoid it. A similar claim was disposed of in the Smith Case in the following language: "The motorman testified that he did not see plaintiff on the tracks until the car was within some 30 feet of the wagon, and that the horses were then upon the track. It is contended that there is no other evidence in the record which would justify a contrary finding. The track, for some blocks leading to Third street, was straight; one could see for several blocks; the motorman himself admitted he could see for some 150 feet ahead. He was sitting on his chair at the front of the car, with his hand on the control, for several hundred feet while approaching the scene of the injury. The wagon was moving at the very slow speed of 3 miles per hour. The car was moving about eight times as fast, or some 25 miles per hour. The wagon had proceeded some 12 feet into the path of danger before being struck. Under all the circumstances * * * the jury might have found that the motorman saw plaintiff in time to have avoided the injury, and while plaintiff was actually in peril." The same inference could have been drawn in the case in hand. It is obvious, with the truck moving ten or twelve miles per hour, that there would be an appreciable time when the truck would be in a position of danger from which nothing that the driver of the truck could do could possibly extricate it. From the time that the front end of the truck was too close to the path of the on-coming automobile to stop before entering that path, until it was actually struck in the rear wheel, the driver of the truck was helpless to avoid the collision. During the same period appellant, by either applying his brakes or swerving behind the truck, could have avoided striking it. The truck was there in plain sight; appellant was sitting at the wheel of the on-coming automobile; there were no obstructions to his view. The jury was not bound to accept his testimony that he did not see the truck until just before he struck it.

The Smith Case likewise answers appellant's claim that if respondent was guilty of negligence it continued up to the very instant of collision. In the Smith Case the court said: "The jury might well have found that when plaintiff had partly crossed the track he had reached a point where he could not help himself, and from that time on vigilance on his part would not have averted the injury. His negligence in reaching that position becomes the condition, not the proximate cause, of the injury."

In cases no more favorable to the plaintiffs on their facts, the Supreme Court held the doctrine of last clear chance applicable in Zerbo v. Electrical Products Corporation (Cal. Sup.) 300 P. 825, and Rocha v. Garcia, 203 Cal. 167, 263 P. 238.

[3] Plaintiff at the time of the collision was the superintendent for one J. H. Kruse and was traveling from one warehouse to another within the scope of his employment, in an automobile truck driven by plaintiff's son, who was also employed by Kruse as a truck driver. That plaintiff, as Kruse's superintendent, had the power to direct and control the driver of the truck is the only fair conclusion from his own testimony. This being so, appellant proposed certain instructions directing the jury that if the driver of the truck was guilty of any negligence which proximately contributed to the collision, such negligence must be imputed as a matter of law to plaintiff. The refusal of such instructions is claimed to be error.

Plaintiff was not the master or principal of the driver of the truck, but only an intermediate and superior employee or agent. This being so, the doctrine of respondeat superior or qui facit per alium is not properly applicable to him. His power to direct and control the driver was not as master, but only by virtue of the fact that they were both employed by Kruse, and the further fact that as Kruse's agent he was delegated Kruse's authority over the driver. In this situation the language of section 2351 of the Civil Code seems to be controlling: "A subagent, lawfully appointed, represents the principal in like manner with the original agent; and the original agent is not responsible to third persons for the acts of the subagent."

In the case of actionable negligence, the rule is well settled both in this state and elsewhere that the negligence of a subordinate employee or subagent is not to be imputed to a superior employee or agent, but only to the master or principal. Hilton v. Oliver, 204 Cal. 535, 269 P. 425, 61 A. L. R. 297; Guild v. Brown (Cal. App.) 1 P.(2d) 528; Ellis v. Southern Ry. Co., 72 S. C. 465, 52 S. E. 228, 2 L. R. A. (N. S.) 378; Thurman v. Pittsburg & M. Copper Co., 41 Mont. 141, 108 P. 588; 2 Cor. Jur., p. 829; and see the elaborate note in 61 A. L. R. 277, and particularly that part commencing at page 290. We can see no logical reason for drawing any distinction in this regard between actionable negligence and contributory negligence. The fact that plaintiff had the power of control over the driver was certainly a factor to be considered with all other circumstances in determining whether he himself was personally negligent; and the jury might well find that one who had the power to control the driver would be guilty of negligence where in the same circumstances one who had no such power would not. But that is a very different matter from saying that the driver's negligence is to be imputed to the plaintiff. If any regard is to be had to making a symmetrical pattern of the law, it will not do to say that a superior employee is not to be held liable for his subordinate's negligence where a liability is sought to be imposed upon him by a third person, but is to be held liable for the subordinate's negligence where he seeks to impose a liability upon the third person.

The case most strongly relied upon by appellant, Chesapeake & O. Ry. Co. v. Warnock's Adm'x, 232 Ky. 340, 23 S.W.(2d) 558, 560, falls into the error of confusing the position of the superior employee with that of the employer and fails to take into consideration the fact that the relation of master and servant does not exist in the case of the former. This confusion is aptly illustrated by the following language from that opinion: "The court approved a quotation from 29 Cyc. 545, to the effect that it is the universal rule that the negligence of a servant is imputable to the master to prevent recovery by him for injuries to which the servant's negligence contributes; in other words, the master assumes the risk of the negligence of the employee, unless the negligent act of the servant was not committed while acting within the scope of his employment." The error of applying this rule to the case of a superior employee seems readily apparent.

The driver of the truck was not plaintiff's employee but Kruse's; he was not engaged in plaintiff's business but Kruse's; he was only subject to plaintiff's direction and control because plaintiff was there acting for and in the place of Kruse, and certainly while the driver was acting in the scope of his employment as Kruse's employee, in no true sense can it be said that he was acting in the scope of his employment by plaintiff, since he was not in any proper sense employed by plaintiff.

The case of Bosse v. Marye, 80 Cal. App. 109, 250 P. 693, is not apposite. There Miss Marye was in the true sense the direct agent of Miss Spreckels. The case may seem at first glance to approximate the case before us, because Miss Marye, who was driving the car, Miss Spreckels, who was riding with her, and Miss Spreckels' father were all held liable for Miss Marye's negligence. But when it is pointed out that Mr. Spreckels was held liable, not as Miss Marye's principal on the doctrine of respondeat superior, but solely by virtue of the statutory liability imposed upon a father who signs a minor's application for a driver's license, the apparent similarity between the cases is dissipated.

[4] We conclude upon this point that negligence is not to be imputed as a matter of law to a superior servant or agent, and that the rule laid down in the following cases was properly followed by the trial court: Bryant v. Pacific Electric Ry. Co., 174 Cal. 737, 164 P. 385, and Sichterman v. Hollingshead Co., 94 Cal. App. 486, 271 P. 372, 1111. In view of our conclusion on this point, the instructions actually given by the trial court, that if the jury found that plaintiff had the power to control the driver of the truck, the driver's negligence, if any, was to be imputed to plaintiff, were more favorable to appellant than he was entitled to have them, and appellant's complaint, that on this issue the court erroneously instructed as to the burden of proof, is for that reason immaterial.

[5] The court concluded an instruction to the effect that the negligence of the driver of the truck would not in itself bar plaintiff's right of recovery with the following sentence: "This instruction assumes, of course, not only that the injured party did not exercise or assume or endeavor to exercise control or supervision over the operation of the car by the driver, but also that he had no power or authority so to do." The jury was not thereby told as a matter of fact that control or supervision were not exercised by plaintiff. The reasonable effect of this language was to tell the jury that it was to apply the preceding portion of the instruction only if it found that plaintiff did not exercise control over the driver, etc.

[6] The court gave the following instruction:

"'Subject to the provisions of subdivision (a) of this section and except in those instances where a lower speed is specified in this act, it shall be lawful for the driver of a vehicle to drive the same at a speed not exceeding the following: 20 miles an hour in a residence district as defined herein;' and I further instruct you that if, under the conditions that prevailed at the time of the collision complained of in plaintiff's complaint, the motor vehicle operated by the defendant at a rate of speed allowed by law, upon the application of its brakes was likely to crash into other vehicles, then a speed within the maximum allowed by law would be unlawful, and the jury would have a right to consider that under the circumstances, the defendant, Sebastian Lombardi, was not exercising reasonable and proper care or having due regard to the traffic or surface of the highway on which he was traveling.

"It is not the purpose of the court in giving you that instruction to of itself make any suggestion to you of the fact or possible fact, much less a suggestion to you with reference to what your finding or conclusion will be."

The last sentence of this instruction so qualifies what precedes that the jury, particularly in view of the general instructions upon negligence and its powers as triers of the facts, cannot have been misled into believing, as claimed by appellant, that it could or must find appellant guilty of negligence if it found that at the speed at which he was driving he was likely to crash into other vehicles, even though the collision was caused solely through the fault of the driver of the other vehicle.

[7] During the court's charge to the jury, the court started to read a proposed instruction, and then discontinued it, in the following language: "You are instructed that a passenger in a motor vehicle has a right to suppose that the driver will exercise due care for the protection and safety of his passenger——. I will omit that. It has been given so far as necessary." We do not feel called upon to decide whether the portion of the proposed instruction thus read to the jury is a correct statement of law, since it is clear that the jury was informed that the instruction was not being given by the court, but was withdrawn from its consideration.

[8] Certain instructions were proposed by appellant to the effect that if the collision was the sole proximate result of the negligence of the driver of the truck in which plaintiff was riding, he could not recover. The court apparently confused these proposed instructions with the doctrine of contributory negligence and qualified them accordingly. We cannot see how appellant was injured thereby. The jury was clearly and repeatedly instructed that, in order to find a verdict against appellant, it must find that he was negligent and that his negligence proximately caused the collision. A finding that this was so is entirely inconsistent with the possibility that the collision was solely caused by the negligence of the driver of the truck; and since the jury must have found, under the instructions, that appellant was guilty of negligence and that his negligence was a proximate cause of the collision, it could not have found that the sole proximate cause of the collision was the negligence of the driver of the truck.

[9] Appellant complains that in certain instructions on contributory negligence the court, in charging that the burden of proof on this issue was on defendant, omitted the qualification "unless it can be inferred from the evidence given in support of plaintiff's case." This qualification was expressly stated in instruction XXXV, and Mast v. Claxton, 107 Cal. App. 59, 290 P. 48, disposes of this objection. Instructions, as reiterated in the opinion in that case, are to be considered as a whole, and a portion of one instruction can-

not be considered by itself and a judgment reversed simply because the whole of the law upon the subject there dealt with is not stated in the portion of the instruction singled out for attack.

[10] In his argument to the jury, plaintiff's attorney referred to defendant as "this rich dairyman." Counsel for appellant immediately objected and the court at once admonished the jury to disregard this reference. The statement should not have been made, but in view of the prompt admonition to the jury, we cannot hold that it constituted prejudicial misconduct.

The witness Clarence Handley testified to a conversation with appellant shortly after the collision which, coupling the parts of the conversation and omitting interruptions by the court and counsel, runs as follows: He said he was very sorry it happened and wanted my father to have the best treatment that was available. And that he was fully covered with insurance and he admitted, "I am responsible for this accident."

[11] While a reference to the fact that defendant is insured against liability may be highly prejudicial, and the courts do not hesitate to reverse verdicts of juries where such evidence is improperly admitted (Squires v. Riffe, 211 Cal. 370, 295 P. 517), it is a well-settled exception to the general rule that where the reference to insurance is incidental to an admission of liability by defendant and a part of the same statement, it is admissible, not to prove the fact of insurance, but solely because it is a part of the admission. McPhee v. Lavin, 183 Cal. 264, 191 P. 23; Dullanty v. Smith, 203 Cal. 621, 265 P. 814; Harju v. Market Street Railway Co. et al. (Cal. App.) 299 P. 788. The evidence of the conversation above set out falls within this exception.

[12] At the trial a medical witness was called and testified for plaintiff. On his cross-examination a letter written by him to the state compensation insurance fund was produced and he admitted having written it. The letter contained the following language in reference to the plaintiff in this case:

"(* * * From the bone injury this patient sustained he would make a complete recovery and should be able to return to work in from four to six months.) But on account of keeping alive his symptoms so that when his case comes to trial he could say that he has been totally disabled over such and such a period of time, it would probably strengthen his suit.

"In my last examination of this patient, and I believe this would be substantiated by most anyone, there is no limitation of motion about the hips or spine. His symptoms are entirely subjective and it is going to be a question of litigation settlement before he does return to work."

Those portions of this letter in which the doctor expressed his opinion that plaintiff was or might be keeping his symptoms alive because of his pending litigation were excluded by the court. We can see no error in this. The portions of the letter which dealt with the doctor's findings and conclusions as to plaintiff's physical and mental condition were admitted. The portions of the letter in which the doctor went into the realm of speculation to find a reason for that condition in the pendency of this action were not properly the subject of expert medical testimony and were rightfully excluded. The trial court expressly allowed the doctor to be cross-examined as to whether in his opinion plaintiff's symptoms were purely subjective, but refused to permit him to be cross-examined about those portions of the letter which were excluded from evidence. In this we can see no error and appellant has cited no authority in point.

[13, 14] Before the injury, plaintiff had a hernia on the right side. After the injury he likewise developed a hernia on the left side. Plaintiff was allowed at the trial to amend his complaint to specifically mention these hernias. The allowance of the amendment lay properly in the trial court's discretion. As to the hernia on the right side, the court instructed the jury: "It has been testified to here in effect that at the time of the accident the plaintiff was suffering a physical disability in the form of hernia. I will say to you that that cannot be at all considered in this case with reference to damages, in the event you find for the plaintiff." This effectually took the consideration of the hernia on the right side from the jury. As to the cause of the hernia on the left side, there was no medical testimony, but plaintiff testified that it developed after the collision and while he was confined to his bed in the hospital. This was enough in our opinion to take the question of the cause of that hernia to the jury.

Judgment affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

122 Cal.App. 348

COLLINS v. CONSOLIDATED WATER CO. OF POMONA et al.

Civ. 8294.

District Court of Appeal, First District, Division 2, California.

April 4, 1932.

Rehearing Denied May 4, 1932. Hearing Denied by Supreme Court June 2, 1932.

1. Appeal and error 🔑1107.

Rights of parties on appeal in stockholder's suit to dissolve corporation *held* governed by corporation laws in force at time judgment was rendered.

2. Quo warranto 🔑33.

Under law existing at time judgment was rendered, right of corporation to exercise corporate powers could be questioned only by Attorney General in quo warranto proceeding (Civ. Code, § 358).

3. Corporations 🔑614(1).

Under law existing at time judgment was rendered, suit by minority stockholders for involuntary dissolution of corporation because it had fulfilled its original purpose would not lie (Code Civ. Proc. § 803).

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by Edwin M. Collins against the Consolidated Water Company of Pomona and others. From judgment for defendants, plaintiff appeals.

Affirmed.

Robert E. Austin and John N. Helmick, both of Los Angeles, and J. E. Stillwell, of South Pasadena, for appellant.

Kemper Campbell and Charles L. Nichols, both of Los Angeles, for respondents.

NOURSE, P. J.

Plaintiff sued to compel the directors of the defendant corporation to dissolve the corporation and to distribute the assets among the stockholders. The individual defendants, together with the plaintiff, made up the entire list of stockholders. The corporation and those defendants constituting the board of directors (who also represented the majority of the stockholders) demurred by general and special demurrer. This demurrer was sustained, and plaintiff declined to amend. Judgment went for the demurring defendants, and plaintiff has appealed on a bill of exceptions.

[1] The gravamen of the complaint is that the original purpose of the corporation has been fulfilled, that the directors are exercising corporate powers beyond the scope of the purposes of the incorporation, and that the corporation should therefore be dissolved. The complaint was filed February 28, 1929: the judgment was entered September 21, 1929. Thus the rights of the parties under the judgment appealed from are to be determined by the law relating to corporations existing prior to the amendments in 1931.

[2] Under the law then existing the right of a corporation to exercise corporate powers could not be inquired into in a private suit, but such inquiry could be had only upon quo warranto at the instance of the Attorney General. Civ. Code, § 358; Westlake Park Inv. Co. v. Jordan, 198 Cal. 609, 618, 246 P. 807.

[3] Likewise, under the law then existing, a suit by minority stockholders for the involuntary dissolution of a corporation upon the grounds specified in this complaint did not lie, but such a suit must have been instituted by the state. Section 803, Code Civ. Proc.; French Bank Case, 53 Cal. 495, 550, 553; Lyon v. Carpenters' Hall Ass'n, 66 Cal. App. 550, 552, 226 P. 942.

The judgment is affirmed.

We concur: STURTEVANT, J; SPENCE, J.

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122 Cal.App. 218

MACHADO v. MACHADO.

Civ. 779.

District Court of Appeal, Fourth District, California.

March 29, 1932.

Rehearing Denied April 16, 1932. Hearing Denied by Supreme Court May 26, 1932.

1. Appeal and error 🔑1011(1).

Where trial court's finding is supported by competent evidence, it cannot be set aside because of conflict in evidence, though evidence supporting finding consists solely of plaintiff's testimony (Code Civ. Proc. § 1844).

2. Husband and wife 🔑264.

In action for divorce, evidence sustained finding that wife was sole and separate owner of real estate involved.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Maria Gloria Machado against Manuel Machado. From an interlocutory decree in favor of plaintiff, defendant appeals.

Affirmed.

Brittan & Brittan, of Bakersfield, for appellant.

Harvey & Heard and Siemon & Garber, all of Bakersfield, for respondent.

MARKS, J.

This is an action for divorce involving a settlement of the rights of the parties in real property. The trial court in its interlocutory decree of divorce decreed that respondent was entitled to a divorce on the ground of extreme cruelty, and disposed of various interests in the properties. While the appeal is taken from the entire interlocutory decree, the only issue presented here and which it is necessary for us to consider is stated in appellant's reply brief as follows: "It is agreed that there is but one question for determination by this court upon this appeal. This single question is whether or not all the evidence contained in the record is sufficient, as a matter of law, to sustain the finding of the trial court that plaintiff is the sole and separate owner of certain real estate described as the south half of the southeast quarter of section 31, in township 30 south, range 28 east, in Kern county. Against this finding of the court there is the plain and unequivocal testimony of the appellant, supported by the testimony of other witnesses, and a long chain of facts and circumstances. These facts and circumstances, with other corroborating testimony, amount almost to a demonstration of the truth of appellant's story. If this story is true the finding of the court must fall." It is admitted that the property was owned by respondent prior to her marriage with appellant.

[1, 2] The respondent testified positively that the real property in question was owned by her as her sole and separate property before her marriage to appellant; that she had never executed and delivered any instrument conveying any interest in this property to her husband; that she had never made any agreement of any kind with him, the effect of which would be to transmute any portion of the property into community property. The record contains no writing of any kind purporting to convey any interest in the property to appellant or to transmute any portion of it to community property. The testimony of respondent furnished competent and material evidence supporting the questioned finding. Section 1844, Code Civ. Proc.; Radich v. Gak, 61 Cal. App. 375, 214 P. 1000. Where a finding of the trial court is supported by competent and material evidence, it cannot be set aside on appeal because of a conflict in the evidence. This is true where the evidence supporting the finding and judgment consists solely of the testimony of the plaintiff in the action. Radich v. Gak, supra.

Appellant maintains that the conduct of the parties after marriage and before their separation, and legal instruments executed by them, support his testimony wherein he maintained that, by a parol agreement, his wife's separate property was transmuted to community property, and that these documents so contradict the evidence of respondent as to render it inherently improbable and so unworthy of belief that it becomes necessary for us to reject all of it. It is true that the conduct of the parties and the instruments signed by them tend to support the theory of appellant in this case. It is also true that some of the reasonable inferences to be drawn from this same evidence tend to support the testimony of respondent. At best the evidence we are now considering amounted to circumstantial evidence, in part supporting the other evidence of appellant, and in part supporting the testimony of respondent, and amounted to a conflict in the evidence which was addressed to the trial judge and which he resolved against appellant. We cannot conclude that the testimony of respondent was so inherently improbable that we must reject it. After studying the record, we have concluded that it must be regarded as true in its major particulars. The following quotation from Firth v. Southern Pacific Co., 44 Cal. App. 511, 186 P. 815, 816, is pertinent: "The presumption on appeal is that, where a witness' testimony at the trial is itself contradictory and inconsistent, and the verdict or a vital finding is in accord with facts testified to by him, and his is the only testimony from which facts supporting such verdict or finding are derived, the trier of the facts has found some reasonable or legal excuse for the inconsistency, and has justification for concluding that, upon the whole, such witness has told the truth about the matter; and where in such a case the story of the witness, viewed as a whole, is not of a character to justify a reviewing court in declaring that it should have been rejected in its entirety, because it was unworthy of being believed, the conclusion of the trial court or jury as to its probative value is conclusive. On the whole testimony of the plaintiff and that of the deponent, Snooks, corroborating it in all important or vital particulars, the trial court could well have found, as it did find, that it was the negligence of the defendant that was the sole and direct cause of the collision and the damage following therefrom. The rule in such cases as this is that where an honest difference of opinion between men of average intelligence can arise as to the effect of the evidence—that is, if the evidence is such as that different conclusions upon the matter can rationally be drawn therefrom—then the case presented is one for the jury or the court, if the questions of fact be submitted to its arbitrament. The case here, we are persuaded to believe, after a careful examination of the evidence, comes within that rule."

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

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122 Cal.App. 260

WHITELAW v. WHITELAW.

Civ. 8391.

District Court of Appeal, First District, Division 2, California.

March 31, 1932.

1. **Bastards** 🔑6.

Evidence, in divorce action, showing child was born 230 days after intercourse between parties preceding marriage, sustained finding husband was father.

2. **Divorce** 🔑179.

Exclusion of evidence of mother's conduct with others *held* not error in divorce action involving question of husband's parentage of child, where there was no offer of proof.

3. **Witnesses** 🔑380(5).

Mere failure to give favorable testimony *held* not to authorize party's impeachment of his witness by proving statements conflicting with present testimony (Code Civ. Proc. § 2049).

4. **Witnesses** 🔑321.

Party cannot impeach his witness unless testimony damages his cause and party is taken by surprise (Code Civ. Proc. § 2049).

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by Harriette E. Whitelaw, an infant, by Elizabeth Anderson, her guardian ad litem, against James Charles Whitelaw, by James Whitelaw, his guardian ad litem, for divorce. From portions of the interlocutory decree requiring defendant to pay monthly sums for support of minor child, defendant appeals.

Affirmed.

Jackson & Peterson and Clell H. McCredie, all of San Francisco, for appellant.

Hilary H. Crawford, of San Francisco, for respondent.

SPENCE, J.

This is an appeal by defendant from those portions of the interlocutory decree of divorce wherein it is adjudged that defendant is the father of the minor child of plaintiff and wherein said defendant is ordered to pay to plaintiff the sum of $15 per month for the support of said minor child.

At the time of the trial in 1929 plaintiff was of the age of 16 years and defendant was of the age of 17 years. It was admitted that the parties had one act of sexual intercourse, the date fixed in the testimony being December 22, 1927. Thereafter plaintiff became pregnant and the parties with full knowledge of that fact were married with the consent of their parents on April 23, 1928. The child was born on August 8, 1928.

[1] Appellant's first contention is that he is not the father of respondent's child. This is equivalent to a contention that the evidence is insufficient to support the trial court's finding to the contrary. We find no merit in this contention. It is unnecessary to discuss whether the presumptions relating to legitimacy have any application to cases involving antenuptial conceptions for in our opinion the evidence was sufficient to sustain the findings without the aid of any presumptions. Both parties testified that they had an act of sexual intercourse as above set forth, and respondent testified that she never had intercourse with any other man. If respondent spoke the truth, the findings are amply sustained, and on this appeal we cannot disregard her testimony unless it may be said to be so inherently improbable as to be wholly unworthy of belief. In this connection appellant points to the fact that the child was born 230 days after the known date of the single act of intercourse and he quotes at length from numerous standard medical works relating to the subject under discussion. These authorities and the medical witnesses were substantially in accord to the effect that the *usual* period of gestation covers approximately 269 days after the known date of intercourse. But the authorities on the subject demonstrate the fact that the period of gestation varies greatly. As was stated in State v. Law, 93 Kan. 357, 144 P. 232, at page 233, quoting from Garrigues on Obstetrics: "Based on large statistics, the supposition is warranted that in woman the time varies between 220 and 320 days, counting from the fecundating intercourse." We may say in passing that the various authorities record many cases where the period of gestation was even less than 220 days. Appellant further calls our attention to the testimony of his own medical witnesses, who expressed the opinion that the child was a "full time baby." Respondent's physician gave testimony tending to show that the child was not fully developed in some respects and he expressed his opinion that the child was prematurely born. These were all opinions based largely on the

development of the child at birth. This test does not seem to be an infallible one. Taking one of the authorities upon which appellant relies, we quote from Edgar on the Practice of Obstetrics (1926) at page 557, as follows: "In other words, one birth out of six, the world over is probably premature. * * * A child may be born at term and yet be backward in development; and, conversely, children may be born before term and yet be fully mature." Again, on page 558 the same author says: "From the twenty-eighth to the thirty-second week the pupillary membrane disappears, the intense red color fades out, the subcutaneous fat becomes diffused over the body, and the nails are developed nearly as far as the finger tips. Children born during this period are viable. From the thirty-second to the thirty-sixth week the child resembles a mature infant, the differences being of degree only." In 1 Taylor's Principles and Practice of Medical Jurisprudence (7th Ed.), the usual characteristics of a child at the various stages of gestation are given, but it is pointed out on page 200 that "in some cases a seven-months cannot be distinguished with certainty from a nine-months child." Assuming that the date of intercourse in the present case was correctly recalled by respondent, the child was born at the end of the thirty-third week and this may well be one of those cases of early development where the child appeared to be a "full time baby."

A further discussion of this subject would serve no useful purpose. It is more extensively treated in State v. Law, supra, where the court affirmed the judgment of the lower court adjudging the defendant to be the father of a child born 217 days after the act of intercourse. We may further observe that in the present case no effort was made upon the trial to ascertain how this young girl fixed the exact date of the act of intercourse. She may have been mistaken on this subject and as was said in Peterson v. People, 74 Ill. App. 178, at page 180, where 231 days had elapsed, "One thing is certain, if the complaining witness tells the truth in saying she never had intercourse with any one other than appellant, he must be the father of the child, whether she is correct as to dates or not." But again assuming the correctness of the date specified we find nothing contrary to the laws of nature or inherently improbable in the testimony of respondent and the trial court's findings regarding paternity are amply sustained.

[2-4] Appellant further complains of the exclusion of certain evidence. Appellant called a young man to the stand who testified that he had attended a Hallowe'en party on October 31, 1927, at which respondent was present. The witness was then asked to state "her conduct at that time with reference to her relationship with other boys." Objection was made upon the ground that it was irrelevant and immaterial and did not tend to prove that respondent had intercourse with anyone other than appellant. Counsel for appellant made no offer of proof disclosing what he expected from the witness but merely stated that it was difficult to prove "a matter of this kind and the only way we can do it is by indirect evidence." An offer of proof should have been made, and in the absence of such offer we are unable to say that the sustaining of the objection to this broad and indefinite question constituted prejudicial error. 2 Cal. Jur. 275. Appellant called another young man who was asked if he had ever had intercourse with respondent. He stated that he had not and in answer to further questions denied that he had ever made any statement to the contrary. Appellant then sought to impeach his own witness by producing another witness for the apparent purpose of proving that the former witness had previously made such statement. An objection was sustained to the question propounded to this witness regarding such alleged statement. Appellant contends that the trial court erred in sustaining the objection, citing section 2049 of the Code of Civil Procedure. There is no merit in this contention. There are definite limitations upon a party's right to impeach his own witness under that section. That right does not arise upon the mere failure of a witness to give testimony favorable to the party calling him. It must appear, first, that the witness has given testimony of a damaging and prejudicial nature to the cause of the party calling him, and, second, that the party has been taken by surprise because he had been led to believe that the witness would give testimony favorable to his cause. People v. Slisovich, 193 Cal. 544, 554, 226 P. 611. These rules are based upon sound policy for unless a party's right to impeach his own witness is so restricted a convenient means would be afforded for the introduction of otherwise inadmissible hearsay testimony. Measured by the foregoing rules, it is apparent that the offered hearsay testimony was properly excluded. The witness had given no testimony which was damaging or prejudicial to the cause of appellant. All that can be said is that he did not give testimony favorable to appellant. Again it was not shown that the witness had led appellant or his counsel to believe that he would give any favorable testimony.

The portions of the interlocutory decree appealed from are affirmed.

We concur: **NOURSE, P. J.; STURTEVANT, J.**

122 Cal.App. 172

SHAW v. SHAW.

Civ. 8367.

District Court of Appeal, First District, Division 1, California.

March 28, 1932.

1. Divorce ⚷147.

In divorce action, whether conduct of wife inflicted grievous mental suffering on husband was question of fact for determination of trial court from all facts and circumstances in case (Civ. Code, § 94).

2. Divorce ⚷130.

Wife's conduct *held* to entitle husband to divorce on ground of extreme cruelty (Civ. Code, § 94).

Evidence disclosed parties had been separated and husband awarded custody of their two minor daughters and ordered to pay wife monthly alimony; that husband was a lieutenant in the United States Navy; that wife wrote two letters to naval authorities with malicious intent, complaining that husband refused to give her any information as to whereabouts of children, and that husband had failed to send payments for her support for two months; that wife accused husband of being a rogue and a liar in children's presence; that wife, in separate maintenance action, in hearing of children referred to husband's housekeeper as woman he was living with, and falsely testified to absence of extra sleeping accommodations, intending to create impression of immoral conduct.

3. Divorce ⚷27(8).

In determining whether defamatory accusations constitute extreme cruelty, entitling spouse to divorce, test must be effect on complaining spouse rather than effect on others (Civ. Code, § 94).

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Action for separate maintenance by Vera A. Shaw against Joseph Edward Shaw, in which defendant filed a cross-complaint for divorce. From a judgment granting cross-complainant an interlocutory decree of divorce, cross-defendant appeals.

Affirmed.

Fred Miller, of Long Beach, for appellant.

Martin Forrest, of Los Angeles, for respondent.

OGDEN, Justice pro tem.

This is an appeal by Vera A. Shaw, cross-defendant below, from a judgment granting respondent Joseph E. Shaw, cross-complainant below, an interlocutory decree of divorce upon the ground of extreme cruelty.

The parties intermarried in the year 1914, and have been separated since 1924. At the time of their separation the parties lived at Bremerton, Wash., and by order of the courts of that state respondent was awarded the custody of the two minor daughters of the parties, who at the time of this trial were of the ages of fifteen and thirteen years, respectively, and was ordered to pay appellant for her support and maintenance the sum of $50 per month. In January, 1929, respondent, who is a lieutenant in the United States Navy, moved to the city of Los Angeles pursuant to a change of station, where he maintained a home for the children in charge of a housekeeper. In March of the same year appellant established her residence in the city of Long Beach, and in October commenced action for separate maintenance. The judgment here was granted upon respondent's cross-complaint in that proceeding.

The judgment is based upon four specifications of acts of extreme cruelty. The first involves the sending by appellant of two letters, one on the 11th and one on the 24th day of September, 1929, to the Navy Department at Washington, D. C., complaining that respondent refused to give her or her attorneys any information as to the whereabouts of her children, and asking that he be compelled to reveal their address. She also complained that he had failed to send payments for her support for the months of August and September. The second relates to a reference to respondent by appellant in November, 1929, while visiting the children and in their presence, that he was a liar and rogue. The third is based upon an incident during the trial of the separate maintenance action when appellant in the hearing of the children and others pointed out the housekeeper as the woman respondent was living with. The fourth specification is based upon the testimony of appellant during the trial of the separate maintenance action that she had not seen a bed in the dining room of respondent's home where it had been previously testified to by respondent he slept when at home. The trial court, upon evidence duly corroborated, found all of the specifications to be true and to have been falsely made for the purpose of humiliating and disgracing respondent, and that respondent was thereby in fact, when notified of them, caused grievous mental suffering.

[1] Appellant contends that the above conduct did not and could not, under the circumstances, constitute extreme cruelty. It is well settled that "no arbitrary rule of law can be laid down as to what particular facts must be alleged and proven in order to justify a finding that the complaining party has suffered grievous bodily injury, or has under-

gone grievous mental suffering. A correct decision must always depend upon the sound sense and judgment of the trial court. 'Whether in any given case there has been inflicted * * * "grievous mental suffering" or grievous bodily injury, is a * * * question of fact, to be deduced from all the circumstances of each particular case, keeping always in view the intelligence, apparent refinement, and delicacy of sentiment of the complaining party.' Barnes v. Barnes, 95 Cal. 171, 30 P. 298, 16 L. R. A. 660; Fleming v. Fleming, 95 Cal. 430, 30 P. 566, 29 Am. St. Rep. 124; Andrews v. Andrews, 120 Cal. 184, 52 P. 298; MacDonald v. MacDonald, 155 Cal. 665, 102 P. 927, 25 L. R. A. (N. S.) 45; Donnelly v. Donnelly, 26 Cal. App. 577, 147 P. 582; Perkins v. Perkins, 29 Cal. App. 68, 154 P. 483; Maloof v. Maloof, 175 Cal. 571, 166 P. 330; McCahan v. McCahan, 47 Cal. App. 176, 190 P. 460; Crum v. Crum, 57 Cal. App. 539, 207 P. 506. Therefore, in the case at bar, whether or not the acts and conduct of appellant inflicted grievous mental suffering, or grievous bodily injury, or both, upon the respondent, was a question of fact for the determination of the trial court from all the facts and circumstances in the case." Hansen v. Hansen, 86 Cal. App. 744, 261 P. 503, 504; Thoele v. Thoele, 102 Cal. App. 387, 282 P. 1001.

[2] The finding that the two letters were written to the naval authorities with a malicious intent is supported by the evidence. The record discloses that up to the time of sending them appellant had not, either personally or through her attorneys, requested information from respondent as to the whereabouts of her children, although she at all times knew where he could be reached and her attorneys were in communication with him. For a period of five months immediately prior to respondent's removal to Los Angeles, appellant did not visit them, although she lived in the same city. She did not notify respondent of her residence in Long Beach or of her desire to see her children, despite respondent's repeated requests to her attorney for her address. Respondent was not in default in any payments, but had forwarded them to her attorney in Washington in accordance with past custom and her request. In fact, she admitted that she had been previously advised by her attorney of his receipt of the August payment. The letters were forwarded to the immediate superior officers of respondent to whom he was required to make explanation, and were then filed in the disciplinary files of the Navy Department. That respondent was, as he testified, embarrassed and humiliated as a result of the letters is reasonable to believe.

Likewise the trial court was justified in determining that the reference to respondent's housekeeper as the woman he was living with and her false testimony indicating the absence of extra sleeping accommodations were made with the intent of creating an impression of immoral conduct and in determining that respondent so interpreted the statements. That such an insinuation, made in the presence of the minor children, together with the accusation to them that he was a rogue and a liar, would reasonably cause respondent grievous mental suffering, is not difficult to appreciate.

[3] Appellant insists that, because there is no evidence that the children or others believed in the truth of these insinuations, and because the naval authorities took no disciplinary action in the matter, the statements and letters did not inflict extreme mental cruelty. Although the belief by others of the truth of such accusations probably would, if known to respondent, have accentuated his mental suffering, it is not essential, for, in determining whether or not defamatory accusations constitute extreme cruelty, the test must be their effect upon the complaining spouse rather than their effect upon others.

We cannot say that the trial court, who had the opportunity of observing the delicacy of sentiment and apparent refinement of respondent, acted in abuse of a sound discretion in determining that the conduct of appellant constituted extreme cruelty and inflicted grievous mental suffering upon him within the meaning of section 94, Civil Code. The judgment, therefore, must be, and is, affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

121 Cal.App. 670

CALIFORNIA PUBLIC IMPROVEMENT SECURITIES, Inc., v. PORTER et al.

Civ. 537.

District Court of Appeal, Fourth District, California.

March 17, 1932.

1. Quieting title 🔑44(3).

In quiet title action, introduction of deed from city to plaintiff's grantor executed by virtue of sale of property to pay delinquent assessment bond and deed from grantor to plaintiff made prima facie case for plaintiff (St. 1913, p. 977, § 42).

2. Municipal corporations 🔑582.

Deed from city executed on sale of property to pay delinquent assessment bond *held* void, where grantee served statutory notice, not on occupant of premises, but on one who said she was occupant (St. 1913, p. 976, § 41).

3. Municipal corporations ⚿579.

Affidavit stating purchaser at sale for nonpayment of street improvement bond served notice of redemption upon one who said she was occupant of property *held* insufficient, as not showing service on occupant or facts to excuse service on owner as required by statute (St. 1913, p. 976, § 41).

4. Quieting title ⚿44(4).

Refusal to enter judgment in plaintiff's favor in quiet title action *held* not error, where plaintiff failed to show title in itself (St. 1913, p. 977, § 42).

5. Appeal and error ⚿877(4).

Where plaintiff in quiet title action failed to show interest in land, it cannot complain that court quieted title in defendants without evidence of title, for defendants need only show plaintiff is without title.

Appeal from Superior Court, Los Angeles County; Frank Lamberson, Judge.

Action by the California Public Improvement Securities, Incorporated, against Henry Porter and another, executors of the estate of Bettie Johnson, deceased. From a judgment for defendants, plaintiff appeals.

Affirmed.

U. S. Fitzpatrick, of Los Angeles, for appellant.

M. H. Broyles, of Los Angeles, for respondents.

LAMBERT, Justice pro tem.

Plaintiff and appellant brought an action against Henry Porter and Louis Graham, the executors of the estate of Bettie Johnson, deceased, to quiet title to certain real property situated in the city of Los Angeles, Cal. Henry Porter died pending the trial, and Louis Graham is the surviving executor and respondent herein.

The amended complaint was in the usual form of such action. The answer in substance denied the claim of appellant and alleged defendants to be the owners in fee, and asked that title be quieted in defendants. The court made findings of fact and conclusions of law, and granted judgment quieting the title of the defendants as executors of the estate of Bettie Johnson, deceased. The appellant made a motion under section 663, Code of Civil Procedure, to have this judgment vacated and judgment entered in favor of plaintiff and appellant. This motion was denied, but the court did order the judgment vacated, and entered another judgment on the same findings and conclusions quieting title in defendants. The last judgment entered changed the wording of the former judgment, the former judgment having read that the title was quieted in the estate of Bettie Johnson, instead of naming the executors.

The appellant prosecutes this appeal under the alternative method on the typewritten record. Appellant contends that judgment should be reversed because: (1) The judgment is not supported by the evidence or the findings of fact; (2) the findings of fact are not supported by the evidence; (3) error of the court after vacating first judgment following appellant's motion under section 663, Code of Civil Procedure, in not entering judgment for plaintiff and appellant; (4) that the court quieted title in defendant without any evidence of title being introduced or any finding of title in defendant.

[1] The plaintiff at the trial introduced a deed from the city of Los Angeles to A. F. Moser, which deed had been executed by virtue of sale of the property described in the complaint to pay a delinquent assessment bond in the sum of $55.45, issued pursuant to Street Improvement Act of 1913, approved June 16, 1913, and amendments thereto (Stats. 1913, p. 954), also a grant deed from A. F. Moser to plaintiff. The introduction of these deeds made a prima facie case for the plaintiff under section 42 of the act of 1913, supra. The witness Moser, on cross-examination, testified that he served the notice required to be served by section 41 of the act above referred to, not on the occupant of the premises, but on a lady who said she was the occupant. The plaintiff at this point rested its case. The defendant introduced evidence showing that the executors of the estate of Bettie Johnson were in control of the property, and then introduced the affidavit of service required by section 41 of the act of 1913, supra, which section reads, so far as material here: "* * * Provided, however, that the purchaser of the property, or his assignee, or agent, must, thirty days prior to the expiration of the time of the redemption, or thirty days before his application for a deed, serve upon the owner or agent of the property purchased, if named in such certificate of sale, and upon the party occupying the property, if the property is occupied, a written notice, stating that said property, or a portion thereof, has been sold to satisfy the bond lien, the date of sale, the date, number, and series of the bond, the amount then due, and the time when the right of redemption will expire, or when the purchaser will apply for a deed, and the owner of the property shall have the right of redemption indefinitely, until such notice shall have been given and said deed applied for, upon the payment of the fees, penalties, and costs in this act required."

[2] It thus appears that the proceedings had not been strictly followed, and the deed to Moser was void. The rule covering tax deeds is tersely stated in Warden v. Bittleson

Law, etc., Agency, 41 Cal. App. 1, at page 3, 181 P. 834, 835, thus: "Assessments for street improvements, like tax proceedings, are in invitum, and where the statute prescribes the notice which is to divest the owner of his title, that notice must be given. None other will suffice. A court will not be justified in saying that some other kind of notice would be equally effective. The express requirements of the statute cannot be avoided on the ground that they serve no useful purpose. It is never a question whether, by reason of some omission, the owner has been injured or misled; but whether there has been a compliance with everything the law makes a condition precedent to the right to a deed." See, also, Chapman v. Jocelyn, 182 Cal. 294, at page 298, 187 P. 962.

[3] It will be seen that, according to section 41 of the act of 1913, supra, the purchaser was required to serve upon the owner or agent of the property purchased, if named in such certificate of sale, and upon the party occupying the property, if the property is occupied, a written notice. No notice was served upon the owner or his agent. The affidavit of service was insufficient. It reads:

"State of California, County of Los Angeles —ss.

"A. F. Moser, being first duly sworn, upon oath deposes and says that he personally served written notice of which the within is a true copy and is hereby referred to and made a part of this affidavit, upon Pearl Coming, who said she was the occupant of the property described in said notice, on the 19th day of October, 1926, personally at 2702 Hyams Street on said day and deponent further says that he is said purchaser of said property described in said notice and that he purchased same at the sale thereof for the nonpayment of street improvement bond for the amount and in the manner described in said notice."

[4] It did not show service on the occupant, or any facts to excuse service on the owner. The appellant having failed to show title in itself, the court did not err in refusing to enter judgment in favor of the plaintiff. Kilfoil v. Warden, 46 Cal. App. 502, 189 P. 303; Klumpke v. Henley, 24 Cal. App. 35, 140 P. 289, 313.

[5] It is claimed by appellant that the court decreed the defendants to be the owners without any evidence of title. The respondent's answer to this is: "Evidence was given by defendant as to title being in himself (transcript —, line —)." Notwithstanding respondent's dereliction in this particular, we have examined the record and find appellant's contention to be true. However, this error of the court is one of which appellant is not in a position to complain. In Rockey v. Vieux et al., 179 Cal. 681, 178 P. 712, which was an action to quiet title, and the answer set up title and possession in defendants, the court found the defendant Vieux was the owner in fee, in possession, and entered judgment quieting his title against the claims of the plaintiff. It was claimed in this case that the defendant had no proof of title in himself, and the court, in the course of its opinion, at page 682 of 179 Cal., 178 P. 712, 713, said:

"The defendants claimed under a tax deed, and the appellants argue that the tax proceedings were defective and the deed void. But they totally failed to show that they themselves had any title or interest whatever in the property, or that they had ever been in possession of it. Their own evidence consisted simply of a decree of distribution made by the superior court, sitting in probate, in the matter of the estate of one Ferdinand Smith, deceased. By the terms of this decree there was distributed to the plaintiffs, among other property the land in controversy. There was no attempt, however, to show that Smith, the decedent, had any interest in the land. The plaintiff in an action of this kind must show title in himself. His right to recover must rest on the strength of his own title—not the weakness of defendants'. * * *

"Of course, where both parties claim title from a common source, it is not necessary to prove title in the grantor. McGorray v. Robinson, 135 Cal. 312, 67 P. 279. But that was not the situation here. The plaintiffs' claim, as already stated, was under Ferdinand Smith, while the defendants relied upon a patent from the state of California to one Craig, and a subsequent tax deed to one Tyler, who had deeded to the defendants. There is no need, therefore, to consider whether the tax sale and deed were regular and valid. The plaintiffs having failed to show either title or possession in themselves, they 'cannot complain that some one else, also without title, asserts an interest in the land. * * * A defendant in such an action may always effectually resist a decree against himself, by showing simply that the plaintiff is without title.' Williams v. City of San Pedro, 153 Cal. 44, 49, 94 P. 234, 236, and cases cited. And, having shown no interest in the land, the plaintiffs are not aggrieved by a judgment declaring some one else to be the owner."

Appellant also claims the court should not have quieted title in defendants without compelling the payment of the amount of the bond and interest. It is not necessary to discuss this question, for the judgment quieted the title but did not destroy the lien, and in the conclusions of law the court specifically provided that the property was subject to the lien of the street assessment bond in the sum of $55.45, with interest, in favor of A. F. Moser.

This disposes of all the contentions raised by appellant. For the reasons given, the judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

122 Cal.App. 232

LONDON v. ROBINSON et al.

Civ. 8393.

District Court of Appeal, First District, Division 2, California.

March 30, 1932.

Rehearing Denied April 28, 1932. Hearing Denied by Supreme Court May 26, 1932.

1. Injunction 🔑123.

Exclusion of proof that building permit did not conform to ordinances *held* proper under pleadings in action to restrain erection of building because violating zoning ordinance.

Pleadings did not contain any statement to the effect that any ordinances alleged to have been violated were in existence, or, if in existence, that they were not complied with.

2. Appeal and error 🔑1097(1).

Decision on former appeal *held* law of case as to stipulations on second trial confined to facts before court on former trial.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by L. London against L. B. Robinson and another. From an order granting a motion for nonsuit, plaintiff appeals.

Affirmed.

Sullivan & Barry and Theo. J. Roche, of San Francisco, for appellant.

tum Suden & tum Suden, of San Francisco, for respondents.

STURTEVANT, J.

This is the second appeal in the above-entitled action. London v. Robinson, 94 Cal. App. 774, 271 P. 921. After the remittitur went down and was received in the trial court, the action was again called for trial. No amendments to the pleadings were made. The plaintiff offered certain evidence to which objections were made and sustained. After the plaintiff rested, the defendants made a motion for a nonsuit, the motion was granted, and the plaintiff has appealed from the order granting the motion for a nonsuit.

As recited in the former decision, a permit was issued to the defendant Robinson authorizing him to construct an apartment house on his lot. Thereafter an amended ordinance was enacted which, by its terms, purported to place Robinson's property in a first residential district. In the former decision this court decided that the amended ordinance was not retroactive and did not affect or limit the rights of the defendants. That decision was wholly confined to the zoning ordinances of San Francisco.

[1] On the second trial the plaintiff offered several pieces of evidence for the purpose of proving that the permit was not issued in compliance with the building ordinance, the plumbing ordinance, and the ordinances governing the board of health. Objections were made and sustained to said offers. The rulings were clearly correct, because the pleadings before the court did not contain one word to the effect that any ordinances on said subjects are in existence or that said ordinances, if in existence, were not complied with. If the plaintiff had any such grievances, the ordinances should have been pleaded and the alleged noncompliance should have been pleaded. 18 Cal. Jur. 922.

[2] When the plaintiff rested, certain stipulations were before the court, but those stipulations were confined to an agreement as to the facts that were before the court on the first trial. It follows that the decision, London v. Robinson, 94 Cal. App. 774, 271 P. 921, had become the law of the case. 2 Cal. Jur. 1045; Brett v. S. H. Frank & Co., 162 Cal. 735, 739, 740, 124 P. 437.

The order appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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121 Cal.App. 664

PACIFIC COAST AUTOMOBILE ASS'N, Inc., v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 8109.

District Court of Appeal, First District, Division 1, California.

March 17, 1932.

Rehearing Denied April 16, 1932. Hearing Denied by Supreme Court May 16, 1932.

1. Execution 🔑402.

In proceeding supplemental to execution, no order can be made respecting property in hands of third person, or claimed to be due from him to judgment debtor, if third person claims interest in property or denies debt (Code Civ. Proc. §§ 717, 719, 720).

2. Prohibition 🔑3(3).

That petitioner, denying indebtedness to judgment debtor, appealed from order directing payment in proceeding supplemental to execution, *held* not to deprive him of right to prohibition against threatened contempt adjudication for disobeying order (Code Civ. Proc. §§ 717, 719, 720).

3. Prohibition 🔑27.

Person denying indebtedness to judgment debtor in proceeding supplemental to execution *held* entitled to prohibition against contempt proceeding, as against contention that he failed to show he would be adjudged in contempt if proceeding continued (Code Civ. Proc. §§ 717, 719, 720).

Original proceeding by the Pacific Coast Automobile Association, Incorporated, for a writ of prohibition to be directed to the Superior Court for the City and County of San Francisco, and Lile T. Jacks, Judge of Department Extra Sessions Number One thereof, to prevent further proceedings under an order to show cause for contempt.

Writ granted.

Albert T. Roche and Paul Charles Dana, both of San Francisco, for petitioner.

Barry J. Colding, Theodore Hale, and Carroll B. Crawford, all of San Francisco, for respondents.

PER CURIAM.

This is a petition for a writ of prohibition. The principal contention of respondents seems to be that the record made is insufficient to support the proceeding. To some extent this contention has merit. However, by a somewhat equivocal return to the alternative writ and more expressly at the hearing upon said return, the facts were agreed upon and the record supplemented sufficient to squarely present the issue.

In a certain action brought in the superior court of the state of California, in and for the city and county of San Francisco, wherein Theodore Hale et al. were plaintiffs and California Highway Indemnity Exchange et al. were defendants, a judgment resulted in favor of plaintiffs for the sum of $3,772.25. Thereafter execution upon said judgment was duly issued and the writ of execution was served upon petitioner herein, Pacific Coast Automobile Association. Answering the said writ of execution, petitioner returned that there was no debt due the judgment debtor, nor any funds in the hands of petitioner belonging to said debtor. Thereafter, pursuant to the provisions of sections 717 and 720 of the Code of Civil Procedure, proceedings supplemental to execution were had, and as a part thereof petitioner, through its secretary, appeared before the respondent court and Honorable Lile T. Jacks, judge thereof, and was examined concerning any indebtedness which might exist against it and in favor of the judgment debtor and concerning any property in the possession of petitioner which belonged to or was alleged to have belonged to the judgment debtor.

At the hearing petitioner denied any indebtedness to the judgment debtor and denied possession of any money or property of said debtor. The record disclosed that the California Highway Indemnity Exchange had, at a date prior to process, made an assignment of its assets to the Pacific Coast Insurance Association, and that notice of such assignment had been regularly given to petitioner and by it accepted, as a result of which petitioner held nothing belonging to the judgment debtor. The respondent court and the judge thereof thereupon attempted to and did determine the validity and effect of the said assignment, to the end that an order was made directing petitioner to forthwith pay over and deliver to the judgment creditors the sum of $3,839.65 to be applied to the satisfaction of the judgment. A copy of said order was served upon petitioner on August 21, 1931, and upon its failure to comply therewith, an order of the aforesaid court, by the judge thereof named herein, has been issued and directed to petitioner, commanding it to appear and show cause why its said failure should not be punished as a contempt of court.

[1] The purpose of this proceeding is to prohibit further proceedings in the prosecution of the said order to show cause, and to restrain respondent court and the judge thereof from further steps in the said contempt proceeding. The powers of a court on proceedings supplemental to execution are specified in sections 719 and 720, Code of Civil Procedure.

No order can be made as to property in the hands of any other person, or claimed to be due from him, to the judgment debtor if such person claims an interest in the property or *denies the debt.* Code Civ. Proc., § 719. It will be noted, incidentally, that the portion of the section thus referred to was added to the original code section by way of specific limitation of the court's power. The obvious purpose of the statute is to secure to all parties interested an opportunity for a judicial determination of their respective rights after a full hearing upon issues regularly joined. Miller v. Superior Court, 82 Cal. App. 634, 256 P. 431; Colyear v. Superior Court, 40 Cal. App. 462, 181 P. 74, 75; California Filter Co. v. Superior Court, 97 Cal. App. 99, 274 P. 1012.

[2] Respondents urge, in opposition to the writ here, that an appeal has been taken from the order directing the payment of the moneys by petitioner, and that therefore the present proceeding will not lie. A complete answer to this contention is found in the case of Colyear v. Superior Court, supra, wherein it is said: "* * * A sufficient answer thereto is that petitioner is not seeking a review of the order, but seeks to have the court prohibited from making an order based thereon, which the court threatens to and will make, adjudging him guilty of contempt and committing him to jail for refusing to comply therewith, from which, if made, no appeal lies."

[3] Respondents further contend that nothing appears to indicate that petitioner will

be adjudged guilty of contempt if the proceeding is permitted to continue. They argue that the court will do but justice, and that if petitioner makes a sufficient showing on the order no punishment will be inflicted. This contention, if adopted, would destroy the remedy of prohibition in all cases.

From the record before us and the issue as made and agreed upon at the hearing, it is a proper case for the exercise of the extraordinary writ. The alternative writ is made permanent.

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122 Cal.App. 319

FREITAS v. CORDEIRO et al.

Civ. 744.

District Court of Appeal, Fourth District, California.

April 1, 1932.

1. Infants 🔑105.

Minors rescinding contract to purchase personalty *held* not entitled to recover that portion of payments made by one of buyers who was adult.

2. Infants 🔑58(2).

In minor's action to recover payments under rescinded contract, parties should be restored to status quo so far as possible.

3. Infants 🔑58(2).

Minors rescinding contract to purchase personalty may return property intact or equivalent in value.

4. Infants 🔑58(2).

In minors' action to recover payments made under rescinded contract for purchase of personalty, *held* allowance for value of use of property by minors in operation of dairy should be made.

Such allowance should be made before it could be determined what proportion of payments upon contract received by seller should be returned to minors; evidence showing that minors used property in operating a dairy, that they received large amounts of money in cream checks and otherwise, and that all of payments made upon contract, and now sought to be recovered by minors, except a $500 down payment, were made from proceeds of such cream checks.

Appeal from Superior Court, Tulare County; William D. Dehy, Judge.

Action by Steve Souza Freitas, individually and as guardian ad litem of Manuel Souza Freitas, a minor, against M. S. Cordeiro and another. From a judgment in favor of plaintiffs, named defendant appeals.

Reversed and remanded for a new trial.

Russell & Heid, of Tulare, for appellant.

Bradley & Bradley, of Visalia, for respondents.

BARNARD, P. J.

This is an action to recover certain payments made upon a contract to purchase personal property after a rescission of said contract, based upon the minority of the plaintiffs. The two plaintiffs, together with one Bettencourt, who was not a minor, agreed to purchase from the defendant Cordeiro about 120 head of cattle, with some horses, hogs, poultry, and certain farm machinery, for the sum of $12,000. Five hundred dollars was paid in cash, of which each of the purchasers paid one-third, and the remainder was payable in installments. The purchasers used the property in operating a dairy. After two or three months, Bettencourt assigned his interest in the property to the two minors, without consideration, and quit the business. The two minors operated the dairy for about nineteen months, being about six months after one of them became of age, and then surrendered the property to the defendant Cordeiro, and brought this action to recover the amounts paid. The court found that the plaintiffs were minors at the time the contract was made, but that both were over the age of eighteen years; that the interest of Bettencourt had been assigned to the plaintiffs; that the plaintiffs had given notice to Cordeiro that they disaffirmed the contract; and that they then and there restored to him most of the property referred to in the contract and, in addition, delivered to him "a great deal of other personal property and stock which they had purchased and put into the business, so that the original property or its equivalent in value" was restored. The court also found that one of the plaintiffs had become of age and that such disaffirmance of the contract was made within a reasonable time thereafter; that in addition to the original payment of $500, $2,846.51 had been paid in subsequent installments; and that the plaintiffs were entitled to interest on such payments from the dates when made. In pursuance of the findings, judgment was entered for $3,928.31, from which judgment this appeal is taken.

[1] The appellant contends that notice of rescission was not properly given, and that the older of the two minors affirmed the contract after he became of age. We are convinced that these contentions are without merit, and that the corresponding findings are sustained by the evidence. A further con-

tention that the judgment is erroneous in that it includes the entire $500 originally paid, when one-third of this was paid by Bettencourt, who was not a minor, is well taken. Since we think the case must be sent back for a new trial, this matter can then be adjusted.

[2] The court found that the original property or its equivalent in value had been returned. This finding is attacked as not supported by the evidence. A large part of appellant's argument is based upon the testimony of one witness to the effect that a large number of cows were not returned. There was other evidence that nearly all of the property was returned in kind, and that large and valuable additions which had been made to the property were turned over to the appellant, and, in our opinion, this finding is amply sustained by the evidence. However, the court made no finding upon the value of the use of the property, and no finding to the effect that all of the consideration received by the respondents had been returned by them to the appellant. This is important, since the evidence shows that the respondents used the property in operating a dairy, that they received large amounts of money in cream checks and otherwise, and that all of the payments made upon the contract subsequent to the first payment of $500 were made from the proceeds of these cream checks. The evidence shows that the respondents received $14,745.58 in operating the business and that they expended $10,144.49. Not only did this leave a profit of $4,601.09, which is not accounted for, but the expenditures referred to included the subsequent payments made to the appellant upon this contract, amounting to $2,846.51, and also about $1,500 for groceries. It would thus seem that the respondents, for their investment of $333.33, received their living for nineteen months, about $4,600 in cash, and, if this judgment be affirmed, will receive an additional $3,928.31. On the other hand, the appellant, while receiving back the property originally agreed to be sold to the minors, was without the use thereof for nineteen months and is compelled by the judgment to return the entire amount paid, although it would appear that these payments were largely produced by the use of the property, through cream checks and otherwise. This is an equity case which calls for the doing of equity between the parties, and the general principle involved is that the parties should be put back in statu quo, so far as may be done.

[3, 4] As was pointed out in LeBaron v. Berryessa Cattle Company, 78 Cal. App. 536, 248 P. 779, in such a case as this the consideration received by the minors may be returned in kind or its equivalent in value, and a court should be permitted to balance the equities running through an entire transaction, and should have a rather broad discretion in determining whether or not the consideration or its equivalent has been returned. In that case it was held that it could be assumed, in support of the judgment, that the trial court had taken certain incidental matters into consideration when it found that the entire consideration received by the minors had been returned. Not only do the equities we have above referred to indicate that certain necessary matters were not here taken into consideration, but such an assumption as is referred to in the case just cited is not available here, for the reason that the trial court, although finding that the original property had been returned, made no finding to the effect that all of the consideration received was so returned. Of the large amounts apparently received by the respondents, as above pointed out, a portion may have resulted from or may be credited to the labor of the respondent minors; but since practically all of the money came from cream checks, it would appear that another portion thereof came from and should be credited to the use of the personal property which the minors had agreed to buy, during the months the same was retained by them. Neither from the findings nor from the evidence can it be told whether this use of the property, which was a part of the consideration received by the minors, was worth the entire amount they paid to the appellant or some substantial part of it. In Pereira v. Toscano, 84 Cal. App. 526, 258 P. 429, it was held that a minor should not be charged with the income received from such a business, where the same was reasonably used in defraying the expenses of the business. A different situation here appears, as to a considerable portion of the income.

We conclude that before equity can be done between these parties, and in order to place them as nearly as possible in statu quo, it will be necessary to take into consideration the question of the value of the use of this property during the time it was used by the minors in the operation of this dairy, and that due allowance for such value should be made before it can be determined what proportion of the payments upon the contract received by the appellant should be by him returned to the minors.

For the reasons stated, the judgment is reversed and the action remanded for a new trial in accordance with the views herein expressed.

We concur: MARKS, J.; JENNINGS, J

122 Cal.App. 254

DEMENT et ux. v. PIERCE et al.

Civ. 8229.

District Court of Appeal, First District, Division 2, California.

March 31, 1932.

Rehearing Denied April 30, 1932. Hearing Denied by Supreme Court May 26, 1932.

1. **Quieting title** ⚷10(2).

Action to quiet title cannot be maintained by equitable owner against holder of legal title.

2. **Quieting title** ⚷10(2).

Equitable owner could maintain action to have his interest declared paramount to that of lienholder.

3. **Quieting title** ⚷50.

Remedy of determining priorities of opposing equities may be pursued whenever equitable considerations require it, and pleadings and proof justify it.

4. **Mortgages** ⚷186(5).

Finding that beneficiary of trust deed executed by party contracting, with purchaser in possession, to build house and improperly obtaining title from vendor, had no interest in property as against purchaser, *held* supported.

5. **Mortgages** ⚷186(5).

Evidence established that possession of purchaser occupying land under purchase contract was such as to put beneficiary of trust deed executed by holder of legal title on notice as to purchaser's rights.

Appeal from Superior Court, Ventura County; Edward Henderson, Judge.

Action by Edward B. Dement and wife against William T. Pierce, the People's Lumber Company, and others. From an adverse judgment, the People's Lumber Company and others appeal.

Affirmed.

Sheridan, Orr, Drapeau & Gardner, of Ventura, for appellants.

Pierce & Gould, and James C. Hollingsworth, all of Ventura, for respondents.

TUTTLE, Justice pro tem.

This is an action brought to quiet title to real property and for other relief. Judgment went for plaintiff, Edward T. Dement, and the appeal is from said judgment.

The facts of the transaction which lead to this action are numerous and involved. We will, therefore, confine ourselves only to those circumstances which are essential to a proper disposition of the case. We are using a singular "plaintiff" throughout the opinion, as the judgment and findings bear the name of Edward D. Dement as the sole plaintiff.

On the 19th day of April, 1923, defendant Arcade Building Company was the owner of certain land in Ventura county. Upon that date said defendant executed and delivered to one Orr a contract for the purchase of said property upon time payments. Thereafter Orr assigned said contract to respondent Dement, who moved upon the property and resided thereon at all times mentioned in the action. Following this, Dement entered into an oral contract with defendant Pierce to the effect that the latter was to build a house upon the northeast quarter of said land worth $3,200. He was also to pay $1,600 in cash; build three similar houses upon the remaining three-quarters of the lot; put in cement sidewalks; and thereafter Dement agreed to convey all of said lot, excepting the northeast quarter, to Pierce. The latter also agreed to pay to Arcade Building Company the balance of the purchase price for the lot amounting to $1,090.

Pierce proceeded to pay up in full the amount due upon the purchase price of the lot and secured a deed to himself from the Arcade Building Company, covering the entire lot. He then borrowed from appellant lumber company, through trust deeds, the sum of $2,000 upon each quarter of the lot. He also sold two of the lots to other parties. He then recorded a deed to Dement (without the latter's knowledge) covering the house and lot upon the northeast quarter, which recited that it was subject to a trust deed in favor of the lumber company in the sum of $2,000. This deed was recorded May 13, 1926, but was not delivered to Dement until August 14, 1926. Then, and for the first time, Dement learned that the Arcade Building Company had conveyed the property to Pierce, and that the deeds and trust deeds mentioned had been executed. The sum of $1,600 was never paid to Dement. The deed from Arcade Company to Pierce was executed without the knowledge or consent of Dement, as were also the deeds of trust. The foregoing facts appear in the complaint and are found to be true by the trial court.

The judgment quieted the title of Dement to the northeast quarter of said lot and decreed that appellants had no right, title, or interest therein. This was all the relief granted. This appeal is prosecuted by and in the interest of People's Lumber Company, whose $2,000 deed of trust upon this portion of the lot was, in effect, annulled and wiped out by said judgment. Defendant Pierce does not appeal.

[1-3] It is first contended that the complaint does not state a cause of action for the reason that plaintiff's title was equitable and not legal. It must be remembered

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

that this question is raised by the lumber company alone, whose sole interest in the property, if any, arose out of a deed of trust running in its favor. It is true, as appellant points out, that an action to quiet title cannot be maintained by the owner of an equitable interest against the owner of the legal title. Chase v. Cameron, 133 Cal. 231, 65 P. 460. But here the situation is different, in that the equitable owner is seeking to have his interest declared paramount to that of the holder of an equitable claim (i. e., a lien) against the property. That portion of the decree which quieted the title to the property did not concern appellant lumber company. The latter was only concerned with the portion of the judgment which declared that it had no interest in the property. The question might have been raised by the owner of the legal title, but he is not before this court. The facts upon which plaintiff's claim is based are fully set forth, and the remedy of determining the priorities of opposing equities may be pursued whenever equitable considerations require it, and the pleadings and proof justify it. De Leonis v. Hammel, 1 Cal. App. 390, 82 P. 349. The facts alleged show that the record title to this northeast quarter was in Dement at the time the action was commenced. If it were allowed to remain there, the title of Dement would be subject to the trust deed in favor of the lumber company. Dement, therefore, seeks to void the deed from Arcade Company to Pierce, in so far as it affects him, upon the ground that it was executed in violation of the terms of the agreement mentioned, Pierce taking a deed in his own name when he agreed that it should be issued in the name of Dement. It may be true that the trial court, in quieting the title of Dement, granted relief which was not fully justified under the pleadings, and that the better course would have been to decree that Pierce held the title in trust for Dement, but we cannot see how such an adjudication would place the lumber company in a better or more favorable position. Pierce would have no right as such trustee to incumber the property without the consent of Dement. We are of the opinion that, as to appellants, the complaint states a cause of action, upon the theory that the lumber company was not an innocent purchaser and under the authorities later referred to in this opinion.

[4] It is next contended that the judgment and findings are not supported by the evidence. In this connection we might point out that both parties have misconceived the effect of the judgment in this case. Respondents state: "We think the court could only say as it did that the whole thing, from the Arcade (deed) down, was void." The trial court did not so declare, nor is there any conclusion of law to that effect. The judgment affects only the northeast quarter of the lot, and as to that portion it is effective only to the extent of voiding the transaction as between the parties to the action. The judgment in no manner prejudices the rights of the lumber company in respect to its incumbrances upon the other portions of the lot. It leaves those deeds of trust valid and subsisting obligations. Turning to the contention mentioned, the brief of appellant upon this question is an argument which would have been proper in the trial court. There are twenty-one findings which take up some ten pages of typewriting. No one finding is mentioned by appellant. He launches a "broad-side" attack arguing his entire case. Such a presentation does not make for clarity and precision, and the showing made thereby would justify this court in concluding that appellant is not seriously impressed with the merit of this contention. However, we have gone through the record and are satisfied that there is ample evidence to support the findings.

[5] Appellants earnestly contend that appellant lumber company was wholly innocent in the entire transaction and should not be deprived of the lien of its trust deed upon the northeast quarter of the lot. They say: "It fairly (the action) thunders down the corridors of a court of equity, shouting that the plaintiffs are in court, seeking to confiscate the property of innocent third parties." The court found that: "And on or about the ——— day of November, 1924, the plaintiff and his said wife entered into the actual possession of said Lot Thirteen, being the real estate described in the complaint in this action, erected a house thereon and other buildings, have ever since resided on said lot and by their possession and occupancy have ever since, and at all times given adequate, sufficient and actual notice to the entire world and to the defendants, herein, that the plaintiff so possessed and occupied said premises." Under such facts the following rule is pertinent: "Where, at the time of the execution of a mortgage, a person other than the mortgagor is in actual possession of the mortgaged premises, such possession, in the absence of a statute to the contrary, is ordinarily sufficient to put the mortgagee on inquiry as to the rights of the person in possession, and he takes the mortgage subject to such rights; nor would the fact that the mortgagee secured an abstract of title showing the title to be clear and relied upon such abstract relieve him of notice conveyed by such possession." 41 Cor. Jur., p. 539. "Actual possession is evidence of some title in the possessor, and puts the subsequent purchaser or mortgagee on notice as to the title which the occupant holds or claims in the property." American Bldg. & Loan Ass'n v. Warren, 101 Ark. 163, 141 S. W. 765, 767. Such is the rule in California as stated in 18 Cal. Jur., p. 115. The trustee in a deed of trust, like a mort-

gagee, is a purchaser for a valuable consideration. Both occupy the same ground with respect to notice, actual and constructive. New Orleans Canal Co. v. Montgomery, 95 U. S. 16, 24 L. Ed. 346.

It is contended that the possession of Pierce and Dement was joint, and hence there was not an exclusive possession, and therefore, under authority of 25 Cal. Jur., at pages 840 and 841, such possession was not notice. The court does not find that there was any joint possession. The only claim to possession upon the part of Pierce was that he built the houses upon the property. The record shows that the possession of Dement was clearly of that character described in the authorities cited, and that it was sufficient to charge the beneficiary under the trust deed with notice that Dement had or might have some claim or interest in the property. The possession of the latter was inconsistent with the record title. He was living upon the property and had his home there. We cannot, therefore, agree with appellant in his plea for equity. His client failed to use ordinary diligence in not making inquiries of those in possession of the property. Had he done this, the entire situation would have been immediately disclosed, and we would not be writing this opinion now, nor would the lumber company be "out" its $2,000. It is just another instance where parties rely wholly upon the record title, overlooking entirely the matter of who is actually in possession of the property which is offered as security for a loan. And so, in conclusion, the final answer to the fervid appeal of appellants is that "equity aids the vigilant, not those who slumber on their rights."

Judgment affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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122 Cal.App. 271

LUCKETT v. LA TOUR.

Civ. 7130.

District Court of Appeal, Second District, Division 2, California.

March 31, 1932.

Rehearing Denied April 28, 1932.

1. Husband and wife 🔑333(9).

In action for alienation of husband's affections, finding that plaintiff and party whose affections were allegedly alienated were not husband and wife *held* supported.

2. Divorce 🔑172.

Recitals in divorce decree that defendant was duly cited by publication, but failed to appear and answer, *held* conclusive of such fact, unless contradicted by proof.

3. Appeal and error 🔑1011(1).

Proof contradicting recitals in divorce decree that defendant was duly cited by publication and failed to appear merely creates conflict in evidence.

4. Appeal and error 🔑1071(5).

Finding on immaterial matter cannot be made basis for reversal.

5. Marriage 🔑50(1).

In action for alienation of husband's affections, proof of marriage of husband to defendant following evidence of his marriage to plaintiff *held* not to warrant inference that second marriage was illegal.

> This is so, in absence of further evidence that first marriage had not been set aside by judicial decree, for, even without evidence of divorce, proof of second marriage would raise presumption that it was valid, and the burden of proving the contrary was on plaintiff suing for alienation of affections.

6. Husband and wife 🔑335.

In action for alienation of husband's affections, finding *held* not to constitute finding that defendant interfered in plaintiff's marital affairs.

> This was so, since the complaint alleged that the plaintiff, since the time of her marriage until the interference of defendant, enjoyed the support, protection, and company of her husband, and that they lived happily, and the finding attacked was merely in the language of the complaint preceded by the words, "but finds that it is not true."

7. Trial 🔑404(1).

Finding must be construed as whole in light of its context and issues.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by Mina M. Luckett against Lucille La Tour, sometimes known as Myrtle Ralston, sometimes known as Lucille Luckett. Judgment for defendant, and plaintiff appeals.

Affirmed.

L. G. Hayford and R. R. Sleeper, both of Los Angeles, for appellant.

W. I. Gilbert, of Los Angeles, for respondent.

FRICKE, Justice pro tem.

This is an action for the alienation of the affections of Dr. Thomas O. Luckett, to whom appellant was married in February,

1907. The parties to this marriage lived together up to some time in April, 1926, when they separated and appellant filed a divorce action on the grounds of adultery and habitual intemperance, but, after a trial, a decree of divorce was denied each of the parties. Appellant's points on this appeal are limited to an attack upon the findings of fact.

[1-5] Appellant contends there is no evidence to sustain the finding that "it is not true that they (appellant and Dr. Luckett) ever since (their marriage) have been and now are husband or wife." Appellant refers to the allegation upon which this finding is based as being made in the answer, when in fact the finding is to the effect that one of the allegations in the second paragraph of the complaint is not true. Appellant further asserts that this finding is without support in the evidence. Counsel has evidently overlooked the testimony of Dr. Luckett that in 1926 he filed suit for divorce in Texas, after establishing his residence there and his testimony, received without objection: "Q. Then after you secured a divorce you and the present Mrs. Luckett were married? A. Yes." Appellant also attacks, as without support in the testimony, the finding that appellant and Dr. Luckett were divorced in Texas in November, 1927, and that in December, 1927, respondent and Dr. Luckett were duly and legally married. There is direct testimony of the marriage in December. In addition to the testimony above quoted, there was received in evidence an exemplified copy of the Texas decree of divorce which the trial court admitted as an exhibit "as evidence of the state of mind" of the husband. In the absence of proof to the contrary, it must be presumed that the court which granted the divorce was acting in the lawful exercise of its jurisdiction, and that its official duty was regularly performed. Code Civ. Proc. § 1963, subds. 15 and 16. The decree of divorce recites that the defendant (the appellant here) was duly cited by publication, as required by law, but failed to appear and answer in the action, and such recitals are conclusive of the facts unless contradicted by proof (Estate of Pusey, 177 Cal. 367, 374, 170 P. 846) and, even had there been some proof to the contrary, and we are aware of none, there would merely have been a conflict of evidence. There was, therefore, some evidence of the divorce, sufficient to sustain the finding. We might add that, if, as appellant suggests, and urged at the trial, the matter of the divorce and remarriage of Dr. Luckett was not a material issue, the finding is upon an immaterial matter and she cannot predicate a ground for reversal thereon. If, on the other hand, this was a material issue, respondent is entitled to the benefit of the exemplified copy of the decree of divorce as support for the finding, freed from the limitation imposed by the trial court. Appellant contends that proof of the marriage of Dr. Luckett to respondent following evidence of his marriage to appellant raised the inference that the second marriage was illegal and bigamous. Such a conclusion would not be warranted in the absence of further evidence showing that the first marriage had not been set aside by judicial decree. Even without evidence of the divorce, proof of the second marriage would raise the presumption that it was valid, and the burden of proving the contrary was upon the appellant. See Marsh v. Marsh, 79 Cal. App. 560, 567, 250 P. 411, and cases cited.

The attack upon the uncertainty of the finding referring to the provision which had been made for the care of the children of the marriage of appellant and Dr. Luckett is based upon an obvious clerical error in the omission of four words, and was clearly intended as a finding that an allegation in the complaint was not true, and, what is more determinative the finding was not necessary to the trial court's decision.

[6, 7] Appellant argues that the second finding of fact is a finding that there was an interference by respondent in appellant's marital affairs. The point is without merit. The complaint alleged that appellant, "since the time of said marriage until the interference of the defendant," enjoyed the support, protection, and company of her husband, and that they lived happily. The finding attacked is merely a finding in which the language of the complaint is quoted preceded by the words, "but finds that it is not true." A finding on an issue must be construed as a whole, in the light of its context and the issues raised by the pleadings.

All of appellant's arguments based upon the false premise that the trial court found that there had been an interference in appellant's marital affairs are, therefore, wholly unsupported and untenable.

Appellant attacks certain findings as contrary to the uncontradicted evidence. These contentions are not attacks upon the several findings as a whole, but are the result of the selection of portions thereof, removing them from their context and qualifying phrases and clauses, and in violation of the well-settled rules as to the construction and interpretation of findings.

The judgment is affirmed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

122 Cal.App. 350

LONEY v. CONSOLIDATED WATER CO. OF POMONA et al.

Civ. 8243.

District Court of Appeal, First District, Division 2, California.

April 5, 1932.

Rehearing Denied May 5, 1932. Hearing Denied by Supreme Court June 2, 1932.

1. Corporations 🔑614(1).

Minority stockholders may sue for dissolution of corporation and distribution of assets (Civ. Code, § 358; Code Civ. Proc. § 803).

2. Corporations 🔑614(4).

Minority stockholder's cross-complaint, impliedly ratifying water corporation's sale of assets and asking distribution of proceeds, without charging fraud or bad faith, *held* demurrable (Civ. Code, § 358; Code Civ. Proc. § 803).

First cause of action alleged in minority stockholder's cross-complaint was that certain defendant stockholder controlled corporation through dummy board of directors, received salary of $400 monthly as general manager, overdrew his accounts through loans made to another corporation, and caused directors to vote the amount of his overdraft as additional compensation. The second cause of action alleged that corporation sold its water system to city for specified sum without stockholders' consent, and that after such sale defendant stockholder moved principal place of business of corporation to another city, and was engaged in using its assets for his personal interests.

3. Corporations 🔑614(4).

Minority stockholder's cross-complaint alleging sale of water corporation's assets without stockholders' consent, *held* not to state cause of action as against demurrer (Civ. Code, § 361a).

Such cause of action was insufficient because it did not allege that sale of corporation's water system was disposal of "the business, franchise and property as a whole" within Civ. Code, § 361a, prior to its amendment in 1931; hence the consent of stockholders was not necessary for valid sale.

4. Corporations 🔑614(4).

Claim that, because water corporation sold water system, it was engaged in unauthorized business, could not be considered, without allegations that articles of incorporation had not been amended (Civ. Code, § 362; Const. art. 12, § 1).

5. Corporations 🔑40.

Statute permitting amendment of articles of incorporation *held* not unconstitutional; hence stockholders take "contract" in contemplation of corporation's right to amend (Civ. Code, § 362; Const. art. 12, § 1).

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by James Loney against the Consolidated Water Company of Pomona and others, in which S. M. Haskell filed cross-complaint. From an adverse judgment, defendant and cross-complainant Haskell appeal.

Affirmed.

J. E. Stillwell, of South Pasadena, and Robert E. Austin and John N. Helmick, both of Los Angeles, for appellant.

Kemper Campbell and Charles L. Nichols, both of Los Angeles, for respondents.

NOURSE, P. J.

Plaintiff sued for the dissolution of the defendant corporation and for an accounting by its president and controlling director. Defendant Haskell, as a stockholder of the water company, filed a cross-complaint praying for an accounting by the corporation, for a restoration of funds "wrongfully" diverted, and for a dissolution of the corporation. The corporation and its directors demurred to the cross-complaint, and their demurrers were sustained. An amended cross-complaint was filed; the same parties filed a general and special demurrer, which was sustained; the cross-complainant declined to amend further; judgment was entered against him, from which he appeals.

The amended cross-complaint was framed to plead two separate causes of action. In the first, it was alleged that defendant Lathrop controlled the corporation through a dummy board of directors, received a salary of $400 per month as general manager, overdrew his account through loans made to another corporation, and caused the directors to vote the amount of his overdraft as additional compensation. For a second cause it was alleged that the corporation was organized for the purpose of supplying water to the inhabitants of the city of Pomona and vicinity; that, through the influence of Lathrop, it sold its water system to the city of Pomona for the sum of $831,000, without the consent of the stockholders, that said Lathrop, following this sale, moved the principal place of business of the corporation to the city of Los Angeles, and was engaged in using its assets for his personal interests. It was also alleged that, because of changes in the water system made by the city of Pomona, it was impossible to make a rescission of the sale. Upon this cross-complaint it was prayed that the corporation and its directors be required to make an accounting, to dissolve the corporation, and to distribute the assets to the stockholders.

[1] Stripped of all the academic discussion which surrounds the points raised in the briefs, the cross-complaint presents a simple suit by minority stockholders for the

dissolution of the corporation and the distribution of its assets among the stockholders. That such a suit may not be maintained by the stockholders is determined both by statute and authority. Section 358, Civ. Code, as it read prior to the amendment in 1931; section 803, Code Civ. Proc.; 7 Cal. Jur. p. 135.

[2] If the action were designed to redress the wrongful disposal of corporate property, or were based upon fraud or malversation of officers or directors, a court of equity would have jurisdiction to grant relief. Burbank v. Dennis, 101 Cal. 90, 35 P. 444; Fornaseri v. Cosmosart Realty & Building Co., 96 Cal. App. 549, 556, 274 P. 597. But fraud, breach of faith, or transactions which are ultra vires are the foundations upon which such equity jurisdiction is based. Id.; 14 Cor. Jur. p. 927, § 1444. Here appellant expressly waives his attack upon the sale of the property to the city, and impliedly ratifies it by asking a distribution of the proceeds. He does not charge any acts of fraud or bad faith, but relies solely upon generalities and conclusions. Swan v. Cons. Water Co. et al. (C. C. A.) 28 F.(2d) 971, a case involving the same transactions and a complaint which is substantially the same.

[3] The second alleged cause does not state a cause of action. Swan v. Cons. Water Co. et al. (C. C. A.) 28 F.(2d) 971, 973, 974. It is not alleged that the sale of the water system was a disposal of "the business, franchise and property, as a whole" within the meaning of that term as used in section 361a, Civil Code, prior to its amendment in 1931. Hence the consent of the stockholders was not necessary to a valid sale. Shaw v. Hollister Land Co., 166 Cal. 257, 135 P. 965.

[4, 5] The argument that because the water company sold its water system it must now be engaged in a business not authorized by its articles of incorporation cannot be taken seriously. The original articles adopted are attached to the cross-complaint, but it is not alleged that they have not been amended. The presumption that respondents are acting in good faith prevails over the innuendo to the contrary, in the absence of any allegations of facts. We may fairly assume that such amendments have been made from the vigorous argument of appellant that section 362, Civil Code, permitting such amendments, is unconstitutional. To this latter argument there is but one reply—article 12, § 1, of the state Constitution authorizes the Legislature to prescribe the powers, rights, and duties of corporations and to amend or repeal regulations to that effect. Hence the "contract" of the stockholder was taken in contemplation of the right of the corporation to change or increase its purposes by amendment of its articles under section 362.

Appellant discusses at length the general power of a court of equity to appoint a receiver. This may be granted, but, when applied to a corporation which is a going concern, such power is limited to cases not within the facts here pleaded. 6a Cal. Jur. p. 1524 et seq.; Elliott v. Superior Court, 168 Cal. 727, 145 P. 101; Boyle v. Superior Court, 176 Cal. 671, 170 P. 1140, L. R. A. 1918D, 226.

We do not consider the rights of the parties as they might arise under the General Corporation Law of 1931 (St. 1931, p. 1762), because the judgment appealed from was entered prior to the enactment of that law, and none of the briefs discusses any feature of the new enactment.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

121 Cal.App. 746

HANSEN et al. v. GELDBERG et al.

Civ. 746.

District Court of Appeal, Fourth District, California.

March 18, 1932.

1. Vendor and purchaser 🔑89.

That purchasers owed vendors for advancements and tax payments which made unpaid purchase price of land practically same as at time contract was executed did not justify vendors' forfeiture of contract.

2. Contracts 🔑169.

Contract must be construed in light of surrounding circumstances (Civ. Code, § 1647; Code Civ. Proc. § 1860).

3. Vendor and purchaser 🔑49.

Covenants of purchasers to cultivate in good farmerlike manner lands purchased or forfeit their rights therein *held* to include irrigation of crops.

4. Vendor and purchaser 🔑49.

Provision in contract requiring purchasers to cultivate lands in good farmerlike manner, or forfeit right therein, did not require that purchasers drill additional wells to retain their rights when irrigation water supply gave out.

5. Vendor and purchaser 🔑79.

Purchasers' failure because of drought to irrigate lands under contract requiring cultivation in good farmerlike manner, or forfeiture of rights in land, *held* excused by clause providing breach caused by act of God would not violate agreement.

Facts disclosed that purchasers bought 800 acres of land in lake bottom under contract whereby balance of purchase price was to be paid by delivering to vendors each year one-half of crops or gross selling price thereof, and that purchasers agreed to cultivate land in good farmer-like manner, or forfeit their rights therein, and that during two successive years drought dried up lake and caused irrigation water supply to give out, making it impossible to irrigate crops, which as a result remained immature and could be sold only for sheep pasturage.

6. Contracts 🔑318.

Forfeitures are not favored, and will not be enforced, in absence of clearly stated conditions to such effect (Civ. Code, § 1442).

7. Vendor and purchaser 🔑49.

Purchasers' failure to pay vendors half of proceeds from selling dried crops for sheep pasturage *held* not breach of purchase contract requiring purchasers to deliver half of crops to vendors, or forfeit rights in land.

Failure to make such payments was not breach of contract of purchase, because contract was devoid of any express provision regarding ownership of returns from sale of immature crops as sheep pasturage, and because in years previous to that of alleged forfeiture, when sheep pasturage consisted of stubble rather than dried crops, purchasers had sold such pasturage and retained proceeds with vendors' consent.

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action by Nis Hansen and another against E. R. Geldberg, trading under the fictitious name of the Prudential National Adj. Company and others. From a judgment for plaintiffs, defendants appeal.

Reversed.

Clark Clement, of Lemoore (E. W. Holland, of Tulare, of counsel), for appellants.

M. L. Short and John F. Pryor, both of Hanford, for respondents.

MARKS, J.

This is an action to quiet title. It was filed by respondents on June 20, 1929. Appellants asserted and defended upon the grounds of an interest in and the right to the possession of the property in question under a contract of purchase and sale made with respondents. The trial court held that appellants had forfeited their rights under the contract by a breach of its conditions and gave judgment for respondents.

A former action had been instituted by respondents against appellants on October 25, 1927, in which they sought to quiet title to the property in question, and relied upon breaches of this same contract which had occurred prior to that date. Judgment in that case went against respondents upon the same questions that are presented in the instant case, so we need only concern ourselves with alleged breaches of the terms of the contract which occurred after October 25, 1927.

On September 1, 1922, respondents were the owners of eight hundred acres of land in the Tulare lake bottoms of Kings county, Cal., together with 320 shares of stock in the Gates-Jones ditch. They executed a contract of sale of this property whereby they agreed to sell and appellants agreed to buy it for $104,000, payable $14,000, part in cash and part by a note secured by a chattel mortgage, and the balance with interest by the delivery to respondents each year of one-half of the crops or the gross selling price thereof. A supplementary contract was executed, the terms of which are not material here.

In the instant case the judgment in the trial court is based upon the failure of appellants to irrigate the growing grain during the cropping seasons of 1927-1928 and 1928-1929, which failure resulted in its drying up and failing to mature; and also upon their failure to pay to respondents one-half of $200 which had been received for sheep pasturage on the property for 1928 and $800 received for the same purpose in 1929.

[1] In the first action the trial court found that the appellants had paid respondents "on account of said agreement the aggregate sum of $51,485.32." Respondents now urge that under the terms of their contract they were required to make certain advancements to appellants and to pay certain taxes and assessments for them, and that these sums, together with interest which has accrued, leave the amount unpaid on the purchase price at practically the same sum which was owing at the time of the execution of the contract. While this may be true, it does not of itself furnish any ground for a forfeiture of the contract or of the rights of appellants to continue the purchase of the property. If the respondents desired to have the purchase price paid within a given time, they should have so specified in the contract. They did not do so, and the courts cannot rewrite the instrument for them.

The contract contains the following covenants: "The balance of said purchase price, and interest thereon, to be paid by the delivery of one-half (½) of the gross value of the crop raised upon said premises each year. * * * The said buyer * * * agrees to pay said sellers * * * the sum of one hundred four thousand ($104,000.) Dollars, at the times and in the manner herein provided, * * * interest and principal to be payable from the crop as more particularly herein set out. * * * The buyer agrees to plow and cultivate, in a good and farmerlike manner, all of said lands during each and every year, beginning with the crop year of 1923, and to so continue until the purchase price hereinbefore mentioned, together with interest on deferred payments and any payments made by the sellers as herein provided, have been paid in full; and to seed as much of said lands each year as is consistent with good farming methods. When the grain grown upon the aforementioned premises is ready to be harvested, said buyer covenants and agrees to commence harvesting, and continue with due diligence the harvesting of said crop, and to at a proper time and in a proper manner, deliver the same for sale or storage, at his discretion. That if he shall sell said grain, he shall immediately deliver to the sellers one-half (½) of the gross proceeds received therefrom, as herein provided; and that if he shall decide to store said grain, he shall immediately deliver to said sellers warehouse receipts for one-half of all grain grown upon said premises, said warehouse receipts to be properly assigned to said sellers so as to transfer title in said grain to said sellers. It being understood and agreed that the said grain so held by said sellers shall be held subject to be sold at the request of the buyer, the money obtained therefrom to apply on this agreement, after deducting from said money so obtained any warehouse charges or costs incurred by said sellers in the storing or handling of said grain; it being understood and agreed that said grain shall not under any circumstances be stored more than one year. The buyer covenants and agrees that he will at all proper times keep the grain fully insured, and should the grain be destroyed by fire, or otherwise, any money obtained from insurance or otherwise, shall be paid one-half (½) thereof to the sellers, and credited herein as provided. It is mutually understood and agreed that the money obtained from the sale of said grain, or the insurance thereof, shall be applied, first, on the payment of any taxes or assessments previously paid by the seller, as herein provided; secondly, to the payment of interest due under this agreement; the balance remaining thereafter to apply on the purchase price, as herein agreed. * * * Failure on the part of the buyer to comply with any of the provisions or conditions of this agreement, by reason of * * * the elements, acts of God, * * * floods, * * * or by any cause beyond the control of the buyer, whether similar to the causes herein specified, or not, shall not be deemed a failure by the buyer to comply with any of the provisions of this agreement, or a violation of any of the provisions of this agreement. * * * Should default be made in the payment of any sum or sums which said buyer hereinbefore covenants and agrees to pay when the same become due, or should default be made by said buyers in not seeding, cultivating or harvesting the crops upon said lands, as hereinbefore provided, in a good farmerlike manner, or in failing to comply with any of the covenants and agreements hereinafter to be performed by said buyer, then in such event the whole unpaid balance of said purchase price with interest, and all advancements theretofore made by said seller, with interest thereon, shall be immediately due and payable at the option of said sellers, who may thereupon at their option enforce their rights hereunder, either by forfeiture of all rights of said buyer under this agreement and all interest in the land described herein and the appurtenances as herein provided. * * *" The contract provided that time be its essence.

We will first consider the question of whether or not the failure to irrigate the growing crops of grain in each of the years, 1928 and 1929, furnished respondents a ground for forfeiture of the contract. This involves the consideration of two questions: First, because of the total failure of the existing water supply in dry seasons, were appellants required by the contract to develop new sources of supply of irrigating water; and, second, was irrigation excused by the contract when the existing water supply failed because of drought?

[2] Circumstances surrounding the parties executing a contract, and well known to them at the time, are often of great assistance in interpreting their intention where the express terms of the contract are not clear and where a dispute later arises. "A court is not only to take a contract by all its corners, but is to be placed in the seats of the parties when it was made. In other words, a contract is to be construed in the light and with the knowledge of surrounding circumstances." 6 Cal. Jur. 294; section 1647, Civ. Code; section 1860, Code Civ. Proc.; Stein v. Archibald, 151 Cal. 220, 90 P. 536; Peterson v. Wagner, 52 Cal. App. 1, 198 P. 25. As the contract is void of any terms placing an obligation on either of the parties to develop a new or additional water supply in the event of a failure of the existing water supply, we may look to the surrounding circumstances to determine their intention upon the happening of that unhappy event.

We are informed that during the early period of California's statehood Tulare lake was a considerable body of water, and was of sufficient depth to permit the navigation of flat-bottom steamboats. It was fed by the melting snows of the mountains, and at times drained northward, its waters finally reaching the ocean. As the San Joaquin Valley became populated and its lands cultivated, much of the water which formerly fed the lake was diverted by agriculturists for irrigation purposes. This, with recurring periods of subnormal rains and mountain snows, so reduced the waters of the lake that, intermittently, and for several successive years at a time, it has been entirely dry, and much of its old bed has been at times cultivated. For the last number of years, during the periods when there was water in its bed, its size as a lake has been greatly reduced. Farmers of the district built a series of dikes to restrain the spreading of the water during the "wet years," so that a large portion of the former lake bottom was reclaimed and permanently used as agricultural lands. The water confined in the lake furnished an important supply of irrigating water for the district.

The land in controversy was located about one and one-half miles from the boundaries of the lake as defined by the dikes. In the development of an irrigation project the farmers of the neighborhood had constructed the Gates-Jones ditch, which passed by the boundaries of respondents' property. The 320 shares of stock which we have mentioned entitled the parties here to take irrigating water from this ditch. Its bottom was about level with the bottom of the lake, and in the summer of 1922 the water in it stood at about, or slightly above, the level of the adjacent land. When the water was above the land, gravity flow carried it onto the fields. When it receded below this level it was necessary to pump the water onto the lands.

Respondents had a well upon their property, with a pump operated by electrical energy. The plant cost about $10,000. A number of years ago the well flowed, but the water level had so receded in the summer of 1922 that the pumps and equipment could only raise sufficient water to irrigate three or four acres of land each day. It is therefore obvious that the water in the Gates-Jones ditch furnished the only adequate supply of water for irrigation purposes on September 1, 1922, the date of the contract of sale. At that time, by using the pumping plant alone, it would have taken at least two hundred days to irrigate the eight hundred acres of land to be cultivated under the terms of the contract. It is apparent, from the relatively small number of acres of land that could be irrigated with water from the well during the comparatively short irrigating season in maturing a crop of grain, that the pumping plant furnished a small auxiliary to the main supply of irrigating water obtained from Tulare Lake through the Gates-Jones ditch. That it was so regarded by the parties is indicated from the failure of the contract to require appellants to maintain the pumping plant so that it would pump water to its capacity of that time, or to enlarge it and install other and larger or deeper pumping equipment, or to provide other sources of well water for irrigating purposes. The silence of the contract on these questions might be strongly urged as indicating that, as there was a considerable quantity of water in Tulare Lake in 1922, the parties regarded that source of supply adequate for irrigation purposes until such time as respondents would receive their pay in full for the property.

Shortly after appellants went into possession of the property, a series of "dry years" set in. The water in Tulare Lake began to recede and the water levels in all the wells in the district fell. Appellants twice lowered the pump in the well and later installed a pump of different capacity from the one which was there in September, 1922. The mechanical construction of the well would not permit the pump to be further lowered without much reconstruction work.

In the fall of 1927 appellants planted the entire property to crops of grain which ordinarily would have matured in 1928. In 1927 the water level receded to between one hundred twenty and one hundred thirty feet below the surface of the ground, entirely below the reach of the pumping equipment, so that no water could be raised to the surface during 1928. Tulare Lake entirely dried up, and appellants were without any water for irrigation purposes. The crops failed to mature in 1928 solely because of a lack of irrigation. The same condition existed in 1929 and the same crop failure resulted. It is conceded that the planting was done in a good and farmerlike manner, and it is admitted that in these two years the crops were only fit for pasturage and were not suitable for harvest.

As we have indicated, appellants sold the pasturage for $200 in 1928 and $800 in 1929, retaining these sums of money. On May 28, 1929, respondents demanded that appellants pay them $500, one-half the money received for the pasturage. It was not paid, and this action was instituted on June 20, 1929.

[3] Appellants maintain that their covenants to "plow and cultivate in a good and farmerlike manner all of said lands" or the provision for forfeiture upon their failure in "cultivating * * * the crops upon said lands * * * in a good and farmerlike manner" should not be construed to include the irrigation of the crops. It is admitted that grain cannot be grown upon the property without irrigation, and that this was well known to both parties at the time of the execution of the contract. We think the construction of this language sought by appellants is not justified by the intention of the parties as disclosed from the entire instrument and the well-known conditions governing the farming of grain in the district. We conclude that the provision requiring appellants to cultivate the crops upon the lands in a good and farmerlike manner required them to perform all acts of good husbandry necessary to successfully mature the crops within the means reasonable within their command, if not prevented by means over which they had no control, or excused by other terms of

the contract. As the crops could not be matured without irrigation, good husbandry would require their irrigation, if water were therefor reasonably available under ordinary conditions.

[4] As the contract did not require appellants to develop new or additional supplies of water for irrigation purposes, and did not contain a specific requirement that appellants irrigate the crops each season, we cannot hold that the provision requiring them to cultivate the crops in a good and farmerlike manner would compel them to drill additional wells or develop other sources of supply, should the water ordinarily used for irrigation purposes entirely fail by reason of long or continued droughts. The development of an additional supply of water would not be included within the duties imposed by their obligation to cultivate the crops in a good and farmerlike manner. Whether or not the development of irrigating water by drilling wells was included as one of the incidents of "farming" was considered in the case of Robinson v. Eberhart, 148 Cal. 495, 83 P. 452, 454, where it was said: "If it be conceded that sufficient water could in the future be obtained on the land in question, by artesian well-boring, which, if used in irrigating the same, would render any considerable part of it fit for agricultural purposes, and this the evidence utterly fails to show, the question would then remain as to whether the development of water in this way could be considered an ordinary farming process. We have no hesitation in answering this question in the negative. An attempt to so develop water has nothing whatever to do, like the clearing land of timber, or even surface water, with the preparation of the soil for agricultural purposes. It is in no proper sense of the word 'farming.' It is more in the nature of a speculative and very costly effort to discover an element which, when discovered, and, by artificial methods, combined with the soil, will render it amenable to ordinary farming processes. * * * However liberally the words 'ordinary farming processes' may be construed, we are satisfied that they cannot be held to include such a method for the development of water."

[5, 6] We conclude that by the terms of the contract the failure of appellants to irrigate the crops and thereby mature them so that respondents would have received payments on their contract during the years of 1928 and 1929 was expressly excused by that clause which provided that, where any breach was caused by "the elements, acts of God, * * * or by any cause beyond the control of the buyer," that such breach should not be considered "a violation of any of the provisions of this agreement." The failure of the implied obligation to irrigate the crops was caused by a total failure of the supply of irrigating water, and should be held to come within these provisions. Certainly, if the crops had been washed out or destroyed during these two years by great and unusual floods, their loss would be excused. We cannot see why such loss should not be excused when the converse was true and they were destroyed by drought. In reaching this conclusion, we are aided by the principle announced in 6 Cal. Juris. 362, as follows: "A forfeiture stipulated in a contract will be enforced if the rights of the parties cannot otherwise be preserved. But a contract is not to be construed to provide a forfeiture unless no other interpretation is reasonably possible. The law does not favor forfeitures, and will not enforce them in the absence of clearly stated conditions of forfeiture. As provided by the Civil Code, 'A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created.'" Section 1442, Civ. Code.

[7] The only other purported breach of the contract by appellants upon which a forfeiture might be predicated is their failure to pay respondents one-half of the moneys received from the sale of sheep pasturage during the two years in question. We should again observe that the contract is devoid of any express provisions regarding the ownership of the returns from such a source. In its entirety it would appear that at the time of the execution of the contract the parties had in view the division of the proceeds from the matured crops, from which source alone respondents would receive payment for their property. The trial court found: "It is true that there is no custom as to the division of stubble on lands neighborhood of the lands described in plaintiffs' complaint herein."

In considering this question, we have access to the interpretation put upon the terms of the contract by the conduct of the parties from its execution in 1922 to its attempted forfeiture in 1929. Where a contract between parties has been interpreted by their actions over a period of years, and the express terms of the contract are not to the contrary, and their meaning not clear, the construction so placed upon its terms forms a very reliable means of arriving at their true intentions. Ghirardelli & Co. v. Students' Express & Transfer Co., 175 Cal. 427, 166 P. 16; Woodard v. Glenwood Lumber Co., 171 Cal. 513, 153 P. 951; Boardman Co. v. Petch, 186 Cal. 476, 199 P. 1047.

Each year, from the execution of the contract to its attempted forfeiture, sheep pasturage was grown on the property. Up to the year 1928 it consisted of stubble, and in 1928 and 1929 it consisted of unmatured and dried crops planted by appellants which were not fit to be sold for any other purpose. The stubble had been sold by appellants for sheep pasturage and all of the proceeds from such sales retained by them with the knowledge of respondents and without their demanding any part thereof. The dried crops were also so sold by appellants in 1928 and the sale price retained by them. This sale was made some time before the middle of 1928, and was known to respondents, who did not demand any part of the proceeds of the sale until the latter part of May, 1929, and after the sale of the sunbaked crops of 1929. We believe this course of conduct between the parties, extending without interruption and by mutual consent over a period of six consecutive years, shows rather conclusively that they construed the contract in such a manner as to give appellants the right to retain the money received from the sale of sheep feed. This conclusion is supported by a careful study of the contract, which in its entirety would support the conclusion that only matured crops or money derived from their sale should be divided between the parties and furnish a fund to which alone the respondents must look for their payments under its terms.

We have reached the conclusion that the two purported breaches of the contract relied upon by the trial court to support the judgment forfeiting appellants' rights under the contract are entirely insufficient to accomplish any such result.

Judgment reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

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122 Cal.App. 298

NEWMAN v. NEWMAN.

Civ. 8397.

District Court of Appeal, First District, Division 2, California.

April 1, 1932.

1. Appeal and error ⚷1011(1).

Conflict in evidence is addressed to trial court and not to court of review.

2. Divorce ⚷135.

Evidence that, although husband deserted wife, he returned within month and offered in good faith to fulfill marriage contract and solicited condonation, made prima facie showing on issue of condonation.

3. Divorce ⚷127(4).

Testimony of witness that plaintiff husband and defendant wife were not living together *held* sufficient corroboration to justify divorce.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Action by Abe Newman against Lillian Newman. Judgment for plaintiff, and defendant appeals.

Affirmed.

Joseph F. O'Malley, of San Francisco, for appellant.

Roland Becsey and W. P. Caubu, both of San Francisco, for respondent.

STURTEVANT, J.

The plaintiff was awarded an interlocutory decree of divorce from the defendant, and she has appealed and has brought up a typewritten record. The transcript discloses that the plaintiff and defendant married on the 19th day of August, 1927. Prior to that date the defendant had been married and had four children. She and her children were residing at 1366 Noe street in San Francisco. After his marriage the plaintiff took up his residence in the home of his wife. Some trouble arose regarding the inability of the husband to get along with his stepchildren. For that reason, on January 23, 1928, he left the home. He remained away until the date of the defendant's birthday in the month of February —one month more or less. On that date he returned to congratulate his wife on her birthday and to present her with a gift of $50. It was about lunch time, and they had their luncheon. During that same year he returned on two or three other occasions—the last one being in August. The plaintiff testified that when he called in February he asked his wife if they "couldn't patch things up and go back together." He further testified that in that conversation he and his wife talked about where they might live outside of the place they had formerly lived, and that he was willing to buy a home at Ingleside terrace and take the whole family out there. Continuing, he testified, " 'No,' she says, 'it's to choose between you and my children, it wouldn't do any good, I wouldn't be satisfied there,' she says she rather not, she preferred to stay with the children." The wife testified to the same facts, but claimed that the conversation about a reconciliation did not occur in the February meeting, but did occur at another meeting. Furthermore, she testified: "Mr. Newman wanted to come back then and I told him his disposition was bad and I said I knew we couldn't get along with his disposition, it was awful hard and he hesitated a minute and he says, 'I can't help my disposition,' and he got up and walked out. He walked out gruffly." As may have appeared from what has been said above, it was the theory of the plaintiff that, although he deserted the defendant, when he returned within a month and offered in good faith to fulfill the marriage contract and solicited condonation, his desertion was cured, and that the separation thereafter constituted desertion on the part of the defendant.

[1, 2] The defendant claims that the facts do not show that the plaintiff solicited condonation. Kusel v. Kusel, 147 Cal. 52, 81 P. 297. The facts of the cited case are quite different from the facts in the instant case, and we think it is not controlling. There was nothing in the record showing that the plaintiff did not make his offer in good faith to fulfill the marriage contract. As to soliciting condonation, the most that can be said is that the evidence contained some conflict, but that conflict was addressed to the trial court and not a court of review. The facts recited above made at least a prima facie showing on the issue of condonation. McMullin v. McMullin, 123 Cal. 653, 656, 56 P. 554.

[3] It is claimed that the record does not contain sufficient evidence of corroboration. The defendant asserts that a divorce may not rest on the testimony of the parties, but that there must be corroboration. Admitting the contention, it will suffice to say in the instant case the record contains such corroboration. After the plaintiff left the home in January, 1928, he and the defendant lived separate and apart. Both the husband and the wife testified to those facts. Mr. Stewart, a witness called in behalf of the plaintiff, testified at the date of the trial, November 12, 1929, that he and the plaintiff lived at the same hotel. Continuing, he testified that from February, 1928, down to the date of the trial, Mrs. Newman was not living at the hotel with her husband. Therefore it cannot be said that there was not some corroboration.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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122 Cal.App. 12

PAGE et ux. v. BROWN et al.

Civ. 4544.

District Court of Appeal, Third District, California.

March 19, 1932.

Rehearing Denied April 18, 1932. Hearing Denied by Supreme Court May 16, 1932.

1. **Exchange of property** 🔑**8(1).**

Evidence as to truth of representation as to quantity of hay produced on land *held* for jury in suit to rescind exchange of property.

2. **Specific performance** 🔑**49(2).**

While adequate consideration must be shown to justify specific performance of contract for exchange of property, highest possible price is not essential to sustain decree (Civ. Code, § 3391, subd. 1).

3. **Specific performance** 🔑**49(2).**

Specific performance of contract for exchange of properties will not be disturbed for inadequate consideration merely because values are unequal, where ample opportunities for investigation existed (Civ. Code, § 3391, subd. 1).

4. **Specific performance** 🔑**121(8).**

Evidence as to values of properties involved in exchange *held* not to show such disparity as to justify reversal of decree for specific performance (Civ. Code, § 3391, subd. 1).

5. **Exchange of property** 🔑**5.**

Plaintiffs cannot rescind contract because of their own neglect to execute deed within time fixed for exchanging properties.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by Thomas Page and Emma May Page, his wife, against James T. Brown and Marie M. Brown, his wife, who filed cross-complaint, and the Security Title Insurance & Guarantee Company. From judgment for defendants Brown on the cross-complaint, plaintiffs and cross-defendants appeal.

Affirmed.

Leland J. Allen, of Los Angeles, for appellants.

Ben F. Gray, of Los Angeles, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiffs began this action to secure the rescission of a certain agreement made and entered into with the defendants Brown on or about the 11th day of April, 1929, whereby the respective parties just mentioned agreed to exchange certain real property. To this complaint the defendants Brown, in addition to their answer, filed a cross-complaint praying for specific performance and for a decree of the court directing and requiring the plaintiffs to fully execute their part of the agreement. The defendants Brown had judgment upon their cross-complaint for specific performance. Rescission as prayed for by the plaintiffs was denied. From this judgment the plaintiffs appeal.

The record shows that some time prior to the 5th day of April, 1929, the defendants Brown, desiring to exchange a ranch belonging to them, situate in the county of Calaveras, for property in the county of Los Angeles, engaged the services of a real estate dealer by the name of C. P. Blakemore, and left with him a description of their property, as follows:

"Improved ranch, Calaveras county, California.

"Acreage: 1,900 acres, more or less. Location: One mile west of Angels Camp. Elevation: 1,500 feet above sea level. Climate: Mild; produces nuts, figs, oranges, etc., near this ranch. There are English walnuts, figs, apples, peaches, cherries, etc., produced on this ranch. The climate is very even; the coldest is frost or perhaps thin ice a few mornings in the winter. Soil: Best soft, mountain loam. This soil is very productive, and much of it is made-soil. Water is supplied in abundance from Angels Creek, in our own ditches. Water is all free, about 200 acres irrigated. Production: This is really a cattle ranch; is equipped for hogs also, but place is now used for sheep-raising. It will run 300 head cattle or 1,500 head sheep. Acorns in abundance make hog-raising profitable. Alfalfa does well on this ranch. Some of land is heavily wooded, large portion of grazing land. 300 tons hay cut annually. Angels Creek is a wide stream flowing through the ranch; excellent fishing; good hunting. Angels Camp has 1200 population; good schools; theatres, churches, etc. Is 60 miles from Stockton, 56 miles from Modesto, 140 miles from San Francisco. Improvements: 3 living houses and 4 barns. One house has 8 rooms; one has 4 or 5 rooms, modern. Entire ranch is fenced and cross-fenced, partly hog-tight fencing, part barbed-wire. The mortgage is $13500. 10 years to run at $1500 per annum, starting May, 1930. Int. 7 per cent, payable semi-annually. Taxes $581 per year."

At about the same time the plaintiffs in this action, the owners of a small tract of land situate in the county of Los Angeles, to wit, all of lot 1, block "A" of the Lowell tract, county of Los Angeles, state of California, as per map recorded in Book 54, page 17 of Miscellaneous Records of said county, containing 7.93 acres, more or less, on which tract was standing and growing lemon and orange trees, being desirous of exchanging the same for a cattle ranch, came in contact with C. P. Blakemore, who exhibited to them the description of the property belonging to the Browns, as set forth herein. Thereafter, and about the 6th of April, 1929, Blakemore took the plaintiffs and their two sons from their home in Los Angeles county to the stock ranch owned by the Browns in Calaveras county, and remained there with them two days, during which time the plaintiffs inspected the Brown ranch.

We may here state that the contention of the appellants is based upon two grounds: First, misrepresentations as to the amount of hay raised upon the Brown ranch annually; and second, the inadequacy of consideration, or, rather, the alleged disparity in the value of the two places.

The record shows that Mr. Blakemore, Mr. Brown, Mr. Page, and Mr. and Mrs. Page's two sons spent two days going over the Brown ranch. In going over the ranch they walked a considerable part of the distance and rode on horses a part of the way. The Pages were shown the exterior boundary lines of the ranch; they were shown the hay land, which included the irrigated land; they were also shown the pasture lands and the portion of the land which included a small mountain peak. During the stay of the Pages at the Brown ranch they were introduced to Mr. Tyron, who had managed the Brown ranch during the time that the Browns had been owners thereof. Mr. Brown informed the Pages that he himself had only spent about six months on the ranch; had been the owner of it less than a year; that Mr. Tyron was familiar with the ranch, and could tell them all about it. In relation to the quantity of hay which the ranch had, or would produce, Mr. Tyron stated that it was one of the best stock ranches in that part of the country; that it would run from 200 to 300 head of cattle, if properly cared for; that the quantity of hay produced depended entirely upon the care of the ranch; that the ranch had had no care for six or seven years, and needed reseeding; that he had seen from 300 to 400 tons of hay cut off the ranch. During the stay of the Pages in Calaveras county they spent one night at Angels Camp, a short distance from the Brown ranch. The Pages also were shown all the irrigation ditches, the fences, and were informed as to a certain mortgage thereon in the sum of $13,500. After the two days spent in examining the Brown ranch, it appears that the following conversation took place between the Pages and Mr. Brown: Mr. Page said: "I have seen your ranch; I like it better today than I did yesterday. After you come down and look at my ranch I will be glad to have you look my proposition over." Mr. Brown replied: "I am very busy; I am shearing sheep; I cannot go down on uncertainties. If you like the ranch well enough to make a proposition, I will take the time to go down and look at your property." Mr. Page replied: "Well, I will make you this proposition: I will give you my ranch for yours; you throw in the Ford truck, goats, horses and cow." Mr. Brown replied: "I couldn't throw in the horses or cow, Mr. Page. I am just pasturing the horses for their use, and the cows I don't own. I do, however, own the pony. I will give you the goats, truck and pony, provided your place suits me." After some further conversation Brown agreed to throw in a certain kitchen range that was on the Brown premises. (We are quoting from the testimony of Mr. Blakemore.) A good portion of Mr. Blakemore's testimony is taken up in answering questions to the effect that he heard no such conversation between the Pages and Brown as appears in the testimony of the Pages. Mr. Blakemore stated that, after Mr. Page had made his proposition to Mr. Brown, Page and Mr. Brown shook hands upon the proposition. Thereafter the Browns went to Los Angeles, examined the land owned by the plaintiffs, and, after agreeing that the plaintiffs should gather the orange crop then on the premises and one picking of lemons, an agreement was entered into on the 11th day of April, 1929, for the exchange of their properties. The Pages, for their property, were to receive in exchange the ranch belonging to the Browns, covering between 1,900 and 2,000 acres. 60 head of goats, a few chickens, pony, Ford truck, and kitchen range. The agreement of exchange was left with the Security Title Insurance & Guarantee Company, with directions with regard to searching the title and carrying out the escrow instructions, which are not material herein save and except as to one paragraph, which reads as follows: "If you are unable to comply with these instructions prior to the expiration of thirty days from this date, you are instructed to comply with the same within such additional time as may be required by you, unless a demand is written and delivered to you subsequent to such expiration and prior to the filing of any document required in this escrow by any party who has signed this escrow for the return of the money and documents to the parties who deposited the same with you." The Pages' property was subject to an encumbrance in the sum of $10,500.

A deed was executed and delivered by the Pages, running in favor of the Browns, for their property in Los Angeles county, and a deed was executed by the Browns in favor of the Pages for their Calaveras county ranch; both deeds being left with the Security Title Insurance & Guarantee Company. Subsequent to the delivery of these papers and searching of the title, it was discovered that the property belonging to the Pages was listed under the "Torren's Act," and an additional deed from the Pages was required, which deed has not been executed by the Pages.

After the deposit of the escrow deeds and the execution of the escrow instructions, and the agreement of exchange to which we have referred, and on or about the middle of May, 1929, the Pages moved their household effects and personal belongings to the Brown ranch, and also, on their return trips, moved the household and personal belongings of the Browns from the Calaveras county ranch to the Page ranch in Los Angeles county.

At the time of the first visit of the Pages to the Brown ranch the Browns had some 500 head of sheep feeding upon the pasture land on the Brown ranch, and it appears that, when the Pages returned to the Brown ranch in the middle of May, they ascertained that the hay land had been browsed over by the sheep, and that there was little or no grass left which would be available for cutting for hay. Thereupon the Pages telegraphed and also wrote to the Security Title Insurance & Guarantee Company, notifying them to return all papers which had been signed by them and theretofore deposited under the escrow instructions. Demand was also made upon the Browns for a cancellation of the agreement of exchange and for repossession of the Los Angeles property, possession of which had been delivered to the Browns. This demand not having been complied with, this action was begun.

The record shows that there was no reservation in the agreement or escrow instructions relative to the 1929 hay crop, but it also shows that there was some conversation between the Pages and the Browns concerning the time when possession was to be delivered of the Brown ranch, and of the fact that the Browns had some 500 head of sheep running on the ranch, and that green feed was necessary to their maintenance. In this particular the testimony is in direct conflict, and therefore was a matter solely within the purview of the trial court. The judgment in this case, however, is not sought to be set aside for this reason, and therefore need not be further discussed herein.

[1] The first attack upon the judgment is that relating to the quantity of hay produced, and the statement contained in the description of the property left by the Browns with the agent Blakemore, wherein it is recited that the ranch produced 300 tons of hay annually. As we have stated, the Pages visited the ranch in April, 1929, and were told by Tyron that the ranch had been neglected for several years and that the hay land needed reseeding. Appellant calls our attention to the testimony of one Bava, who was at work on the ranch for four or five years preceding the transfer thereof by the Browns to the Pages. His testimony was to the effect that in no year during the time he was upon the ranch did he cut over 100 tons of hay. A witness by the name of Airola testified that he had been acquainted with the ranch for over twenty years, and that during such time 300 tons of hay were never cut during any one year. On the other hand, a witness by the name of Sanders testified that he bought the ranch in 1917; lived there until some time during 1922 or 1923, and that the least quantity of hay he ever cut off the ranch was 300 tons; the largest quantity was 600 tons; that in

1917, when he bought the ranch, he cut 150 tons; in 1920, between 350 and 400 tons; in 1921, about 300 tons; and about the same amount in 1922.

There is testimony in the record also to the effect that during the time that Bava was in charge of the place it was not properly irrigated, and that Bava cut the hay only once, whereas other witnesses stated that they cut the hay several times, four cuttings in some places.

A witness by the name of McCauley testified that the place did and would produce between 275 and 300 tons of hay per year, and that more could be obtained if the right care was taken thereof.

A witness by the name of Reister testified as to four cuttings annually while he was on the ranch. There is also testimony in the record that Mr. Brown stated to Mr. Page that all he knew about the ranch was what his neighbors had told him.

The record also shows that the Pages had an opportunity, when they were visiting the ranch, to make inquiries concerning the same, but, according to their own testimony, they did not do so.

From what we have here recited, as shown in the transcript, it is clear that we cannot disturb the finding of the trial court in holding that the Pages were not defrauded by any representations made concerning the quantity of hay which the ranch was capable of producing annually. The mere fact that any one in charge of the ranch neglected to properly irrigate the same, or to make as many cuttings of hay as others had done, would not justify a holding that the statement given by the Browns to Blakemore contained any fraudulent representations. The Pages had an opportunity to investigate the ranch to see for themselves, and, according to the testimony of the witness Tyron, were advised of the fact that in recent years the ranch had been neglected and proper care had not been taken of the hay land.

[2, 3] It is next contended that the Pages have not received adequate consideration, and therefore, under the provisions of subdivision 1 of section 3391 of the Civil Code, which provides that, if adequate consideration for a contract has not been received, specific performance will not be enforced, the judgment should be reversed on account of lack of adequate consideration.

In Boulenger v. Morison, 88 Cal. App. 664, 264 P. 256, 258, it is said: "The law is well established that before a court of equity will decree specific performance of the contract, the plaintiff must allege and prove that the contract was just and reasonable and the consideration adequate." This statement of the law is supported by a long list of authorities found on page 669 of 88 Cal. App., 264 P. 256, 259.

"'Adequate consideration,' as used in section 3391, subd. 1, Civil Code, does not necessarily mean the highest price obtainable, but a price that is fair and reasonable under all the circumstances; it is always peculiarly a question of fact for the trial court to determine, in the light of all the facts and circumstances of each particular case. Morrill v. Everson, 77 Cal. 114, 19 P. 190; Wilson v. White, 161 Cal. 464, 119 P. 895; Cummings v. Roeth, 10 Cal. App. 144, 101 P. 434." Boulenger v. Morison, supra.

While an adequate consideration must be shown, the highest possible price need not be the consideration in order to sustain a judgment decreeing specific performance. Applying this rule to the case at bar, it is not necessary that the respective parcels of land should be of an exact equal value or command an equal price in the market in order to require an affirmance of the judgment. If, under the circumstances surrounding the transaction, and in view of the fact that the parties had an equal opportunity to make investigations, it appears that the consideration was adequate, even though we might believe that one tract of land was of a greater value than the other, or would command a greater market price, it would still be our duty under the law to uphold the judgment.

As we have stated, in addition to the real estate involved, the Browns agreed to deliver, and did deliver, sixty head of goats, one pony, saddle, and kitchen range. On the other hand, the Pages reserved the crop of oranges upon their Los Angeles county property and one picking of lemons. The testimony set forth in the record would indicate that the Page property in Los Angeles county would probably sell for a somewhat greater price than the Brown ranch in Calaveras county. The record, however, does not show the market value of either property in the true sense of the word. None of the witnesses were interrogated as to the market value of either property; they were simply asked what they thought the different properties were worth. Both of the appellants' testimony was introduced, and several witnesses testified that the Page property was worth $40,000 to $45,000. On the part of the respondent testimony was introduced that the Page property was worth only about $24,000 or $25,000. An analysis of the testimony shows that the value set upon the Page property by the real estate dealers who testified concerning the same was all based upon the possibilities, and what we may properly call the future possibilities of selling a portion thereof for town lots, the testimony showing that the Page property faced upon a boulevard leading to the city of Whittier, some miles distant. Thus, when the different possibilities of the use of the property were segregated, and the respondents' witnesses were interrogated as to the possible use of the property in the manner indicated, testified to a valuation of between $31,910 up to $34,270, but that taken as a whole the property was worth only about $25,000.

The record is absolutely silent as to the expenses that would be necessary in subdividing the property and placing it upon the market for town-lot purposes, or rather, for country homes, upon lots similar in size to those found in incorporated cities. The record is also silent as to there being any present market for residence lots on the Page property, though there is some testimony that residence lost had, at some date previously not given, been sold from a tract of land between one and two miles distant from the Page property, which one of the witnesses testified was not quite so favorably situated.

As to the value of the Calaveras land, one of appellants' witnesses testified that it was between $20,000 and $22,000. Mr. Tyron, a witness for the respondent who had lived on the land and managed the same, testified that it was worth $25,000, and one witness by the name of Ruthven, who had spent only one day upon the land, had made no inquiries concerning the value of lands in Calaveras county, and who testified that he was not familiar with the value of lands north of Fresno, was allowed to state his opinion that the Brown ranch was worth the sum of $40,000. Though admitted by the trial court, we cannot conceive that the court gave any consideration to an opinion based only upon confessed ignorance. It should have been excluded, but we nevertheless think it harmless.

In view of the fact that the witnesses testifying as to the value of the Page property based their estimates so largely upon what clearly appears to be speculative possibilities in the use of the property for subdivision purposes, we cannot say that the court was not justified in taking the statement of witnesses who testified as to the value of the property taken as a whole, and just as it existed at the time of entering into the agreement of exchange by the respective parties to this action, especially in view of the fact that no information was given to the trial court as to the expenses that would necessarily be incurred in subdividing the property and marketing the same, and also, as we have stated, the silence of the record as to there being any existing market for the property even though subdivided.

A setting forth of the testimony would only show what we have summarized, and disclose the wide divergence in the estimate of values concerning the Page property; that is, its value as a whole and its value for possible subdivision purposes.

Again, the court had before it the witnesses, and could determine just how much weight should be given to the testimony of the different real estate men, concerning the subdivision possibilities of the Page property, and how much was based upon fact, and how much was based upon anticipation of future demands and inflated prices that might never exist. In this particular our attention is called to that portion of the record where it is claimed that Mr. Brown was guilty of fraud by remaining silent when Mrs. Page stated to him that their property in Los Angeles county was worth $60,000, and Brown said nothing concerning the value of the Calaveras ranch. It is urged that Brown's silence amounted to a concealment of a fraud, or to a tacit statement that the Calaveras ranch was worth an equal sum. On the other hand, in the light of the circumstances, we think the trial court was justified in concluding that the statement of Mrs. Page was of such inflated ideas concerning values, as to require no answer.

[4] While there is some disparity in the values between the two properties, the record does not show a sufficient difference in values of properties agreed to be exchanged as to justify a reversal of the judgment on the ground of inadequacy of consideration.

It is also urged that, as the exchanges of deeds had not been entirely completed prior to the expiration of thirty days after the signing of the escrow agreements, the telegram and letter sent to the Title Company amounted to a rescission under the paragraph set forth in the escrow instructions which we have quoted in this opinion.

[5] The failure, if any, on the part of the Security Title Insurance & Guarantee Company was due to the fact that the appellants had not executed the second deed due to their property having been listed under the "Torren's Act" (St. 1915, p. 1932). We do not very well see how the appellants can take advantage of their own neglect or failure.

The appellants strongly insist that the circumstances of this case are similar to those involved in the case of De Garmo v. Petitfils Confiserie Corporation, 93 Cal. App. 261, 269 P. 692, and that the decision herein should be governed thereby. A reading of the De Garmo Case shows that it is inapplicable. The De Garmo Case bristled with fraudulent representations, which are absent from the record in the case which we are now considering.

The judgment is affirmed.

We concur: PRESTON, P. J.; R. L. THOMPSON, J.

122 Cal.App. 237

LOS ANGELES SOAP CO. v. BOSSEN et al.

Civ. 4516.

District Court of Appeal, Third District, California.

March 30, 1932.

1. Appeal and error ⚿82(3).

Order denying motion to vacate judgment is appealable as "special order made after final judgment" (Code Civ. Proc. § 963).

[Ed. Note.—For other definitions of "Special Order," see Words and Phrases.]

2. Appeal and error ⚿920(4).

In support of findings that one attachment had priority over attachment levied three days before by another judgment creditor, appellate court must assume money was not on such earlier date in possession of third party against whom attachments were made.

3. Appeal and error ⚿931(1).

Every presumption in support of judgment must be indulged.

4. Attachment ⚿164.

Levy of attachment made on personalty which officer does not see or have in his possession is void (Code Civ. Proc. § 542, subd. 3).

Appeal from Superior Court, Yuba County; J. O. Moncur, Judge.

Action by the Los Angeles Soap Company against A. E. Bossen and another, copartners, doing business under the firm name and style of Bossen Bros. Laundry, and the G & H Commercial Service Corporation. From an order denying its motion to vacate the judgment, defendant last named appeals.

Affirmed.

Fred M. Harter, of Marysville, for appellant.

Rich, Weis, Coats & Carlin, of Marysville, for respondents and cross-complainants.

W. E. Davies, of Marysville, for plaintiff and respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from an order denying a motion to vacate a judgment. The motion was presented pursuant to section 663 of the Code of Civil Procedure. The evidence is not before this court.

It is contended the findings are in irreconcilable conflict, and that they do not support the judgment.

The complaint alleges that plaintiff secured a judgment for $1,103.44 against Yuba City Steam Laundry Company in the Superior Court of Yuba county September 8, 1930; that the defendant Bossen Bros. Laundry was possessed of the sum of $775.13 belonging to said Yuba City Steam Laundry Company; that a writ of execution was duly issued by the plaintiff in said original action and levied upon all property belonging to the Yuba City Steam Laundry in the possession of Bossen Bros. Laundry, which last-mentioned company refused to surrender or deliver any of said money or property to the officer upon said execution. Judgment for $775.13 was demanded. The defendant controverted the essential averments of the complaint, and filed a cross-complaint alleging that on May 26, 1930, it took charge of the Yuba City Steam Laundry and collected certain accounts belonging thereto; that on September 16, 1930, the defendant collected and held the sum of $405.47 belonging to the Yuba City Steam Laundry; that, subsequent to the levying of the execution above mentioned, this appellant, G & H Commercial Service Corporation, also levied an execution against the defendant in an action in which the last-mentioned company had also procured a valid unsatisfied judgment against the Yuba City Steam Laundry; that the appellant thereby claimed title to said sum of $405.47, in the hands of the defendant. The appellant was thereupon made a party defendant in this action under the provisions of section 389 of the Code of Civil Procedure, and, admitting the allegations of the cross-complaint, demanded judgment for the sum of $381.77. The court adopted findings favorable to the plaintiff, and rendered judgment accordingly for the sum of $459. A motion was subsequently made under section 663 of the Code of Civil Procedure to vacate this judgment. The motion was denied. From this order denying the motion to vacate the judgment the G & H Commercial Service Corporation has appealed.

[1] The paramount issue at the trial was to determine whether the plaintiff or the appellant had a prior lien upon the money in the possession of Bossen Bros. Laundry in partial satisfaction of their respective judgments theretofore procured. It is inferred the appeal from this order does not lie. Section 963 of the Code of Civil Procedure authorizes an appeal from an order denying a motion to vacate a judgment for the reason that it constitutes a "special order made after final judgment." Condon v. Donohue, 160 Cal. 749, 118 P. 113; Bond v. United Railroads of San Francisco, 159 Cal. 270, 113 P. 366, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50; Pomper v. Behnke, 97 Cal. App. 628, 276 P. 122; Gittelson v. Gandolfo, 85 Cal. App. 320, 259 P. 340.

The trial court found that on September 8, 1930, the plaintiff procured a judgment of $1,103.44 against the Yuba City Steam Laundry, which remains unsatisfied; that on May

26, 1930, the defendant Bossen Bros. Laundry took charge and control of the Yuba City Steam Laundry, together with all assets and debts due to the last-named firm, and by virtue thereof "collected various moneys due and owing" to said firm; that on the last-mentioned date the sheriff of Yuba county levied an attachment in behalf of plaintiff on the property of the Yuba City Steam Laundry, and found at that date only the sum of $23.70 cash in the possession of Bossen Bros. Laundry; that on September 16, 1930, a writ of execution was issued to the plaintiff in the original action and levied "upon said Bossen Bros. Laundry," which then had in its possession the sum of $459 belonging to the Yuba City Steam Laundry which Bossen Bros. Laundry refused to surrender; that on September 13, 1930, the cross-defendant, G & H Commercial Service Corporation, "caused an attachment to issue out of the Justice's court of Marysville Township * * * and the same was levied upon cross-complainants on or about said day in an attempt to attach all moneys in the possession of said cross-complainants, belonging to said Yuba City Laundry; * * * that said attachment was and is subordinate to the attachment issued and levied through this plaintiff"; that on the 19th of September, an execution was issued to the appellant and attempted to be levied on said cross-complainant; that neither the defendant Bossen Bros. Laundry, nor the cross-defendant, G & H Commercial Service Corporation, has any right or title to any part of said $459, or any moneys in their possession which were collected in behalf of Yuba City Steam Laundry, but that said moneys are subject to the superior lien acquired by the plaintiff by virtue of its prior writs of attachment and execution. As a conclusion of law, the court held that plaintiff is entitled to judgment against the defendant and cross-complainant for the sum of $459 and all other moneys collected by them in behalf of the Yuba City Steam Laundry to the 1st day of November, 1930. Judgment was rendered accordingly.

[2, 3] The appellant asserts that the findings which were adopted show that it was entitled to a prior lien on the $459 in the possession of Bossen Bros. Laundry by virtue of its attachment which was levied on September 13th, which is three days prior to the levying of execution by the plaintiff. It will be observed, however, there is no finding that this money was in the possession of Bossen Bros. Laundry on the 13th day of September. The specific finding is that this sum was in their possession September 16th. In the absence of a finding to the contrary, we must assume this money was not in the possession of Bossen Bros. Laundry on September 13th, and therefore it was not then subject to execution. Every presumption must be indulged which will support the judgment. In the case of Shelley v. Board of Trade, 87 Cal. App. 344, at page 354, 262 P. 403, 409, approving the language used in Haight v. Haight, 151 Cal. 90, 90 P. 197, the court says: "We must continually bear in mind the well-settled rule that the findings are to be liberally construed in support of a judgment; that all of the findings are to be read and considered together, and, if possible, are to be reconciled so as to prevent any conflict on the material points; and that unless the conflict is clear and the findings incapable of being harmoniously construed, a judgment will not be reversed on the ground of a conflict in the findings."

[4] In accordance with this established rule, we must assume the sheriff neither took into his possession nor saw the money which is the object of controversy in this action, at the time he attempted to levy an attachment on September 13th. No lien vested in this property by virtue of this ineffectual effort to levy an attachment. A levy of attachment made by an officer on personal property which he does not see or have in his possession is void. Section 542, Code Civ. Proc.; Herron v. Hughes, 25 Cal. 555; Taffts v. Manlove, 14 Cal. 47, 73 Am. Dec. 610; 3 Cal. Jur. 483, § 70; 6 C. J. 223, §§ 428–430. Subdivision 3 of section 542, supra, provides that: "Personal property, capable of manual delivery, must be attached by taking it into custody."

It affirmatively appears from the findings, which must be deemed to be adequately supported by the evidence, that the writ of execution which was issued to the plaintiff in the original action in which it recovered judgment against the Yuba City Steam Laundry was levied upon said fund in the possession of Bossen Bros. Laundry on the 16th day of September. This was three days before the attempt was made by the appellant, G & H Commercial Service Corporation, to levy its execution upon the fund in controversy. The plaintiff therefore acquired a prior lien upon this fund by virtue of its previous levy of execution. The court therefore properly rendered judgment against the cross-defendant for this sum of $459. There appears to be no difficulty in reconciling the findings in this case.

The order is affirmed.

We concur: PRESTON, P. J.; PLUMMER, J.

122 Cal.App. 147

PEOPLE v. O'BRIEN.

Cr. 2164.

District Court of Appeal, Second District,
Division 1, California.
March 25, 1932.

1. Criminal law 🔑570(1).

Trial court, on hearing of plea "not guilty by reason of insanity," may judicially declare accused sane, in view of presumption of sanity, even though large volume of evidence tending to prove that he was insane was uncontradicted (Code Civ. Proc. § 2061, subd. 2).

2. Criminal law 🔑450.

Opinions as to whether accused knew right from wrong *held* properly excluded in insanity hearing (Code Civ. Proc. § 1870, subd. 10).

3. Criminal law 🔑982.

In determining degree of offense in connection with accused's application for probation, probation officer's report *held* improperly received, where no notice was given accused (Pen. Code, § 1192).

4. Criminal law 🔑1177.

Accused's rights were not substantially injured by court's determination of degree of offense after passing sentence, where both occurred practically simultaneously (Pen. Code, § 1192).

5. Criminal law 🔑1188.

Where judgments fail to direct whether sentences for separate offenses heard together should run consecutively or concurrently, accused should be returned to trial court for proper judgment (Pen. Code, §§ 669, 670).

Appeals from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Harry H. O'Brien was convicted on two separate informations of crime of robbery, and he appeals.

Affirmed, with directions.

Charles B. Hazelhurst, of Los Angeles, and Webster Hazlehurst, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for the People.

HOUSER, J.

Defendant pleaded guilty to one count in each of two separate informations by which he was charged with the crime of robbery. At the same time he also pleaded "not guilty by reason of insanity." By stipulation of the parties and by consent of the trial court, the two actions were considered and tried together. In each action, the appeal is from the judgment of conviction which followed defendant's trial on the issue of his sanity, as well as from the denial of his motion for a new trial. A motion by respondent for a diminution of the record is also presented.

[1] As a ground for reversal of the judgments, it is urged by appellant that, as shown by the record herein, because on the hearing before the trial court, no evidence whatsoever was introduced by the prosecution which tended to establish the sanity of defendant, but on the part of defendant a large volume of evidence was presented which tended to prove his insanity at the time when each of the crimes of which he was charged was committed, the trial court was without authority to judicially declare that at said time or times the defendant was sane. Conceding the fact that, as claimed by defendant, the effect of all the direct or circumstantial evidence adduced by him on the issue of his sanity was in favor of his contention, the question arises as to whether the legal presumption that all persons are presumed to be sane until the contrary is proved (14 Cal. Jur. 362; 10 Cal. Jur. 778, and authorities there respectively cited) in and of itself was sufficient, not only to offset the evidence introduced by defendant, but as well was sufficient to support the conclusion reached by the trial court on the issue of the sanity of defendant. In that connection, an instructive and forceful argument in favor of defendant's contention is presented in the course of the opinion in the case of State v. Brown, 36 Utah, 46, 102 P. 641, 24 L. R. A. (N. S.) 545, where, in the latter report, it is held:

> "The jury cannot disregard an overwhelming mass of uncontradicted evidence of insanity on the part of one accused of crime, and convict him on the legal presumption of sanity.
>
> "The legal presumption of the sanity of one accused of crime is not sufficient evidence in support of a conviction to prevent a reviewing court from interfering with a verdict of guilty, where an overwhelming mass of uncontradicted evidence, which admits of but one conclusion, shows that accused was insane when the offense was committed."

In addition thereto, the editorial footnote attached to said authority contains the opening statement that: "The proposition that a defendant may be convicted of the crime charged notwithstanding there is a mass of uncontradicted evidence as to his insanity needs merely to be stated in order to show its unsoundness. Of course the question does not, and in fact cannot, arise frequently. It is almost inconceivable that there would be no evidence at all to show sanity, or, at least, that a case would go beyond the trial court if the prosecution has nothing but the bare presumption of sanity on which to base its claim that the defendant was sane and consequently responsible for his acts. * * *"

To the same effect are Thomson v. State, 78 Fla. 400, 83 So. 291; People v. Cochran, 313 Ill. 508, 145 N. E. 207.

But the difficulty encountered in attempting to apply to the facts of the instant case the declarations of the law contained in the authorities to which attention has been directed is that both by statute of our own state, as well as by judicial decisions therein, a principle of law which in its effect is in direct conflict with that to which reference has been had is freely and positively announced. By the terms of subdivision 2 of section 2061 of of Code of Civil Procedure it is provided "that they [the jury] are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds. * * *"

The opinion in the case of Smellie v. Southern Pacific Co. (Cal. Sup.) 299 P. 529, contains an exhaustive review of the question of the probative force of a presumption of fact when opposed to direct evidence of the same fact to the contrary of such presumption. It is there held that (syllabus) "a presumption is evidence, and may outweigh positive evidence adduced against it."

As far as this court is concerned, the conclusion necessarily follows that the point presented by appellant cannot be sustained.

[2] Prejudicial error by the trial court is urged by appellant in that on the trial of the issue the trial court refused to permit each or either of several witnesses introduced by defendant to express an opinion as to the "mental sanity" of defendant.

On the trial of an action, assuming the existence of a proper situation, there can be no doubt regarding the admissibility of opinion evidence of an intimate acquaintance respecting the "mental sanity" of a person, "the reason for the opinion being given." Subdivision 10, § 1870, Code Civ. Proc. Nor does it appear to be seriously questioned by the respondent herein that on the hearing of the issue the conditions required by the statute were substantially present. On examination of the testimony given by each of the several witnesses regarding the sanity of defendant, it is discovered that a unanimity of opinion was expressed in substance that at the time of the commission by defendant of each of the several crimes of which he was accused he either positively or probably was of unsound mind. But as to each of four witnesses, who were intimate acquaintances of defendant, it is contended by appellant that the trial court refused to permit a direct expression of opinion as to whether defendant was sane or insane. Specifically, as to one of such witnesses, after he had detailed certain "peculiar actions" of defendant and had stated that in his opinion the defendant was "irresponsible," the trial court declined to permit the witness to give "an opinion as to his (defendant) knowing or comprehending right from wrong." As to a second witness, following statements that she had known defendant for a period of five years next theretofore preceding, during which time she had observed certain eccentric conduct of defendant, and had an opinion as to whether defendant was sane or insane, the trial court sustained an objection to a question propounded to the witness as to whether in her opinion defendant "knew right from wrong." In similar circumstances, although a third witness declared that he had "just surmised that he (defendant) was not quite aware of all the things he was doing," and that regarding the question of his sanity he formed an opinion, "which of course I kept to myself; but I didn't think he was quite responsible," the witness was denied the privilege of expressing an opinion as to whether defendant "knew right from wrong." Likewise as to a fourth witness, who testified that she had "never thought him (defendant) mentally balanced," the trial court refused to permit her to reply to the question of whether defendant "knew right from wrong."

It thus may be observed that, although generally each of the witnesses was permitted to express an opinion which, if not precisely, in a measure, was authorized by the provisions of the statute, he was not allowed specifically to state whether in his opinion defendant "knew right from wrong." With reference to the legal propriety and admissibility of evidence of the nature of that which may be involved in the rejected testimony, the authorities of the several jurisdictions are not harmonious one with the other. In State v. Porter, 34 Iowa, 131, and State v. Leehman, 2 S. D. 171, 49 N. W. 3, 6, it is held that on cross-examination the question as to whether a defendant "knew right from wrong" was admissible. Going further, in Pflueger v. State, 46 Neb. 493, 64 N. W. 1094 (overruling Shults v. State, 37 Neb. 481, 55 N. W. 1080, on the precise point), it was held that even on direct examination such a question was proper. To the same effect is Carr v. State, 24 Tex. App. 562, 7 S. W. 328, 5 Am. St. Rep. 905. But to the contrary, see State v. Palmer, 161 Mo. 152, 61 S. W. 651, 657, where it is said: "In the fifth place, the very point at issue was whether defendant could distinguish right from wrong in doing the act charged as criminal. This was for the determination of the jury, and an expert cannot be allowed, by answer to an improper question, to usurp the province and functions of the triors of the facts. Graney v. Railway Co. [157 Mo. 666] 57 S. W. loc. cit. 280 [50 L. R.

A. 153]; Lawson, Exp. Ev. (2d Ed.) 172. An expert witness cannot be asked his opinion as to whether the accused was capable of judging between right and wrong. Shults v. State, 37 Neb. 487, 55 N. W. 1080; Reg. v. Layton, 4 Cox, Cr. Cas. 149. Nor to express an opinion that the accused acted under an insane delusion or was impelled by an irrepressible impulse. Patterson v. State, 86 Ga. 70, 12 S. E. 174. And an expert witness may give his opinion as to the state of mind of the accused, but not as to his responsibility; that being a question for the jury. Reg. v. Richards, 1 Fost. & F. 87; Reg. v. Burton, 3 Fost. & F. 772; People v. Thurston, 2 Parker, Cr. R. [N. Y.] 49; 1 Clevenger, Med. Jur. Insan. pp. 585, 586. And it has been generally, if not universally, held, in cases where the objection has been made that the question covered the point in issue, that the experts cannot be asked the broad question whether they considered the person whose sanity is being litigated is out of his mind, or whether his mind was so affected as to be unfit to transact business (Deshon v. Bank, 8 Bosw. 461; Chickering v. Brooks, 61 Vt. 554, 18 A. 144); or to give their opinions on the whole case, as it would necessarily include a determination of the facts (Negro Jerry v. Townshend, 9 Md. 145; Yardley v. Cuthbertson, 108 Pa. 395, 1 A. 765 [56 Am. Rep. 218]; In re McCarthy, 55 Hun, 7, 8 N. Y. S. 578; People v. Lake, 12 N. Y. 358; 1 Clevenger, Med. Jur. Insan. p. 542, and cases cited). These authorities effectually show the incompetency of the question asked Dr. Davis as to what was the condition of defendant's mind on the day of the homicide."

In this state the exact question has never been judicially determined. There are, however, a number of cases which in principle are in point and which in substance are to the effect that such a question invades the province of the jury in that it constitutes an attempt by the witness to determine the issue which consists of a mixed question of law and fact, which the jury only is authorized to consider and which is determinative of the ultimate fact or question before the court.

In the leading case of Estate of Taylor, 92 Cal. 564, 28 P. 603, 604, several of the authorities on the subject are reviewed. The question there under consideration was whether a qualified nonexpert witness might properly testify as to the capacity of a person to make a will. In ruling the Supreme Court declared that, "in allowing this witness to answer the question referred to, not only was the province of the jury invaded, but that of the court also, and the whole issue of law and fact was determined by the mere opinion of the witness."

The rule there announced is followed in each of the following cases, to wit: In re Estate of Sexton, 199 Cal. 759, 770, 251 P. 778; In re Estate of Perkins, 195 Cal. 699, 710, 235 P. 45; In re Estate of Schulmeyer, 171 Cal. 340, 345, 153 P. 233; Langenbeck v. Louis, 140 Cal. 406, 411, 73 P. 1086; In re Coburn, 11 Cal. App. 604, 620, 105 P. 924.

In the case entitled In re Estate of Schulmeyer, 171 Cal. 340, 153 P. 233, 236, which was a guardianship proceeding in which a question of the competency of an individual was involved, a distinction was drawn by the court between the effect of testimony given by one witness that she "had noticed Mr. Schulmeyer's 'inability to take care of himself,'" (which statement was held inadmissible) and testimony given by another witness that "he did not believe the appellant 'capable of going into any business proposition to any depth,'" (which statement was held admissible). The reason given by the court for its ruling was that: "This testimony [the latter statement] was not open to the objection which, as we have just said, should have excluded the opinion of Ethel Hanrahan [the first statement]. It did not purport to pass upon the ultimate issue of competency or incompetency—an issue which involves questions of law as well as of fact. Expert witnesses may give their opinions concerning the mental condition of a person. They are not restricted to the mere declaration of an opinion that the person is or is not of sound mind, but may state the nature and extent of the deficiencies, if any, which they believe to exist. * * *"

Not only by the courts of this state, but as well by courts of other jurisdictions, wherein the rule obtains by which testimony of the nature of that here under consideration is denied admission, the universal reason assigned therefor is that such evidence trenches upon the province of the jury in that it permits a witness to decide the very question upon which the jury alone is qualified to pass judgment. It is a well-recognized principle of law that, as applied to criminal prosecutions, the defense of insanity of the defendant is narrowed to a question of whether at the time of, and solely with relation to, the commission of the particular offense of which he is charged, he was capable of distinguishing between right and wrong. 7 Cal. Jur. 862, and authorities there cited. Having in mind the foregoing test, together with the question asked each of the witnesses as hereinbefore set forth, the effect of the situation would be the same as though the witness had been asked whether, admitting defendant was "irresponsible," or not "mentally balanced," etc., his mental condition was such that he should be held legally excusable for the commission of the criminal act for which he was then on trial. We think it manifest that the objection as to each of the questions asked of each of the several witnesses to which attention herein has been directed was properly sustained by the trial court.

[3] As an additional reason for reversal of the judgments, appellant presents the point that, although he pleaded guilty to each of two of the offenses of which he was charged, he was substantially prejudiced in his rights with reference to the determination of the degree of his crime or crimes by the method adopted by the trial court in making such decision in that no evidence whatsoever was adduced concerning such matter.

On the part of respondent it is not denied that in arriving at its conclusion with reference to the degree of the offense no evidence was directly received by the trial court; but in effect it is asserted by the respondent, and not denied by appellant, that, following the application by defendant that he be placed on probation, a "report" was received in evidence by the court from the probation officer which contained a statement of the facts and circumstances which related to each of the robberies to which defendant pleaded guilty—which facts show that in the commission of each of the crimes a deadly weapon was used by defendant. In that connection, respondent contends that, even though such evidence was hearsay, nevertheless it was received without objection by defendant, and that therefore it was competent and sufficient for the purposes of enabling the trial court to determine the degree of the offense, as provided by statute. Section 1192, Pen. Code.

Notwithstanding the fact that it has been decided that the hearing which may be conducted by the trial court for the purpose of determining the degree of the offense "is not a trial," nevertheless the only means by or through which the court is authorized to reach a conclusion in the matter is by the aid of evidence. People v. Chew Lan Ong, 141 Cal. 551, 553, 75 P. 186, 187, 99 Am. St. Rep. 88; People v. Bellon, 180 Cal. 706, 182 P. 420, 421.

In the former case, where it appeared that on the hearing, by stipulation of the parties, the evidence taken on the preliminary examination of the defendant might be considered as though given at such hearing, in part it was said: "The universal aid is evidence. * * * It is the only means by which a judicial determination can be had, and was the means which it was contemplated by the Legislature should be invoked by the court."

In the latter case, the following excerpt from the opinion therein is illustrative of the point: "* * * The appropriate and proper method for a court to pursue in such a case is to receive such competent evidence from the respective parties as is material to the question of degree, and, the evidence having been concluded, to pronounce its determination thereon."

In said case it also appears that on the hearing "the defendant, without having been sworn as a witness, was examined by the district attorney and the court, both as to the circumstances of the crime and as to the things material to the statement required by section 1192a [of the Penal Code] to be sent to the clerk of the state prison in cases where a prisoner is to be punished by imprisonment therein. The examination of the defendant was intended to, and did, cover both of these matters. No objection whatever was urged by either the defendant or his counsel to the course pursued in this matter. * * *"

In effect, in each of the foregoing cases the Supreme Court held that the defendant was in no wise prejudiced by the irregular manner in which the hearing had been conducted.

A similar conclusion in a like proceeding was reached in the case of People v. Hall, 105 Cal. App. 359, 287 P. 533, where the error of which complaint was made consisted of the admission in evidence of extra-judicial confessions "without a showing first being made that such confessions were free and voluntary."

With reference to the weight and the sufficiency of hearsay evidence, in the case of Lucy v. Davis, 163 Cal. 611, 616, 126 P. 490, in substance it is held that, when such evidence is received without objection, the trial court is justified in accepting it, and that when so received it is a sufficient basis for the determination of an issue of fact. And in 22 Corpus Juris, 291, where authorities are cited in support of the doctrine, the rule is declared to be that "it is, however, the province of the jury to weigh such evidence and give it the consideration to which it is entitled (citing many authorities), and it may be sufficient to support a decision" (citing one authority).

However, as between the facts which affect the situation in the instant case and those which appear to have been present in each of the authorities to which attention has been directed, a clear distinction may be marked in that in each of the latter a regular hearing was had; while in the instant case there was no hearing as such. Neither from the record herein, nor from the statements of respective counsel, does it appear that, other than the formal application by defendant for probation, coupled with the "report" thereon by the probation officer, any attempt was made by the trial court to ascertain the facts essential to a determination of the degree of the offense. Nor does it appear that at any time was defendant afforded any opportunity to be heard in the matter; or even that he had any notice or knowledge of the fact that a hearing was to take place. It is not improbable that he made no objection to the admission in evidence of the "report" of the probation officer for the very good and sufficient reason that he was not aware that such "report" was offered in evidence in connection with the determination by the court of the degree of the offense committed by him. It would seem clear that, in order to charge defendant with the consequences of his failure to object to the introduction of hearsay evidence, at least in some manner he should have been notified or apprised by the people of its intention to offer such evidence for the consideration of the trial court. Had defendant known that a hearing was in progress, and that in the determination by the trial court of the degree of the offense committed by defendant consideration would be given to hearsay evidence consisting of statements contained in the "report" by the probation officer, it is not impossible that, if given an opportunity to do so, he might have conclusively established the falsity of such statements and thereby, as well as by other evidence, have succeeded in convincing the trial court that the degree of his offense was less than that which, by the aid of such hearsay evidence, was determined by said court. It may not therefore be legally declared that the action of the trial court in the premises was not substantially prejudicial to the rights of defendant.

[4] Appellant also registers objection by reason of the fact that the attempted determination of the degree of the offense occurred after, instead of before, the judgments were pronounced by the trial court.

Although by the terms of section 1192 of the Penal Code "the court must, before passing sentence, determine the degree," considering the fact as shown by the record herein that the passing of sentence and the determination of the degree of the offense occurred practically simultaneously, we fail to see how or in what manner defendant could have been injured by the reversal in point of actual seconds of time of the two respective elements of procedure.

[5] Appellant also urges the point that, because in the circumstances present at the time in question, failure of the trial court in pronouncing judgment to include therein an adjudication as to whether the two sentences imposed upon defendant should run concurrently, or should run consecutively, one with the other (section 669, Pen. Code), constituted such an infringement upon the substantial rights of defendant that on account thereof the judgment should be reversed.

It may be, as conceded by respondent, that considering the provisions of sections 669 and 670 of the Penal Code together, the necessary effect of the dereliction of the trial court in the premises would be that the two sentences imposed on defendant would run concurrently; in which event defendant would suffer no prejudice. That, however, is a question which, for obvious reasons, need not be determined at this time.

In the case of In re Lee, 177 Cal. 690, 171 P. 958, it is indicated that, where it appears that an irregular judgment has been rendered by the trial court, the proper method of correction thereof is by an order by that court returning the defendant to the trial court in order that a proper judgment may be pronounced. To the same effect, see In re Fritz, 179 Cal. 415, 177 P. 157; In re McCready, 179 Cal. 514, 177 P. 459; People v. Marshall, 209 Cal. 540, 289 P. 629; Ex parte Carrera, 36 Cal. App. 817, 172 P. 979; People v. Votaw, 38 Cal. App. 714, 177 P. 485; People v. Scott, 39 Cal. App. 128, 178 P. 298; People v. Gibson, 45 Cal. App. 770, 188 P. 603; In re Nichols, 82 Cal. App. 73, 255 P. 244; In re Otto, 84 Cal. App. 186, 257 P. 880.

Misconduct of the deputy district attorney in charge of the prosecution of defendant is also relied upon by appellant as a reason for a reversal of the judgments. Without herein setting forth the details of the circumstances of which appellant complains, it may suffice to state that, in the opinion of this court, although the alleged misconduct constituted error, nevertheless, the situation considered, it was not of that serious character and importance which would justify this court in directing a reversal of the judgments.

In each appeal it is ordered that the order denying the motion for a new trial be and it is affirmed. Each of the judgments is affirmed, subject, however, to further determination of the degree of the several crimes. It is further ordered that defendant appear before the superior court for the purpose of having determined the degree of each of the crimes of which he pleaded guilty, and thereafter that in each action a new judgment be pronounced against him. And it is further ordered that the motion presented by respondent for a diminution of the record herein be, and it is, denied.

We concur: CONREY, P. J.; YORK, J.

122 Cal.App. 354

WARE et ux. v. JULIAN et al.

Civ. 8261.

District Court of Appeal, First District, Division 2, California.

April 5, 1932.

Rehearing Denied May 5, 1932.
Hearing Denied by Supreme Court
June 2, 1932.

Acknowledgment ⚿52.

Certificate of acknowledgment attached to mortgage *held* alone sufficient to support finding of due execution of mortgage, as against contradicting parol evidence (Code Civ. Proc. § 1951).

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

Action by Henry E. Ware and wife against Sue C. Julian and others. From an adverse judgment, named defendant appeals.

Affirmed.

Lewis Cruickshank and Randall & Bartlett, all of Los Angeles (Kenneth W. Kearney, of Los Angeles, of counsel), for appellant.

J. Wiseman Macdonald and W. W. Wallace, both of Los Angeles, and R. A. Newell, of Long Beach, for respondents.

DOOLING, Justice pro tem.

This is an appeal by the defendant Sue C. Julian from a decree foreclosing a mortgage made to secure the payment of a promissory note and providing for a deficiency judgment.

Attached to the mortgage was the certificate of acknowledgment in regular form of a notary public reciting that Sue C. Julian, known to him to be a party whose name is subscribed to the within instrument personally appeared before him and acknowledged that she executed the same. In the body of the mortgage a copy of the promissory note was set out in hæc verba and as so set out it purports to bear the signature of Sue C. Julian.

Appellant on the trial testified that she had not signed the note or mortgage or appeared before the notary public and acknowledged the execution of the mortgage.

The trial court found that appellant executed and delivered both note and mortgage. Appellant attacks these findings as being without support in the evidence. The certificate of acknowledgment attached to the mortgage was prima facie evidence of its due execution (Code Civ. Proc. § 1951; Thomas v. Fursman, 177 Cal. 550, 171 P. 301), and the only question is whether the certificate of acknowledgment standing alone can support the finding of the trial court against the parol evidence of appellant that she did not sign the note and mortgage nor acknowledge the execution of the mortgage. The precise question seems not to have been passed upon by the courts of this state, but the overwhelming weight of authority in other jurisdictions is to the effect that a certificate of acknowledgment will support a finding of the truth of its recitals against parol evidence contradicting it. The rule is thus stated in Albany County Sav. Bank v. McCarty, 149 N. Y. 71, 43 N. E. 427, 431, by the Court of Appeals of New York: "We think that, as between the parties, a certificate of acknowledgment, when read in evidence, makes out a prima facie case as strong as if the facts certified had been duly sworn to in open court by a witness apparently disinterested and worthy of belief. The legal presumption of the proper performance of official duty by a public officer requires that this effect should be given it. Downing v. Rugar, 21 Wend. [N. Y.] 178 [34 Am. Dec. 223]. While the evidence is not conclusive, * * * it is of such a character as, standing alone, to send a case to the jury, so that they may decide between the probative force of the certificate supported by the presumption that it states the truth, on the one hand, and the evidence produced in rebuttal, whatever it may be, on the other."

That this is the generally accepted rule, see Jones, Commentaries on Evidence, vol. 3, § 490, pp. 379–384; case notes in Ann. Cas. 1917A, pages 368 et seq.; 7 Ann. Cas. 245 and 54 Am. St. Rep. 148; 1 R. C. L. p. 299, § 90; 1 C. J. p. 898, §§ 285, 286.

The reasons for this rule are well stated in 1 C. J., pp. 897, 898: "The reasons for these rules are obvious and satisfactory. They are essential to the security of titles. If the solemn deed of a party to real estate, duly attested by a public officer and recorded according to law, may be avoided by the grantor's individual oath or by anything short of clear and convincing evidence, the efficacy of recording statutes is largely destroyed, and the title to such property is precarious indeed. Public policy, as well as individual security, require that the ownership and peaceful possession of land should be subjected to no such hazard." Or as stated in Jones, Commentaries on Evidence, vol. 3, p. 381: "If the evidence of the grantor should be held sufficient to overcome the certificate of the acknowledgment, then most real estate would be held by a slender and uncertain tenure. Where the value of the property is large, and the conscience of the grantor weak, it would afford a powerful inducement for him to claim and swear that the signature to his deed was a forgery, and thus recover the land which he had sold, and for which he had been paid."

We are satisfied that the prima facie evidence of the certificate of acknowledgment was sufficient to support the finding of due execution even though contradicted by the oral testimony of appellant. This holding not only accords with all the authorities, but is in line with the recent decision of our own Supreme Court in Smellie v. Southern Pacific Co., 299 P. 529.

Our conclusion on this point renders unnecessary the consideration of the other questions raised by appellant, as they go to other issues not necessary to support the judgment.

Judgment affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

On Petition for Rehearing.

PER CURIAM.

Appellant in her petition for rehearing seems to think that this court decided that the facts recited in a certificate of acknowledgment are conclusive against, and cannot be disproved by, the oral testimony of the person who is certified to have acknowledged the execution of the document. We did not so hold. All that we held in that regard is that the certificate of acknowledgment is itself a species of proof which will support a finding against the oral evidence of such person to the contrary.

Appellant also contends that the certificate of acknowledgment attached to the mortgage can, in no event, stand as proof of her execution of the note. But, as we pointed out in our opinion, a copy of the note was set out in hæc verba in the mortgage. As so set out, it purported to bear a copy of appellant's signature. The execution of the mortgage by appellant being proved, the inclusion therein of a copy of the note purporting to bear her signature amounts to an admission that she signed the note.

The petition for rehearing is denied.

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121 Cal.App. 730

SISKIN v. DEMBROFF et al. (DISCOUNT CORPORATION OF CALIFORNIA, Intervener).

SAME v. ROSENGARTEN et al. (DISCOUNT CORPORATION OF CALIFORNIA, Intervener).

Civ. 718.

District Court of Appeal, Fourth District, California.

March 18, 1932.

1. Evidence 🔑220(1), 241(1).

Testimony of conversations constituting oral conditional sale agreement between manufacturer and dealer *held* admissible against buyers present or represented at conversations.

2. Evidence 🔑256.

Testimony of conversations constituting oral conditional sale agreement between manufacturer and dealer *held* not binding on assignee of conditional sale contracts obtained by dealer from buyers, in absence of facts connecting assignee therewith.

3. Trial 🔑48.

Testimony competent as to one defendant is admissible.

> This is so, even if the evidence is not binding on another defendant.

4. Sales 🔑480(4).

Evidence established assignee of dealer's conditional sales contract took with knowledge of existence of conditional sales agreement between manufacturer and dealer.

5. Sales 🔑480(4).

Manufacturer's invoices, stating that title was reserved until full payment, *held* properly admitted for limited purpose of establishing notice, of parties purchasing from dealer, that manufacturer had reserved title and in corroboration of testimony regarding conditional sale by manufacturer.

6. Appeal and error 🔑1170(7).

Errors in rulings on evidence are to be disregarded, unless they affect substantial rights of parties (Code Civ. Proc. § 475).

7. Appeal and error 🔑1054(1).

In conditional seller's action to recover personalty, tried to court without jury, error, if any, in admission of evidence as to who buyers were holding title for, *held* harmless.

8. Frauds, statute of 🔑95(1).

Finding that buyer at time of sale paid part of purchase price *held* supported; hence oral conditional sale contract was not void under statute of frauds (Civ. Code, § 1624, subd. 4, and § 1739, subd. 3).

9. Frauds, statute of 🔑90(1).

Evidence established manufacturer's delivery of furniture to buyers purchasing from dealer constituted partial performance of oral conditional sales contract with dealer; hence contract was not invalid under statute of frauds (Civ. Code, § 1739, subd. 2).

10. Appeal and error 🔑994(3).

Credibility of witnesses is for court sitting without jury (Code Civ. Proc. §§ 1847, 2103).

11. Appeal and error 🔑1011(1).

Determination of conflict in evidence is for court sitting without jury (Code Civ. Proc. §§ 1847, 2103).

12. Appeal and error 🔑994(3), 1011(1).

Determination of trial court sitting without jury as to credibility of witness and conflict in evidence will not be disturbed on appeal.

13. Appeal and error 🔑931(1).

In determining sufficiency of evidence to support finding, appellate court must accept as true evidence tending to establish finding.

> For such purpose, appellate court must accept as true evidence tending to establish the correctness of the finding as made, taking into account all inferences which might reasonably have been thought by the trial court to lead to the same conclusion.

14. Appeal and error 🔑931(1).

Every substantial conflict in testimony must be resolved in favor of findings.

15. Sales 🔑460.

Oral conditional sales contract is valid, if not in contravention of statute of frauds.

16. Sales 🔑473(1).

Assignee of dealer's conditional sale contract having knowledge of manufacturer's claim of title was under duty, as regards claim as innocent purchaser, to ascertain if manufacturer's claim was valid.

17. Sales 🔑**477(1).**

Manufacturer's limited authorization to dealer to sell furniture to certain individuals *held* not to constitute waiver of manufacturer's reservation of title, as against assignee of dealer's conditional sales contract (Civ. Code, § 1142).

18. Estoppel 🔑**98(2).**

Where assignee of dealer's conditional sales contract knew manufacturer claimed to have reserved title, question of estoppel of manufacturer by reason of negligence *held* not presented (Civ. Code, § 3543).

Appeals from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Separate actions by Harry Siskin, doing business under the firm and style name of the Angeles Furniture Manufacturing Company, against Robert J. Dembroff and others and against Daniel Rosengarten and others, in each of which the Discount Corporation of California intervened. The cases, while not consolidated, were tried together on the same evidence. From judgments for plaintiff, the intervener appeals.

Affirmed.

Flint & MacKay, of Los Angeles, for intervener and appellant.

Bicksler, Smith, Parke & Catlin, of Los Angeles, for plaintiff and respondent.

S. W. Newman, of Los Angeles, for defendants and respondents.

THOMSON, Justice pro tem.

These two actions were brought by Harry Siskin, doing business as the Angeles Furniture Manufacturing Company, to recover the possession of certain furniture in the possession of defendant Dembroff in the one case, and certain other furniture in the possession of defendant Rosengarten in the other case, or the value thereof, if recovery of the furniture could not be had. Discount Corporation of California, a Delaware corporation, intervened in each case, claiming ownership of the furniture. It was stipulated by all parties that since the matters in both of the cases were handled as practically one transaction, testimony in one case will be taken as testimony in the other case, the cases, however, not being consolidated, and the cases were tried together on the same evidence. The cases were tried without a jury, and the trial court gave judgment for plaintiff in each case, from which judgments the intervener appeals. The appeals are presented on a bill of exceptions. The following matters are undisputed: That plaintiff manufactured certain furniture and delivered some of it to an apartment house held by Dembroff and the remainder to an apartment house held by Rosengarten; that plaintiff sold the furniture to S. A. Baker, doing business under the name of Adams Furniture Company, who in turn sold part of it to Dembroff, and part of it to Rosengarten under conditional sales contracts in writing; that said conditional sales contracts were assigned by the Adams Furniture Company to the intervener, and the intervener held them at the time of trial; that there were no issues as to the value of the furniture or damage. Proof of other facts was received in evidence, some of which proof is conflicting and some of which appellant contends is too weak and unsatisfactory to be considered by the trial court. Such proof includes evidence of the following facts adduced through the testimony of plaintiff, his daughter, his son, and one W. A. Smith: That plaintiff was a manufacturer, and sold only to dealers; that Dembroff, on behalf of himself and Rosengarten, with one Smith, came to plaintiff seeking to purchase furniture for said two apartment houses; that they decided upon S. A. Baker, doing business as Adams Furniture Company, as the retail dealer to handle the transaction; that, after several meetings and discussions, Dembroff selected the furniture to be manufactured by plaintiff for the two apartment houses; that a meeting was held, at which were present plaintiff, his daughter, his son, W. A. Smith (an employee of Baker), and Dembroff, and at this meeting plaintiff stated to all present, including Dembroff, that the furniture would be sold by plaintiff to Baker under a contract retaining title in plaintiff until the full purchase price had been paid to plaintiff, and that the furniture would be delivered to the apartment houses respectively on special invoices providing for such reservation of title in plaintiff; and that plaintiff then and there exhibited to them a form of such special invoice; that it was understood that the furniture would be resold by Baker to Dembroff and Rosengarten and that appellant was going to finance Baker in the transaction; that appellant paid Baker for the contracts, but Baker failed to pay plaintiff for the furniture. It was stipulated that Baker absconded. The other material facts are stated in the opinion. The trial court decided that plaintiff was and is the owner and entitled to the possession of the furniture, and awarded plaintiff judgment for the possession or the value of such furniture.

Appellant contends that the trial court erred in such decision in that, first, the trial court erroneously admitted in evidence certain testimony on which its decision was based; second, the findings of the trial court are not supported by the evidence; and, third, the findings of the trial court, as a matter of law, do not support the court's decision.

[1-3] In support of its first contention, appellant claims that the trial court erred in admitting the testimony of conversations relating to, and conversations constituting, the oral agreement between plaintiff and Baker as set forth in the statement of facts above, and particularly with reference to the reservation of title to the furniture by plaintiff. Appellant objected to the introduction of these conversations in evidence on the ground that they were "outside the presence of" appellant. Such conversations were properly in evidence as between plaintiff and defendant Dembroff, who was present and heard them, and defendant Rosengarten, who, the evidence indicates, was represented at such conversations by Dembroff. Testimony competent as to one defendant is properly in evidence, even if it is not binding upon another defendant. Lampton v. Davis Standard Bread Co., 48 Cal. App. 116, 119, 191 P. 710; Voorman v. Voight et al., 46 Cal. 392, 397. In the absence of any facts to connect the appellant with this evidence, it would not be binding upon appellant where, as in this case, the trial court limited this evidence to apply only to the defendants other than appellant. Olsen v. J. J. Jacobs Motor Co., 99 Cal. App. 423, 433, 278 P. 1051.

[4] However, appellant contends that the trial court must have based its decision on this evidence. But we are of the opinion that there is ample other evidence upon which the trial court could have based its decision, so far as it affects appellant. Isadore Siskin testified to the effect that, before any of the furniture was delivered by plaintiff, he went with Baker to appellant's office to get a copy of a letter from appellant to Baker, which had been exhibited to the witness, which letter stated in part that appellant would purchase from Baker the conditional sales contracts between him and Dembroff and Rosengarten "after the furniture is delivered in the apartment houses, and evidence is presented to us that the merchandise bills have been paid"; that at appellant's office on that occasion, Isadore Siskin obtained from G. E. Powell, Jr., vice president and general manager of appellant, a copy of said letter, and talked with Powell about the transaction, stating to Powell, in substance, that plaintiff was selling the furniture to Baker on a conditional sales contract and plaintiff was retaining title until the furniture was paid for; that Powell answered that he knew that, and he said it was all right with him; that he would pay plaintiff when the goods were delivered and installed. This witness testified that, later, he telephoned to Powell, stating that plaintiff was ready to send the furniture, and asked if he (Powell) remembered plaintiff's arrangement that plaintiff expected to be paid before the title was turned over; and that Powell answered: "That is all right, that is the way it goes; it is perfectly all right, Mr. Siskin, send the merchandise out. I have made arrangements and we will take care of it." The furniture was thereupon delivered. W. A. Smith, a witness for plaintiff, testified that he heard a telephone conversation between Isadore Siskin and Powell in which Isadore Siskin told Powell that he had not delivered any of the furniture yet, and he wanted to be sure plaintiff was going to get his money, and was not sure Baker would pay, and that, if he (Powell) promised to hold plaintiff's money out, he would deliver the furniture; and that Powell said: "That's absolutely all right with me. Mr. Baker told me to do that." At the trial counsel agreed "that Baker had absconded and left the country." Plaintiff testified that, after delivery of the furniture, he talked with Powell, who told plaintiff that Baker came with checks all made out to all parties from whom he was buying, and asked Powell to give him checks. Powell said that, after giving Baker the intervener's check, he tried to cancel it, and it was too late. Plaintiff further testified that, after filing these suits, he asked Powell how he happened to give the money to Baker when he guaranteed to give the money to plaintiff, and Powell said he realized that he had made a mistake. With such evidence before it, it was not necessary for the trial court to base its decision against appellant on the evidence of the conversations between plaintiff and parties other than appellant.

[5, 6] At the trial plaintiff introduced his Exhibit No. 2, consisting of a number of invoices containing certain printed matter to the effect that title remained in plaintiff until the full purchase price has been paid. These invoices were admitted over appellant's objection that they were incompetent, irrelevant, and immaterial, and that no foundation for their admission had been made and no authority for them shown. The trial court admitted them for the limited purposes of "bringing home notice" to parties other than appellant, and in corroboration of the fact that arrangements had been made between plaintiff and such other parties to have title reserved in plaintiff. As stated above, some of the witnesses testified that a form of such special invoice was shown to Baker and Dembroff during the negotiations for the sale from plaintiff to Baker. It is not contended that such printed matter on said invoices is evidence of any reservation of title. Appellant contends that the trial court must have considered such invoices as evidence of such reservation of title. However, as pointed out above, there was ample other evidence upon which to base a decision against appellant, and, if we regard these invoices as inadmissible, still, under the other evidence in the case, the decision of the trial court against appellant was justified. Errors in rulings on evidence are to be disregarded, un-

less they affect the substantial rights of the parties. Code Civ. Proc. § 475.

[7] In cross-examining witness Dembroff, counsel for plaintiff asked the following question: "Who are you holding title for?" The witness answered that he was holding title for Mr. Samuel F. Bard. Mr. Bard's connection with the case does not clearly appear from the record. Counsel for appellant contends, however, that his general objection to the question should have been sustained because the facts sought to be elicited (the titles of Dembroff and Rosengarten) were not within the issues, and the disclosure of such facts could only have been sought with the idea of creating in the mind of the court an impression that there was an attempt to withhold facts that should have been disclosed to the court. If this evidence was inadmissible, it was harmless error, and could not have affected the rights of appellant. The reviewing court cannot assume that the trial court allowed itself to be prejudiced against appellant by such a question and answer, and there is no showing of prejudice to the appellant's rights.

[8] Appellant contends that the oral contract between plaintiff and Baker, wherein it is claimed by respondent the reservation of title in plaintiff was provided for, is invalid under the statute of frauds. It is conceded the agreement was for the sale of personal property of the value of more than $200. Such an oral contract would be invalid, unless it comes within at least one of the exceptions prescribed by law. In respondent's brief on appeal, respondent takes the position that there was a sufficient memorandum in writing to take the contract out of the statute, and refers to Plaintiff's Exhibit No. 3, which is a written order listing the furniture to be manufactured by plaintiff, and this document was signed "The Adams Furn. Shop, by S. A. Baker," as buyer. The order does not set out the title reservation clause, but it is marked in large letters "Special Invoice," and respondent contends that the words "Special Invoice" were understood between plaintiff and Baker to refer to merchandise delivered on a title retaining contract, and that plaintiff had previously exhibited to Baker a form of such special invoice, explaining its meaning to him at the time. In the view we take of the facts in the case, it is not necessary to determine whether or not this is a sufficient memorandum to take the agreement out of the statute of frauds. The record indicates that the case was tried upon the theory that the agreement between plaintiff and Baker was an oral agreement. The evidence shows that $500 was paid to plaintiff by Baker at the time the order was signed. Plaintiff testified that he received $500 on account of the contract. Florence Greenberg, a witness for plaintiff, testified that a list of furniture (Plaintiff's Exhibit No. 3), was made out on January 28, 1927, before the furniture was manufactured; that Baker came to plaintiff's office and signed this order on the day he confirmed the order and the terms agreed upon; that the order had been made out previously; and that this was about the middle of February, 1927. A ledger sheet of plaintiff is in evidence containing an account with Baker, and this ledger sheet shows an entry crediting Baker with the payment of $500, dated February 14, 1927. Appellant, in his reply brief, urges the point that the oral agreement must have been made before the list was prepared, which is dated January 28, 1927, and, the $500 not having been paid until February 14, it was not paid at the time of the sale and therefore does not bring the oral agreement within the exception to the statute of frauds. But the witness Florence Greenberg, plaintiff's office manager, testified that Baker confirmed the list about the middle of February, 1927; and the trial court could very well have concluded that the oral agreement was not completed until Baker had actually examined the list and approved it. From this evidence we think the trial court was justified in concluding that the buyer, at the time of the sale, paid part of the purchase price, and thus brought the case within the exception specified in section 1624, subdivision 4, of the Civil Code and the exception specified in section 1739, subdivision 3, of the Civil Code, as these subdivisions existed at the time involved in these actions.

[9] We believe the evidence shows that this oral agreement comes within another exception provided for in the statute of frauds (Civ. Code, § 1739, subd. 2); namely, that there was a partial performance of the contract, in that the buyer accepted and received part of the furniture. At the trial, during the direct examination of Florence Greenberg, a witness for the plaintiff, counsel for appellant admitted the delivery of the furniture. The bill of exceptions also contains a stipulation by all parties that the furniture was delivered. Defendant Dembroff and said Florence Greenberg testified that the furniture was delivered to the apartment houses. The evidence shows that, under the oral agreement between plaintiff and Baker, it was understood that part of the furniture was to be delivered to Dembroff's apartment house and part to Rosengarten's apartment house. The testimony also shows that the furniture was receipted for in part by representatives of Baker and in part by representatives of Dembroff and Rosengarten. The delivery invoices are in evidence, and defendant Dembroff testified that the persons who signed many of these invoices were the agents of himself, Rosengarten, and Baker, respectively. Appellant, however, urges that mere delivery or receipt is not sufficient, but it must be proved also that

the furniture was accepted by Baker, and that such proof is lacking. If appellant is correct in this contention that acceptance by Baker was not proved, it follows then that Baker could not have entered into a valid agreement with Dembroff or with Rosengarten to sell this furniture, and the contracts which he assigned to appellant would be void as to this furniture, and the title would not have left plaintiff. Dembroff testified on cross-examination as follows: "I accepted the furnishings and furniture a few days after April 18th. Prior to that time they were under the control of Adams Furniture Company." This evidence, together with the evidence that the furniture was delivered at the apartment houses with Baker's knowledge and consent, and that Baker made the contracts for its sale to Dembroff and Rosengarten, and thereupon sold these contracts to appellant, is sufficient to justify the trial court in concluding that Baker accepted the furniture.

[10-14] Appellant next contends that the findings of the trial court are not supported by the evidence. The first specific finding objected to by appellant is the finding that on the 21st day of April, 1927 (a date prior to the filing of the complaints in these actions), the plaintiff was, and now is, the owner of, and entitled to the possession of, the personal property involved in these actions. Appellant complains that the contract reserving title in plaintiff was oral and uncorroborated by any one except plaintiff's own family, and that their testimony is disputed by defendant Dembroff. The evidence and stipulations of counsel at the trial showed that Baker had disappeared and was unavailable, and that Powell and his secretary were dead. The trial court evidently accepted the testimony of the plaintiff and his "family" as true, and matters going to the credibility of witnesses and the determination of conflicts of evidence ordinarily fall within the exclusive province of the trial court and will not be disturbed on appeal. Code Civ. Proc. §§ 1847 and 2103; 27 Cal. Jur. p. 186. In examining the sufficiency of evidence to support a questioned finding, an appellate court must accept as true all evidence tending to establish the correctness of the finding as made, taking into account, as well, all inferences which might reasonably have been thought by the trial court to lead to the same conclusion. Every substantial conflict in the testimony is to be resolved in favor of the finding. Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 142, 134 P. 1157.

[15] Appellant urges that, if there was a reservation of title, we may be sure that plaintiff would have provided for it in the usual way by making a written agreement to that effect. There is no such legal requirement. A verbal contract for the sale of personal property, when the seller retains the legal title conditional upon full payment of the purchase price, is valid, if not otherwise in contravention of the statute of frauds. Shook v. Levi (C. C. A.) 240 F. 121; Wise v. Collins, 121 Cal. 147, 53 P. 640.

[16] Another finding of the trial court which is objected to is one to the effect that, at different times before appellant purchased the contracts from Baker, plaintiff notified appellant of the conditions under which the furniture was being manufactured and sold, and that title was to remain in plaintiff until the full amount of the purchase price had been paid to him, and that the title of said merchandise was reserved in plaintiff under such contract, and appellant knew that the balance of the purchase price was payable upon the completion of installation. Counsel for appellant urges that there is no evidence to support such a finding, and contends that, even if appellant did receive such notice from plaintiff, it did not have any notice or knowledge of any right on the part of plaintiff, as distinguished from a mere contention on the part of plaintiff that he claimed a reservation of title in himself, and that there is no evidence that Baker ever advised appellant that he consented to such claim. We find no merit in this contention. Isadore Siskin testified that he went to appellant's office with Baker, and that, in the presence of Baker, he told Powell, appellant's vice president and manager, about the contract and about the reservation of title. Witness W. A. Smith said he heard a telephone conversation between Isadore Siskin and Powell, in which Powell said Baker told him to hold out the money due plaintiff on the furniture. While this is not conclusive evidence of such knowledge on the part of appellant, the trial court might well have believed it, and, after considering this evidence and all the circumstances of the case, might well have concluded that appellant had knowledge that Baker consented to the reservation of title in plaintiff. We are of the opinion, however, that, if appellant had knowledge of plaintiff's claim of ownership, it was not necessary for it to have knowledge of his right to ownership. The duty was upon appellant, knowing about plaintiff's claim of title, to ascertain if the claim was valid. With such notice or knowledge appellant cannot claim to be an innocent purchaser as against the plaintiff. Marker v. Williams, 39 Cal. App. 674, at pages 678, 679, 179 P. 735.

[17] The trial court further found in substance that appellant never was at any time the owner of said furniture or any part thereof, or any right, title, or interest therein or "right to the title thereof," and appellant contends such finding is not supported by the evidence. Appellant argues that the authorization by plaintiff of a resale by Baker of the furniture and a sale of the resale contracts was in effect a waiver by plaintiff of his reservation of title and of his notice to appellant of such reservation of title. Section 1142 of the Civil Code of California, which was in effect at the time involved in these cases, and which provided that, "where the possession of personal property, together with a power to dispose thereof, is transferred by its owner to another person, an executed sale by the latter, while in possession, to a buyer in good faith and in the ordinary course of business, for value, transfers to such buyer the title of the former owner. * * *" It cannot be said that appellant is the kind of a buyer contemplated by the statute when we consider the evidence to the effect that appellant, before taking the assignment of the resale contracts from Baker, knew about this transaction and the terms of the contract for the sale of the furniture, and knew that plaintiff reserved in himself title to the furniture, and that appellant was afterwards, and before the delivery of the furniture under that contract, notified again of such reservation of title. We must also bear in mind that the authority given by plaintiff to Baker to resell the furniture and to sell the resale contracts was not a general authority such as is usually found in the cases cited as authorities on this subject, but was a very limited authority, and was confined to permission to sell the goods, not in the ordinary course of trade, but only to Dembroff and Rosengarten by delivery direct from the factory to the apartment houses, and to sell the resale contracts, not to an innocent purchaser in the ordinary course of that business, but only to appellant; and, in any event, the sales of the furniture and of the resale contracts were to be made subject to plaintiff's reservation of title—all of which limitations, including the reservation of title in plaintiff, were well known to all the parties to the transaction, including appellant.

Appellant cites in support of his contention last mentioned the following language from California Jurisprudence, volume 22, page 1118: "Although the parties to the contract agreed that title should remain in the seller, a reference to elemental principles leads to the conclusion that rights may be acquired by third persons who have extended credit to or dealt with the buyer relying upon the latter's possession and apparent ownership, and without knowledge or notice as to the state of the title." This correctly states the rule therein discussed, but it does not apply to the facts of the instant case, because, as stated above, appellant was not "without knowledge or notice as to the state of the title," and did not rely upon the apparent ownership of Baker, but rather relied upon Baker's honesty, when appellant, through Powell, intrusted the money to Baker to pay plaintiff for the furniture, so that title might pass to appellant, Powell knowing at the time that the title was reserved in plaintiff. Baker failed to pay the balance of the purchase price to plaintiff, and, such balance being unpaid, title remained in plaintiff by reason of the provision in his conditional sale contract with Baker to the effect that plaintiff would retain title until the purchase price was fully paid. On the following page of the same volume of California Jurisprudence (p. 1119) appears the following language: "Without any doubt, the right of persons who deal with the buyer is inferior to the right of the seller where it appears that such persons had actual knowledge of the state of the title."

[18] Appellant cites section 3543 of the Civil Code of California, which provides that, "where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer;" and reasons that appellant has suffered through plaintiff's negligence in extending to Baker the limited authority above mentioned. However, under the evidence in the case, the trial court might well have found, and no doubt did conclude, that the loss occurred through the negligence of Powell, vice president and manager of appellant, in paying the money for the furniture to Baker instead of to plaintiff, with full knowledge of the reservation of title in plaintiff. Where the person claiming under the buyer had full knowledge as to the state of title, the question of estoppel of the owner by reason of his negligence is not presented. Lowe v. Woods, 100 Cal. 408, 34 P. 959, 38 Am. St. Rep. 301; Pacific Finance Corp. v. Hendley, 103 Cal. App. 335, 339, 284 P. 736.

Under appellant's third main contention, namely, that the findings of the trial court as a matter of law do not support the court's decision, appellant advances the argument that, even if the evidence objected to was validly admitted and the findings objected to were amply sustained, still plaintiff is not entitled to recover, for the reason that, where the original seller gives his purchaser actual authority to resell the goods and to sell the resale contracts, the purchaser of the resale contracts is protected, whether or not he knew of any reservation of title on the part of the original seller. There is, of course, a recognized difference between actual authority and apparent authority in connection with conditional sales contracts. Actual authority is express authority. Apparent authority arises from facts and circumstances, and operates by way of estoppel, as, "where the true owner holds out another or allows him to appear as the owner of or as having full power of disposition over the property, and an innocent third person is thus led into dealing with him, the rights of the innocent person will be protected; * * * the true owner can neither legally nor equitably complain or maintain a cause of action against the innocent party for the obvious reason that he himself has put it within the power of the apparent owner to dispose of the property." Rapp v. Fred W. Hauger Motors Co., 77 Cal. App. 417, 421, 246 P. 1067, 1068. In such a case the innocent party's rights do not depend upon any actual title or authority of the party with whom he deals directly, but are derived from the act of the real owner by which such situation was created, and which estops or precludes him from disputing, as against the innocent purchaser, the existence of the title or authority which by reason of his negligence or mistaken confidence he has caused or allowed to be vested in the party who sold to the innocent purchaser. Western States Acceptance Corp. v. Bank of Italy, 104 Cal. App. 19, 23, 285 P. 340; Pacific Finance Corporation v. Hendley, 103 Cal. App. 335, at page 338, 284 P. 736.

We know of no California cases, and none has been cited by appellant or respondent, which directly support or refute appellant's contention last above mentioned, and apparently the exact question has never been determined in any California authority. Appellant cites a note found in 47 A. L. R. page 86, wherein the author of said note does conclude from the cases previously cited therein (none of them being from this jurisdiction) that "it is not necessary that he [the subvendee] be a bona fide purchaser for value any more than if he had purchased directly from the conditional seller. In other words, the sale having taken place within the actual authority conferred upon the conditional buyer, title passes to the subvendee." The author of the note, however, indicates that this rule does not obtain in California, for he refers to section 1142 of the Civil Code of California and certain California cases which were determined on the question of estoppel. The note also recites that in many states the rule is confined to a purchaser in the ordinary course of trade. The language of section 1142 of the Civil Code of California, we believe, is broad enough to cover both cases mentioned by appellant, namely, the case in which the original seller gives his purchaser actual authority to resell, and one in which the authority to resell is only apparent. The words in the statute "with a power to dispose thereof," we believe, refer to both actual and apparent power to dispose of the personal property. This statute, of course, requires that the purchaser must be a buyer in good faith and in the ordinary course of business, and, as pointed out above, the appellant herein is not such a buyer.

In the view we take of this case, it is not necessary to determine appellant's contention last above mentioned, because all of the numerous authorities cited in support of that contention indicate that such resale must have taken place within the actual authority conferred upon the conditional buyer, or title will not pass to the subvendee. From the evidence in this case it is apparent that the sale of the resale contracts to appellant by Baker was not within the actual authority conferred by plaintiff upon Baker. The authority conferred upon Baker by plaintiff was a very limited and restricted authority, and it did not authorize Baker to actually transfer any title until the balance of the purchase price had been paid to plaintiff. The trial court evidently concluded, and, we believe, had ample evidence to conclude, that it was contemplated and agreed by all of the parties to the transaction, including Powell (acting for appellant), that under no circumstances would any title pass from plaintiff until the balance of the purchase price had been paid to plaintiff. The evidence showed that plaintiff took every reasonable means to prevent the situation that arose. He and his son repeatedly notified Powell that plaintiff would not surrender title until he had received the balance of the purchase price, and the court found that Powell knew title was reserved in plaintiff. It would have been an easy matter for Powell to have paid the balance to plaintiff or to have escrowed it, conditioned upon the transfer of title from plaintiff to appellant.

We have failed to comment on other points and authorities cited in appellant's briefs, as we think the principles contained therein have been covered under other points in the opinion.

For the foregoing reasons, we are of the opinion that the trial court did not commit any prejudicial errors in the admission of evidence; that the findings are supported by the evidence; and that the findings fully support the judgment.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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TULLER v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

L. A. 13230.

Supreme Court of California.
March 31, 1932.

Rehearing Denied April 28, 1932.

1. Parent and child ⚷3(3).

Complaint by child as poor person against father for nonsupport *held* not demurrable for failure to join mother (Civ. Code, § 1428).

2. Parties ⚷95(7).

Where court erroneously sustained demurrer to complaint of child as poor person for nonjoinder of mother, refusal to permit joinder at time of hearing when mother was present and willing to join *held* error (Code Civ. Proc. § 389).

3. Mandamus ⚷48.

Where trial court entered judgment after denial by appellate court of mandamus, and plaintiff took no appeal therefrom, Supreme Court is without power to order case set for hearing by trial court.

4. Judgment ⚷656.

Judgment for plaintiff's failure to amend within time fixed is not judgment on the merits and res judicata.

In Bank.

Application by Lula May Tuller for writ of mandate directed to the Superior Court in and for Los Angeles County and another.

Writ denied.

Jas. Donovan and M. C. Spicer, both of Los Angeles, for petitioner.

Pierce Works, of Los Angeles, for respondents.

PER CURIAM.

This is a petition for a writ of mandate to require respondent Superior Court to set a case for trial or show cause why this has not been done. The merits of the said case are not before us; this proceeding being solely concerned with technical questions of procedure.

Prior to the present litigation, Edna May Tuller was granted a divorce from Walter K. Tuller, and was awarded the custody of their daughter, Lula May Tuller, petitioner herein. Said daughter on June 9, 1931, being of the age of majority, filed a complaint in the Superior Court against Walter K. Tuller, her father, seeking support under the provisions of section 206 of the Civil Code, on the theory that she was a "poor person" unable to maintain herself by work. An order to show cause why the defendant should not make provision for her support and counsel fees and costs pendente lite was obtained at this time. The defendant demurred to the complaint, mainly on the ground that Edna May Tuller, the mother of plaintiff, was a necessary party defendant, and should have been joined. An affidavit was filed in answer to the order to show cause, denying its substantial allegations. On July 21, the respondent judge of the Superior Court sustained the demurrer on the above-mentioned ground, giving plaintiff ten days to amend. At that time, the mother was present in court, and expressed her willingness to be joined; and counsel for the plaintiff requested the court to make an order joining her as a party defendant by virtue of its powers under section 389 of the Code of Civil Procedure. This the court refused to do, declaring that the proper procedure was to file and serve an amended complaint. The plaintiff then moved to enter the default of the defendant. The court denied the motion, and placed the order to show cause off calendar. The plaintiff did not amend, but instead applied to the District Court of Appeal, Second Appellate District, Division 1, for an alternative writ of mandate to compel the court to set the cause for trial. The application was denied, and, upon petition for hearing in this court, an alternative writ was granted. While this proceeding in the appellate court was pending, that is, between the time that the District Court of Appeal denied the application and the time of filing a petition for rehearing in that court, the Superior Court, upon request of the defendant, entered judgment in his favor by reason of the failure of plaintiff to amend the complaint within the specified time. This judgment was secured without notice to plaintiff, and her motion to vacate the same was denied. No appeal was taken from the judgment, and the time for appeal has passed.

The original complaint of petitioner against the defendant Tuller contained allegations supported by affidavits of several doctors, to the effect that she was in danger of tuberculosis and was in immediate need of medical attention. It was for this reason, counsel for petitioner say, that relief was sought by application for mandamus to the appellate court. They assert further that the procedure of filing and serving an amended complaint would have resulted in great delay, in view of the congested calendar; and that an appeal from a judgment in the action would have been a slow, and consequently an inadequate, remedy.

[1] Passing for the moment the question of the propriety of mandamus as a remedy under these circumstances, we think it is clear that the lower court was in error in making the orders complained of. Section 206 of the Civil Code reads in part as follows:

"It is the duty of the father, the mother, and the children of any poor person who is unable to maintain himself by work, to maintain such person to the extent of their ability. * * *" It is contended that this section establishes a *joint* liability of the father and mother, which cannot be enforced in an action against one without joinder of the other. Such an interpretation of the section is unreasonable on its face, for it would also necessitate joinder of the *children* of such person, if any existed. Nothing in the language of the statute beyond the equivocal term "their" suggests that the obligation is not individual and several as to each person named therein. No procedure for the enforcement of this liability has ever been provided by the Legislature, and it has been decided that a general action addressed to the equitable powers of the court is proper. Paxton v. Paxton, 150 Cal. 667, 89 P. 1083; see, also, Cal. Civ. Code, § 1428. We are at a loss to understand how this technical rule of procedure invoked by defendant Tuller can be fastened upon an action for which no procedure at all is specified, in the absence of a clearly defined statutory purpose making the liability joint.

[2] The demurrer should unquestionably have been overruled, and the order sustaining it was palpably erroneous. It was still less proper for the court to refuse to permit the bringing in of the mother at the time of the hearing, when she was present and expressed her willingness to become a party. The power to bring in parties who are necessary to a determination of the cause is, under section 389 of the Code of Civil Procedure, not wholly discretionary. Inasmuch as the court, in sustaining the demurrer, concluded that the mother was a necessary party, it necessarily follows that it should have permitted the joinder at that time. No possible reason save excessive legal formalism could demand that plaintiff be forced, in effect, to start her action anew; and the only purpose to be served would be delay. No discretion resided in the court in this state of the record. We said in Ambassador Petroleum Company v. Superior Court, 208 Cal. 667, 671, 284 P. 445, 447: "* * * When the trial court finds, or the record indisputably shows, that a 'complete determination of the controversy cannot be had without the presence of other parties,' such parties become necessary and indispensable parties, and the section is *mandatory*, and the question then becomes one of jurisdiction in that the court *may not proceed without bringing them in.*" (Italics ours.) See, also, Solomon v. Redona, 52 Cal. App. 300, 198 P. 643.

[3] A plain showing of error below is thus presented, first, in sustaining the demurrer, and, second, in refusing to permit what in effect was the carrying out of the court's own order—the joinder of the mother as a defendant. The difficult questions are whether the petitioner has chosen a valid method of securing relief, and whether at this time such relief may properly be granted. It is contended that it is not possible to grant the writ because judgment has been entered in the action, and no appeal has been taken from it. We have reached the conclusion that this contention is sound. It appears that the application to the District Court of Appeal was denied on July 30, 1931. The judgment was signed by the judge of the Superior Court on August 1, 1931, and entered on August 5, 1931. During all this time, the Superior Court had jurisdiction to act. Counsel for petitioner have staked their entire case on the application to the District Court of Appeal for an alternative writ of mandate. They have failed to amend the original complaint, and thus have permitted the trial court to render judgment by default. They have not appealed from this judgment. They now ask this court to order a cause set for trial, in spite of the rendition of judgment therein by a court having jurisdiction thereof, which judgment is now final. We think this is beyond our powers.

[4] Petitioner, however, is not debarred from further prosecution of her claims. The effect of the technical maneuvers of counsel for defendant Tuller and the failure of counsel for petitioner to pursue the appropriate remedies provided by statute has been to delay, for a regrettably long period, a trial of the action. Nevertheless, the right of petitioner to file a new action has not been impaired by the judgment entered in this one. It is too plain to require discussion that said judgment was not rendered on the merits, and is consequently not res judicata on any of the issues. See, generally, 2 Freeman on Judgments § 744, p. 1566 et seq.

The writ is denied.

We concur in denying the writ: SHENK, J.; SEAWELL, J.

GOSNELL et al. v. LLOYD et al.

L. A. 11554.

Supreme Court of California.
March 28, 1932.

Rehearing Denied April 25, 1932.

1. Specific performance ⚷6.

Question of mutuality of remedy may arise only in action for specific performance (Civ. Code, § 3386).

2. Specific performance ⚷6.

Where one seeking specific performance offers performance of his part of contract, other party cannot claim lack of mutuality of remedy (Civ. Code, § 3388).

3. Mines and minerals ⚷74.

Where purchaser had paid most of purchase price and offered to pay rest, vendor could not rescind contract for sale of interest in oil lease upon ground that contract lacked mutuality.

4. Vendor and purchaser ⚷38.

That vendor placed great confidence in purchaser would not put purchaser in confidential relationship or make purchaser vendor's agent.

5. Mines and minerals ⚷74.

In action for rescission of contract for sale of interest in oil lease, because of purchaser's misrepresentations and fraudulent concealment, evidence supported finding that vendor entered transaction with independent knowledge of material facts.

6. Mines and minerals ⚷74.

In action for rescission of contract for sale of interest in oil lease, evidence sustained finding that purchase price was adequate.

7. Vendor and purchaser ⚷13.

Equity will not estimate adequacy of purchase price with relation to events transpiring after parties contracted.

8. Vendor and purchaser ⚷13.

In action for rescission, where both parties could form independent judgment and acted knowingly and intentionally, mere inadequacy of price will not authorize canceling contract.

9. Insane persons ⚷98.

In action by incompetent's guardians for rescission of contract for sale of interest in oil lease, evidence sustained finding that he was not incompetent at time of transaction.

10. Mines and minerals ⚷74.

Acquiescence and delay in seeking rescission of contract for sale of interest in oil lease, after discovery of facts allegedly authorizing rescission, waived right thereto.

11. Evidence ⚷590.

Witness' interest in suit could be considered in determining weight of her testimony.

12. Appeal and error ⚷1033(1).

Persons seeking rescission could not complain of uncertainty in contract, where uncertainty had been determined favorably to them.

In Bank.

Appeal from Superior Court, Ventura County; Edward Henderson, Judge.

Action by Ira Gosnell and another, as guardians of the estate of T. B. Gosnell, also known as Truman B. Gosnell, an incompetent person, against Ralph B. Lloyd and another. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Clarke & Bowker, of Los Angeles, and James C. Hollingsworth and Sheridan, Orr, Drapeau & Gardner, all of Ventura, for appellants.

Lawler & Degnan, of Los Angeles, and Blackstock & Rogers, of Ventura, for respondents.

PER CURIAM.

This is an appeal by the plaintiffs from a judgment in an action to rescind a contract or for declaratory relief, wherein the right to rescind was denied and the rights of the parties declared.

The plaintiffs are the son and daughter of T. B. Gosnell, and sue in their capacity as the legally appointed guardians of his estate. On June 17, 1925, T. B. Gosnell was the coowner with his son and daughter of a one-eighth share of the royalties payable under an oil lease executed in October, 1913, by Caroline Gosnell and T. B. Gosnell, her husband, and the latter's son and daughter as lessors, to Joseph B. Dabney as lessee. Dabney assigned one-half of his interest as lessee to the defendant Ralph B. Lloyd. Subsequently Caroline Gosnell died, and T. B. Gosnell succeeded to her one-third interest in the lessors' rights under the lease.

In June, 1925, Gosnell was about 76 years of age. He was a native of Ohio. In 1885 he settled in Ventura county on the land involved herein. In 1914, he married Ethel Gosnell, who was many years his junior. She obtained a divorce from him in 1917, and left Ventura to reside in Los Angeles. In 1921, subsequent to an arrangement by which Ethel Gosnell was to receive all of his property, Gosnell moved to Los Angeles, and from thenceforward resided with her.

The defendant Lloyd had lived as a boy in Ventura county, and Gosnell and Lloyd knew each other during that period and thereafter. At the time of the negotiations with Gosnell in June, 1925, Lloyd was about 48 years old. At an early date Lloyd began prospecting for oil in the neighborhood of the

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Gosnell property, and prior to June, 1925, with others had acquired interests in other lands and leases, some of which adjoined the Gosnell property. In June, 1916, Lloyd and his associates sublet their interests, including their interest in the Gosnell lease, and consisting of about twelve properties or units, to the Shell Company with an option to purchase. The Shell Company immediately commenced drilling operations on some of the adjoining leases and on the Gosnell property itself in February, 1917, and subsequently on other units. In the progress of its drilling operations on all of these properties, the Shell Company encountered difficulties, the greatest of which apparently was the water hazard, so much so that in the latter part of 1919, pursuant to the terms of its contract, it surrendered all leases, except those covering three properties, which included the Gosnell lease. In 1920, Lloyd leased to the Associated Oil Company certain units surrendered by the Shell Company. Subsequently drilling operations resulted in good producing wells on lands adjoining the Gosnell property.

The Shell Company continued drilling operations on the Gosnell property, completed wells Nos. 1, 2, 3, 4, and 5, and was engaged in the early part of 1925 in bringing to production wells Nos. 6, 7, 8, and 9. Well No. 7 was put on production in January, 1925, at a depth of 4,821 feet, but produced water in excess of oil. In May, 1925, it was "killed" and work on it was suspended until September of the same year. Well No. 8 was completed in February, 1925, at 5,082 feet and flowed salt water. It was also "killed" in May, 1925, and was abandoned the following January. In March, 1925, well No. 9, at a depth of about 4,000 feet, flowed salt water. It was completed on May 5, 1925, at 4,450 feet, with an initial flow of 662 barrels of oil per day. In March, 1925, a test of well No. 6 showed salt water entering below 4,280 feet, and again in April at a depth of 4,313 feet. It was completed about June 10, 1925, with an initial production of 365 barrels at a depth of 4,800 feet. Prior thereto, on land adjoining, and about 150 feet north of the Gosnell property, Notten No. 6, on April 25, 1925, had come in with an initial production of 4,330 barrels at a depth of 4,584 feet. At a like distance from the easterly line of the Gosnell property Lloyd No. 5, prior to April, 1925, had come in with a production of 1,900 barrels at 4,050 feet, and on April 16th, with an initial production of 3,200 barrels at a depth of 4,695 feet. Lloyd No. 5 was opposite and about 300 feet distant from Gosnell No. 5, which had developed water to an extent ranging from 32 per cent. to 84 per cent., and in May, 1925, it had ceased to flow and was "on the pump."

In April, 1922, the Shell Company had exercised its option to purchase the Gosnell lease, and it appears that $82,305 was received by Lloyd as the purchase price of his one-eighth interest in the lease. Prior thereto Lloyd had received all of the royalties paid by the Shell Company under these leases, and he in turn computed the share of each person interested, and remitted the amount due to each less the recipient's share of the taxes, which in turn was remitted by Lloyd to the Shell Company to reimburse it for the taxes which it was required to pay under the terms of each lease for the lessors' account. Subsequent to the sale of the leases to the Shell Company, at his own solicitation made to the Shell Company, Lloyd continued to receive and disburse the royalties as formerly. During this time he maintained an office where he also received Shell Company's daily reports of conditions and production on all of its properties in the Ventura field.

It is in evidence that T. B. Gosnell often visited the field to watch drilling operations, especially when a new well was expected to come into production. At frequent intervals, either alone, or accompanied by Mrs. Ethel Gosnell, T. B. Gosnell called at Lloyd's office and was permitted to examine the Shell Company's reports there for the reason given by him that he had had a dispute with one of the Shell Company's officials. At these times he jotted figures in a notebook for purposes of comparison with previous figures, and he discussed with Lloyd, or in his absence, with some one else in the office, the progress of the field, and other topics. It is in evidence that he complained often of the low production of oil on the Gosnell property as compared with other properties, and expressed surprise that the Shell Company could not get a well on his property like Lloyd No. 5, and opined that the wells were going to salt water and that salt water was going to ruin them. He also complained that the royalty checks were not larger.

In 1923, the monthly royalty payment to Gosnell reached its highest mark, approximately $3,100. The highest monthly royalty in 1924 was $1,035.79, and the lowest in that year was $631.82, in December. In January, 1925, Gosnell's royalty was $463.41; in February, $257.22; in March, $241.35; and in April, $268.75. It was also in evidence that in his home Gosnell read the oil news and discussed it with others, and that prior to June, 1925, he expressed a desire to sell out, and that on at least one occasion he had suggested to Lloyd that the latter buy his interest for $150,000, which Lloyd refused. On June 2, 1925, Gosnell, accompanied by Mrs. Ethel Gosnell, went to Lloyd's office, and at that time negotiations for the sale of Gosnell's interest to Lloyd were opened. The evidence from this point becomes sharply conflicting, but there is testimony which the trial court might reasonably credit that during this visit, after Gosnell had examined reports and compared figures, he proposed to Lloyd that the latter buy his rights for $100,000; that Lloyd refused this offer, but countered with an offer of $72,000, payable $1,000 a month; that Gosnell objected that he must have some money immediately, $15,000 or $20,000; that Lloyd consented to make a cash payment of $15,000, and the balance at the rate of $1,000 a month. There is evidence that Mrs. Ethel Gosnell urged Gosnell to accept the offer, but that the latter stated he would think it over and let Lloyd know within ten days; that subsequently Gosnell telephoned to Lloyd that he would accept the offer. It is in evidence that Mrs. Gosnell sent C. H. Hartke, an attorney, to Lloyd for information respecting the agreement, and that Lloyd and Hartke arranged that the former should draw the contract; that later Hartke took the agreement prepared by Lloyd to the Gosnells' home and went over it with them; that on June 15th Lloyd called on Hartke and executed it. On June 17, 1925, Gosnell, Hartke, and Mrs. Gosnell met Lloyd at the Pacific Southwest Trust & Savings Bank in Los Angeles. Together they went to the collection department and conferred with Mr. Hawkins, an escrow officer of the bank. Lloyd introduced Mrs. Gosnell to Mr. Hawkins; also Mr. Hartke as T. B. Gosnell's attorney. Mr. Hawkins read over the contract and called attention to the fact that it did not provide for interest. Lloyd stated that the agreement did not contemplate interest, but Gosnell insisted that he must have interest on the deferred payments, to which Lloyd finally agreed, and at Hartke's suggestion a provision therefor was interlined and initialed by the parties. A discussion arose concerning payment of the cost of the certificate of title. Gosnell insisted that he would not pay it, but he finally agreed to pay $25 on account of the cost, the balance to be paid by Lloyd. An understanding was also reached respecting taxes then due, which it was agreed should be deducted from Gosnell's share of the May royalties. The question was raised as to whether royalties should be accounted for to Gosnell as of June 1st or June 17th, the date of the contract. There is a sharp conflict as to whether Lloyd stated the approximate amount of the May royalties, a check for which had been deposited by him on the day previous, but there is the testimony of Mr. Hawkins and Lloyd that the latter presented a statement of the amount, and it is undisputed that, after June 1st was agreed upon as the appropriate date for the accounting, Gosnell insisted that the oil in the tanks should be checked before the amount of the royalties was accepted as correct. Gosnell executed the agreement and acknowledged it before a notary, whereupon the agreement, the deed, and other necessary papers and Lloyd's check for $1,000 for which a receipt was given, were deposited in the escrow. The contract provided that the balance of the $15,000 cash payment should be deposited when the certificate of title was furnished. Under the terms of the contract, the deed and certificate of title were to be delivered to Lloyd when the full purchase price had been paid into escrow. Upon inquiry by the escrow officer, Gosnell gave instructions as to the account to be credited with the payments of principal and for monthly notices to himself and Lloyd. It seems not to be disputed that during all of this conference, which lasted about an hour, Gosnell was at no time seated nor apart from the others, but carried on conversations with Hartke and Lloyd and took part in the discussions with the escrow officer.

About June 20, 1925, Lloyd mailed to Gosnell a check for $1,355.88, representing Gosnell's share of the May royalties, less the agreed deduction for taxes. It is not disputed that this increase was due to the coming in of well No. 9 in May. The June royalty received by Lloyd, by virtue of well No. 6 coming into production on June 10th, together with the continued production from well No. 9, amounted to $1,953.98. In subsequent months the royalties under the Gosnell lease gradually increased by reason of the continued production from wells 6 and 9 and the completion of other wells at depths varying from 5,300 to 6,488 feet, until it reached a peak of about $38,000 in August, 1926, when production then commenced a continuous fluctuation downward until we find that in November, 1927, the royalties to Lloyd amounted to $10,003.

On June 25, 1925, after the receipt of the May, 1925, royalty check, Mrs. Ethel Gosnell stated to Lloyd over the telephone that they were anxious to get the money, and requested that the initial payment be made immediately, inasmuch as the title company had by letter approved the title, though the certificate had not been deposited. To this Lloyd consented, and on June 27th deposited $14,000 and the payment of $1,000 due July 1st, which were immediately withdrawn by the Gosnells. Lloyd continued to make the payments of $1,000 per month, which were regularly withdrawn by the Gosnells. In September, 1926, Gosnell, with Mrs. Gosnell, called upon Lloyd and stated that they desired an advance of $18,000, that Lloyd had been doing well, and that they needed that amount of ready money. Lloyd paid this amount into escrow and it was withdrawn by the Gosnells. Thereafter Lloyd continued to make the deposits of $1,000 per month up to and including the deposit made on February 1, 1927. Including that payment, $51,000 had been paid by Lloyd.

On February 9, 1927, Mrs. Ethel Gosnell and the plaintiffs, Ira Gosnell and Lena Bowyer, entered into an agreement among themselves for the recovery of the interest of T. B. Gosnell in the Gosnell lease. Pursuant to that agreement, and on February 10, 1927, the plaintiffs were appointed the guardians of the estate of T. B. Gosnell, who was declared an incompetent. On the same day a notice of rescission was served on the defendants, and on the following day this action was commenced.

By their amended complaint the plaintiffs sought to rescind the contract of June 17, 1925, on the ground of fraud and misrepresentation on the part of Lloyd, inadequacy of consideration, and that the contract was indefinite, lacking in mutuality, and unenforceable; also on the ground of the incapacity of T. B. Gosnell to make the contract; and sought further a declaration of the rights of the respective parties. By his answer, in addition to denials and affirmative defenses, Lloyd averred a readiness and willingness to complete performance on his part either in accord with the terms of the contract or otherwise, as the court might direct.

One of the issues raised by the pleadings was that a confidential relationship or an agency existed between Gosnell and Lloyd. In addition to the facts herein stated, the trial court found that no such relationship existed between the parties to the contract, but that Lloyd in disbursing royalties, etc., was acting as the agent of the Shell Company and not otherwise. The court also found that there existed no fraud, misrepresentation, or concealment on the part of Lloyd, but that Gosnell acted with full knowledge, voluntarily and with advice and services of counsel; that the consideration for the contract was fair and adequate, and that the contract was not indefinite nor lacking in mutuality; that at all times involved Gosnell possessed sufficient mentality to manage his property and to understand the nature, extent, and value thereof, and the nature, purpose, and effect of any agreement with respect thereto, and that Gosnell was not a person of unsound mind nor likely to be deceived or imposed upon by artful or designing persons; and that T. B. Gosnell and Ethel Gosnell ratified and confirmed the sales agreement and all steps taken thereunder. The court also found that Lloyd had performed all of the conditions on his part to be performed, and had made lawful tender of all sums remaining unpaid under the terms of the contract. The decree denied rescission and established the validity of the contract and provided that the defendants, upon deposit of the balance of $21,000 due upon the principal, together with such interest as may be payable under the terms of the contract, should be entitled to receive the deed and other instruments deposited in escrow.

[1-3] On this appeal the plaintiffs contend first that the contract lacks mutuality, and is therefore invalid as a matter of law. The contract recites that in consideration of $1,000, and "for and in consideration of the payments hereinafter to be made" by Lloyd "according to the terms of the agreement," Gosnell "agrees to sell to" Lloyd, the rights described "for the sum of Seventy-two Thousand Dollars ($72,000.00) payable as follows: One Thousand Dollars ($1000.00) paid herewith: Fourteen Thousand Dollars ($14,000.00) upon the delivery" into escrow of deed and certificate of title. It also provided for the payment into escrow of the remaining $57,000 in monthly installments of $1,000 each, and that upon the completion of the payment into escrow of the gross sum of $72,000, the bank was instructed to deliver the deed, etc. The contract contains also the following provision: "In the event that party of the second part shall fail to make the payments as herein provided, and shall continue in the failure to make payment for thirty (30) days after written notice sent to his address by registered mail by said bank, then, in that event the party of the first part shall be entitled to and shall have the right to take down from the escrow said deed and assignment of his interest in said oil lease, and said party of the first part shall retain all moneys theretofore paid under this agreement into the escrow, in liquidation and settlement in full for all claims and damages against the party of the second part, and the party of the second part shall from that date forward lose all his rights under this agreement and the benefits and provisions created by the same." The plaintiffs contend that there is no agreement in the contract on the part of Lloyd to pay the full sum of $72,000, but that he may cease making payments at any time without further liability, and they argue from this that the remedy of specific performance not being available to Gosnell, Lloyd is not entitled to have the promise of Gosnell enforced.

But this is not an action for specific performance, in which alone the question of mutuality of remedy may arise. Section 3386, Civ. Code; 23 Cal. Jur. 445 et seq. Furthermore, if the answer of Lloyd be considered to seek such relief, we have his concurrent offer of performance which must be deemed to supply any lack of mutuality of remedy of specific performance. Sec. 3388, Civ. Code; Thurber v. Meves, 119 Cal. 35, 50 P. 1063, 51 P. 536; Sayward v. Houghton, 119 Cal. 545, 51 P. 853, 52 P. 44; Hay v. Mason, 141 Cal. 722, 723, 75 P. 300; Bird v. Potter, 146 Cal. 286, 79 P. 970; 23 Cal. Jur. 452.

There is no merit in the contention that the respective promises or obligations of the parties are lacking in mutuality; in other words, that the promise of Gosnell is not supported by any promise on the part of Lloyd. Accepting the plaintiffs' construction of the contract as unilateral, we have a simple contract where performance of the act of payment on the part of Lloyd is a consideration in law for performance of the promise of Gosnell to convey. 6 Cal. Jur., p. 213; Williston on Contracts, vol. 1, pp. 314, 315. An inquiry into this question in a court of law therefore discloses nothing illusory respecting the consideration for the promise of Gosnell to sell; it is supported either by the promise of Lloyd to pay the stipulated purchase price, or by the act of performance on his part. The inquiry into the question of adequacy of consideration must be made, therefore, in a court of equity pursuant to principles applicable in cases of rescission. The question presented for review in connection with this and the further contentions of the plaintiffs is whether the findings of the trial court are supported by the evidence.

[4, 5] There is no evidence in the record that Lloyd bore toward Gosnell any fiduciary or confidential relationship, or that the relation of principal and agent existed between them. The plaintiffs assert that Gosnell "placed great confidence and reliance in" Lloyd, but that fact, if it existed, could not impose any corresponding duty upon Lloyd in the absence of any act of the parties creating or establishing a confidential relationship. Bacon v. Soule, 19 Cal. App. 428, 126 P. 384. While the evidence on the issues of misrepresentation and fraud by concealment was conflicting, nevertheless the record sufficiently supports the trial court's findings that Gosnell was informed of the coming in of wells in the months of May and June and of the amount of the May royalties; that he had independent knowledge of all material facts bearing upon the transaction; and that he acted voluntarily and independently, with the services and advice of attorney Hartke. With reference to knowledge of facts subsequent to the execution of the contract, there is the testimony of Ethel Gosnell that she had heard of a well coming in with the largest production of any well previously brought in on the Gosnell lease, and that both she and T. B. Gosnell had read of it in the papers in addition to being advised of it by Mr. Lloyd in a letter written to Mr. Gosnell on September 2, 1925, and that they had had conversations concerning the increased production. Ethel Gosnell testified that both she and T. B. Gosnell had knowledge that there were wells "coming in right along."

[6-8] The factors bearing on the question of the adequacy of the purchase price to be paid by Lloyd must be viewed as they existed at the time the parties negotiated. The trial court might well conclude from the evidence that up to and at that time no one believed or could have believed that the oil sands on adjoining property were any other than water sands on the Gosnell property, and that that situation was given due weight by Gosnell at the time the contract was made, and in fact was the power which motivated Gosnell's approach to Lloyd and his offer to sell him his interest. Considering the past production from the Gosnell lease, the obstacles to be overcome before any great increase in that production became apparent for the future, the fact that $82,000 was received by Lloyd for three times Gosnell's interest, and that there was evidence that $75,000 for Gosnell's interest, computed as of the time when the parties were negotiating, was a fair price, we must conclude that the trial court was justified in finding that the consideration was fair and adequate. Equity will not estimate the fairness and adequacy of the purchase price with relation to events which transpire subsequent to the time when the parties contracted. Colton v. Stanford, 82 Cal. 351, 23 P. 16, 16 Am. St. Rep. 137; Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328. Furthermore, it fairly appears from the record that Gosnell believed the receipt of $1,000 a month, compared with the amounts which he had been receiving, irrespective of the future production, to be a good bargain. In an action for rescission, where both parties were in a situation to form an independent judgment and acted knowingly and intentionally, mere inadequacy, unaccompanied by other inequitable incidents, is never of itself a sufficient ground for canceling an executed or executory contract, and courts of equity will not interfere with the value which the parties in such a situation have themselves placed upon the subject-matter. 2 Pomeroy's Equity Jurisprudence, § 926.

[9] Viewing the questions of incapacity and unsoundness of mind of Gosnell most favorably to the plaintiffs' contentions, we are unable to discover sufficient evidence in the record upon which a finding that Gosnell was incompetent at the times involved, either to manage his own affairs or to understand the nature or effect of the contract, could be based. Gosnell was afflicted from birth with a cleft palate which made conversation with him difficult. He did not write except to sign his name. There is evidence that at the age of 76 he was suffering from some of the effects of senile dementia; that at times he was not very strong and had to be helped into an automobile and when climbing stairs; that on several occasions he had had involuntary movements of his bowels; that sometimes he had difficulty in walking and used a cane and at times complained of dizziness; that sometimes he repeated conversations and that his memory was not so good; and that he had lost weight and appeared feeble in comparison to the large striking physique of his former years. It was in evidence that while in Ventura Gosnell lived in unsanitary conditions; that he ate unwholesome food; that he had boils or sores on his body; that he hoarded junk and was miserly and complained of the banking system and the exaction of interest; that at times he was fanatical on the subject of herbal and religious cures for physical ailments; that he became angry apparently without provocation; and had an exalted opinion of himself. As further evidence of incompetency, the plaintiffs offer evidence of some alleged improvident expenditures and investments; also the claimed unbusinesslike transactions wherein Gosnell deeded and assigned all of his property and his interest in the Gosnell lease and the contract with Lloyd to Ethel Gosnell; the gift to her of $10,000 cash out of the $15,000 initial payment, and the expenditure of the balance for a Marmon car for Ethel Gosnell, and a service station for her son, and the receipt by Ethel Gosnell of the $18,000 advance for some investment of her own. On the other hand there is evidence that for years immediately preceding the transaction involved herein Gosnell had invested and taken care of considerable property without assistance. It has frequently been held as matter of law that infirmities of the type herein listed are insufficient evidence of unsoundness of mind or incapacity to understand the nature or effect of a contract. See Rollins v. Smith, 72 Cal. App. 773, 238 P. 171, and cases therein cited. Here the evidence does not compel the conclusion that any of the infirmities or peculiarities of Gosnell affected his conduct or understanding during the negotiations for and execution of the contract, nor the subsequent dealings with Lloyd. It is not disputed even by the witnesses for the plaintiffs, including Ethel Gosnell, that T. B. Gosnell conducted himself with understanding and took an active part in the negotiations for the contract and in the transaction by which they were consummated. Considering all of the elements contended by the plaintiffs to have a bearing on the alleged inequity of upholding the contract involved here, i. e., the price agreed upon, the mental and physical state of Gosnell, and the conduct of Lloyd, certainly it cannot be said that this case, applying the principles discussed in cases such as Pomeroy v. Collins, 198 Cal. 46, 68, 69, 243 P. 657; Odell v. Cox, 151 Cal. 70, 90 P. 194, and Allore v. Jewell, 94 U. S. 506, 24 L. Ed. 260, should be governed by the results reached in those and similar cases relied upon by the plaintiffs.

[10, 11] A further and important phase of this case is that immediately following the execution of the contract of June 17, 1925, Gosnell assigned all of his interest therein to Ethel Gosnell. Thereafter Ethel Gosnell and T. B. Gosnell, with full knowledge of the increase in production and of all matters sufficient to put them on notice, consented to further performance by Lloyd, and received all of the sums paid by Lloyd, including the $18,000 advanced in September, 1926, and delayed bringing their action for nearly two years after such knowledge. At no time during this period did Ethel Gosnell indicate by word or deed that she considered Gosnell incompetent at the time the contract was executed, nor did she or Gosnell complain of any other matter touching the issues herein. The interest of Ethel Gosnell in the contract involved was not lost by virtue of the assignment made by her to the plaintiffs prior to the commencement of this action. Concurrently with the execution of that assignment, a reassignment was executed by the plaintiffs to Ethel Gosnell and deposited in escrow for her benefit. That conduct and delay of the parties entitled to rescind after a discovery of the existence of the right may constitute a waiver of the right of rescission is well settled (Ruhl v. Mott, 120 Cal. 668, 53 P. 304), and the trial court, under the facts presented, was justified in finding that the right, if any existed, was so waived by Ethel Gosnell and T. B. Gosnell.

The trial court also might properly consider Ethel Gosnell's interest in the outcome of the present action by virtue of the agreement of February 9, 1927, whereby she was to receive 20 per cent. of the estate recovered. This interest was a factor in determining the weight to be given to her testimony.

[12] But one other point raised by the plaintiffs requires notice. It is claimed that the contract is uncertain and indefinite, and therefore unenforceable, because it is not clear whether it provides for the interest as well as the principal to be paid into the escrow before the defendant Lloyd becomes entitled to the deed. But if in this respect there exists any uncertainty, it is a question of construction which has been determined favorably to the plaintiffs, and of which they therefore may not complain.

Finally, it may be said that this case is one peculiarly for the trial court in judging the credibility of the witnesses and resolving the conflicts in the evidence. In view of the findings, no question of law presented would justify a reversal.

The judgment is therefore affirmed.

CALIFORNIA BANK v. TRAEGER et al.

L. A. 12430.

Supreme Court of California.
March 31, 1932.

Rehearing Denied April 28, 1932.

1. Judgment 🔑203.

In interpleader suit to settle conflicting claims to personalty wherein opposing parties set up as res judicata diametrically opposite judgments secured in former suits to quiet title to property involved, judgment last in point of time *held* res judicata, irrespective of whether affirmative relief was sought.

2. Appeal and error 🔑544(3).

Supreme Court is not bound by trial court's finding that judgment set up as res judicata in interpleader suit was outside issues thereof, where appeal is on judgment roll alone.

3. Judgment 🔑203.

In interpleader suit to determine title to personalty, where diametrically opposite judgments were set up as res judicata, judgment last in point of time controls rights of parties.

In Bank.

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action in interpleader by the California Bank against William I. Traeger, Edith Wake Danziger, Lina Danziger, Barney Oldfield, and others. From a judgment in favor of Edith Wake Danziger and Lina Danziger, and against the other defendants, Barney Oldfield appeals.

Reversed.

Carroll Allen and A. E. McManus, both of Los Angeles, for appellant Barney Oldfield.

Patterson, Bailey & Montgomery, and Chas. C. Montgomery, all of Los Angeles, for respondents Edith and Lina Danziger.

CURTIS, J.

This is a suit in interpleader brought by the California Bank, which has deposited the personal property in court, to have the conflicting claims of defendants to said property settled and their rights thereto determined. The property involved originally consisted of a $40,000 promissory note executed by Milton Sills to the Wake Development Company and secured by a mortgage on real property, which note and mortgage were in the possession of the bank as collateral security. As payments were made on said promissory note, other securities in the form of gold bonds were purchased. At the time of the institution of this action, the bank had on hand these gold bonds, the promissory note upon which was due an unpaid balance of $13,500, and cash in the amount of $14,608.62, received from the maker of the note. The claim of the bank had evidently been paid in full, as it expressly disclaimed any interest in said property and prayed that it be permitted to deposit said property in court and thereupon be relieved of further liability with reference to it.

In 1927, Barney Oldfield, who is the sole appellant herein, obtained a $10,000 judgment against J. M. Danziger, husband of Edith Wake Danziger. Oldfield sought to levy execution against the property both in 1927 and 1929 upon the theory that, although the ostensible title was in Edith Wake Danziger by virtue of an assignment from the Wake Development Company, J. M. Danziger, his judgment debtor, was the real owner thereof. Edith Wake Danziger, after the levy of the first execution, on November 7, 1927, commenced an action to quiet title against J. M. Danziger, her husband; Barney Oldfield, as a judgment creditor of J. M. Danziger; and Wm. I. Traeger, as sheriff of Los Angeles county. Said judgment was in favor of the defendants, and specifically provided that: "It is hereby ordered, adjudged, and decreed that the plaintiff, Edith Wake Danziger, is not and never was the owner of that certain note and mortgage executed by Milton Sills to the Wake Development Company in the sum of Forty Thousand Dollars ($40,000) on the 2nd day of September, 1926. That the defendant, J. M. Danziger, was at the date of the filing of the complaint herein, and now is, the owner of said note and mortgage." Judgment in this action (case No. 237,604) was entered on September 28, 1928. An appeal from said judgment was taken by Edith Wake Danziger to the Supreme Court of the state of California, but said appeal on September 16, 1929, was dismissed by the court.

In the present suit in interpleader, this former adjudication was pleaded by Oldfield as determinative of his right to levy upon said property as the property of J. M. Danziger. On the other hand, Edith Wake Danziger pleaded in this action a judgment in a prior suit to quiet title instituted by the Wake Development Company in 1926 against J. M. Danziger, Vera F. O'Leary, a judgment creditor of J. M. Danziger (not a party to this action), and Wm. I. Traeger, as sheriff. The judgment in that case was in favor of the Wake Development Company, subsequent assignor of Edith Wake Danziger, and quieted the title of said plaintiff against any and all claims of J. M. Danziger, O'Leary, and Traeger, to the real property described in the complaint, which is the property from which the present moneys and securities are derived. This judgment was entered on June 29, 1926. It is to be noted that this judgment, for some unexplained reason, was not pleaded by Edith Wake Danziger in the suit which she subsequently instituted to quiet her title to the property in controversy against J. M. Danziger, Barney Oldfield, and Wm. I. Traeger.

In this suit in interpleader the real conflict was between the claims of Edith Wake Danziger and her assignee to the extent of $4,400 in the property, Lina Danziger, on the one hand, and Barney Oldfield, sole appellant and the other judgment creditors of J. M. Danziger, on the other side; the California Bank having deposited the property into court pursuant to an order, and having been thereby relieved of all further liability with reference thereto.

Judgment was in favor of Edith Wake Danziger and Lina Danziger and against the other defendants. The judgment was predicated upon the express finding that the judgment set up by Barney Oldfield in his pleadings, entered on September 28, 1928, in the action of Edith Wake Danziger to quiet title against Barney Oldfield, J. M. Danziger, and Wm. I. Traeger, "adjudicated nothing against the plaintiff therein, Edith Wake Danziger, other than a dismissal of the Case No. 237,-604, and the pretended or purported finding or judgment as to the title or ownership of the property involved in said case was without the issues thereof; that no cross-complaint was filed in said case and no affirmative relief was sought therein and none could be granted under the pleadings of said case, except a dismissal," and the further finding that the judgment set up by Edith Wake Danziger in her pleadings, entered on June 29, 1926, obtained by the Wake Development Company in the suit to quiet title against Vera F. O'Leary, J. M. Danziger, and Wm. I. Traeger, "is res judicata as to the parties involved in said action and their privies, as to the ownership of the property involved in said suit and the other issues determined therein." The court further found that, subsequent to the date of the entry of this judgment of June 29, 1926, Edith Wake Danziger acquired "by a good and valid assignment" all the interest of the Wake Development Company in said property. The judgment which was entered herein, in effect, gave to Edith Wake Danziger all of the property involved in this suit of interpleader, with the exception of an interest to the extent of $4,400 previously assigned by her to Lina Danziger, and decreed that the writs of execution and writs of attachment levied against said property by Oldfield and the other judgment creditors of J. M. Danziger, named as defendants, be discharged. From this judgment an appeal is taken by Barney Oldfield on the judgment roll alone.

Summarized, the situation is this: In a suit in interpleader, each of the opposing parties sets up as res judicata diametrically opposite judgments secured in former suits to quiet title to the property in controversy, or the property from which it is derived, each of which former suits involved the same parties, or their predecessors in interest.

[1, 2] Contrary to the findings of the trial court, we are of the opinion that the judgment in the suit instituted by Edith Wake Danziger against J. M. Danziger, Barney Oldfield, and Wm. I. Traeger, which resulted in a judgment in favor of the defendants, relied upon by appellant as res judicata in the instant suit, is controlling, and compels the determination in this suit in interpleader in favor of appellant, Oldfield. The finding of the trial court that the judgment set up as res judicata by appellant, Oldfield, "adjudicated nothing against the plaintiff therein, Edith Wake Danziger, other than a dismissal," is clearly erroneous. The effect of such finding would be to hold that judgment a nullity and restore the plaintiff to the same advantageous position she occupied prior to the institution of the suit to quiet title, despite the fact that the issue of her ownership of the property in controversy had been presented and tried in said action, and despite the fact that by the dismissal of the appeal therefrom there remained a valid and binding judgment that "Edith Wake Danziger is not and never was the owner of that certain note and mortgage," the property in controversy. In the recent decision of Warden v. Stoll, 210 Cal. 374, 376, 291 P. 835, 837, in which case a cross-complaint which had been filed was voluntarily dismissed by the defendants, and no affirmative relief was sought, the court held that, regardless of whether or not affirmative relief was sought by defendants, a simple judgment in favor of defendants in a quiet title action "operates as an estoppel upon the plaintiff and *determines title as between the parties* and protects the defendant against any claim of the plaintiff as fully as would an affirmative decree in his favor." (Italics ours.) It being immaterial whether or not a cross-complaint was filed or affirmative relief sought, the effect of said judgment as an estoppel upon the plaintiff and as determinative of the title as between the parties arising solely from the issues presented by the plaintiff, it is not necessary that the pleadings should be presented to this court for an examination, and we are not bound by the findings of the trial court that the judgment was without the issues thereof, by virtue of the fact that the appeal is taken on the judgment roll alone without a bill of exceptions.

[3] Moreover, the effect of said judgment operating as an estoppel of any claim of Edith Wake Danziger to the property involved in that suit as against any of the defendants therein named, and determining the title to said property as between herself and said defendants, forecloses Edith Wake Danziger from effectively setting up as res judicata the prior judgment secured by the Wake Development Company in the suit to quiet ti-

tle instituted by it against defendants Danziger, O'Leary, and Traeger. The judgment relied upon by appellant is the last judgment in point of time and controls and determines the rights of the parties herein. Tyrrell v. Baldwin, 67 Cal. 1, 6 P. 867; Semple v. Ware, 42 Cal. 619; Horse Creek Coal Land Co. v. Alderson (C. C. A.) 266 F. 477. "Rights acquired by virtue of a judgment or decree are liable to be terminated in the same manner. Consequently though a matter has once been litigated to a final judgment if it is subsequently relitigated and adjudicated, tne last judgment controls and determines the rights of the parties." Freeman on Judgments (5th Ed.) vol. 2, § 629, p. 1326. "The rule in such cases is, that the last judgment concludes." 15 Cal. Jur., § 171, pp. 104, 105.

The judgment in favor of the defendants in the case of Edith Wake Danziger v. J. M. Danziger, Barney Oldfield, and Wm. I. Traeger (case No. 237,604) is determinative in this action of the title and ownership of the property in controversy as between the parties thereto.

Judgment is reversed.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.

BRIGGS et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.*

L. A. 13150.

Supreme Court of California.

March 31, 1932.

Rehearing Denied April 29, 1932.

1. Prohibition 🔑10(1).

Prohibition lies to control ruling on judge's disqualification, where facts are without substantial conflict and disqualification is question of law (Code Civ. Proc. § 170, as amended).

2. Judges 🔑51(4).

In determining whether judge is disqualified, opinion of challenged judge as to his state of mind must be disregarded (Code Civ. Proc. § 170, as amended).

The word "probable" used in the amended statute, Code Civ. Proc. § 170, as amended, which provides that judge is disqualified when it is made to appear probable that by reason of his bias or prejudice fair and impartial trial cannot be had, is defined as having the appearance of truth; appearing to be founded in reason; supported by evidence which inclines the mind to believe, but leaves some room for doubt.

[Ed. Note.—For other definitions of "Probable," see Words and Phrases.]

3. Judges 🔑49(2).
Prohibition 🔑10(1).

Where trial judge in contempt proceeding stated under oath that statements alleged to constitute grounds for disqualification were absolutely, unqualifiedly, and wholly false, *held* that judge was disqualified as matter of law, and ruling on qualification was reviewable by prohibition (Code Civ. Proc. § 170, as amended).

Prohibition was proper remedy on ground that probability of bias and prejudice of judge appeared as matter of law, since words "false" and "falsehood" generally refer to false statements made with knowledge of falsity, and since the judge's statement read as a whole resulted in conclusion that judge meant to and did in fact charge persons accused of contempt with having knowingly made false statements in their affidavits, and would therefore probably be biased in passing on credibility of affiants.

[Ed. Note.—For other definitions of "False; Falsely" and "Falsehood," see Words and Phrases.]

4. Judges 🔑39.

Qualifications of judge acting as trier of facts should be same as juror's qualifications.

5. Prohibition 🔑10(1).

Prohibition to restrain proceedings by disqualified judge should be limited to judge whose disqualifications are passed on (Code Civ. Proc. § 170, as amended).

In Bank.

Proceedings by H. B. R. Briggs and others for writ of prohibition to be directed to the Superior Court of Los Angeles County and Hon. Frank C. Collier and Hon. J. T. B. Warne, Judges thereof, to restrain the court from hearing and trying certain contempt proceedings.

Writ, as limited, granted.

McAdoo, Neblett & Clagett and S. S. Hahn, all of Los Angeles, for petitioners.

Chandler, Wright & Ward and Chandler P. Ward, all of Los Angeles, for respondents.

PER CURIAM.

Petitioners seek by prohibition to restrain the Superior Court, in and for the county of Los Angeles, and Frank C. Collier and J. T. B. Warne, judges thereof, from hearing, and trying a certain contempt proceeding now awaiting trial in that court, and in which

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 10 P.2d 1003.

proceeding petitioners herein are named as defendants. Petitioners contend that Judge Collier is disqualified from hearing the contempt case on the ground that it is "probable that, by reason of bias or prejudice of such * * * judge * * * a fair and impartial trial cannot be had before him." Subdivision 5, § 170, Code Civ. Proc.

The controversy thus presented is of long standing. On May 17, 1930, petitioners were charged with having committed constructive contempts arising out of certain publications appearing in the Los Angeles Record, of which the petitioners are the publishers and editors. Upon the filing of the complaint, the Superior Court in and for Los Angeles county caused to be issued an order to show cause directed to petitioners, and which order was made returnable before Judge Collier. Before the return date, petitioners filed a statement objecting to the hearing and trial of the contempt case before Judge Collier on the grounds that he was interested in the action, that he was biased and prejudiced, and that he had given advice to the Los Angeles Bar Association, at whose request the contempt proceedings had been instituted. The grounds of the alleged disqualification were set forth in full. This statement was filed by petitioners on the theory that the provisions of section 170 of the Code of Civil Procedure applied to constructive contempt proceedings. Judge Collier ruled that this section did not apply to constructive contempt proceedings. Petitioners applied to this court for a writ of prohibition to have that question determined. This court held in the case of Briggs v. Superior Court, 211 Cal. 619, 297 P. 3, that the provisions of section 170 of the Code of Civil Procedure applied to constructive contempt proceedings, and that, when the trial judge's disqualifications are attacked in such a case, another and impartial judge must pass on that question, as provided by the amendments of 1927 to that section. In accordance with that opinion, the chairman of the judicial council appointed Judge Warne to hear and determine the question as to the qualifications of Judge Collier. Judge Warne ruled that Judge Collier was not disqualified, for reasons that are set forth in a written opinion which is set forth in full in the present petition. The decision of Judge Warne resulted in the present petition for prohibition, which is based on the theory that Judge Collier is disqualified as a matter of law from presiding at the trial of the contempt case.

The original statement objecting to Judge Collier alleges that the proceeding in contempt was instituted at the request of the Los Angeles Bar Association; that Judge Collier is an active member thereof; that Judge Collier was then a candidate for reelection as judge of the Superior Court; that his name, together with that of the other candidates, was to be submitted to the members of the association in a plebiscite; that the Bar Association was to assist financially in the campaign of those who won the plebiscite; that Judge Collier had expressed an opinion as to the merits of the case to the members of the association; that he had written a letter to the association showing his partiality. In reference to the letter alleged to have been written by Judge Collier, Judge Warne ruled, and his ruling was undoubtedly correct, that the interpretation sought to be placed thereon by petitioners was not well founded. Petitioners recognize that the grounds for disqualification alleged in the original statement are now, for the most part, moot, for the reason that the election mentioned by petitioners has long since been held, but allege, by a supplemental statement, that facts occurring subsequently to the filing of the original statement conclusively show, as a matter of law, that it appears "probable" that Judge Collier is biased and prejudiced so that a fair and impartial trial cannot be held before him. It is alleged that, when the contempt matter first came before Judge Collier for hearing on June 2, 1930, and at the time that he ruled section 170 of the Code of Civil Procedure had no application to constructive contempt proceedings, the following took place:

Judge Collier ascended the bench, visibly agitated (which agitation petitioners allege was caused by anger towards them), and had himself sworn as a witness. Then, in an oral statement combining testimony, arguments, and rulings, he concluded that he was not disqualified. He took up each statement alleged by petitioners to constitute a ground for disqualification and denied its truth. During the course of his oral statement, Judge Collier stated:

"Mr. Briggs, will you please arise so that I may see you. I want to look you squarely in the eye when I say certain things that I am going to say this morning. Taking up the first statement objecting to the hearing at the trial of this matter * * * that is an unqualifiedly false statement." He then told Mr. Briggs that another charge of disqualification is "likewise an unqualifiedly false statement"; that the charge that he had given advice to the Los Angeles Bar Association is "absolutely and unqualifiedly and wholly false—not one word of truth in it. And the falsity of that statement could have easily been ascertained upon inquiry of me or of any member of the Los Angeles Bar Association"; that another charge was "absolutely and unqualifiedly false * * * there is no truth in the statement whatsoever"; that another charge "is false in every respect." Referring again to the charge that he had advised the Los Angeles Bar Association, he stated "that statement is a falsehood—every word of it; every word of it

* * * I challenge anyone here to prove that statement. * * * Now any attempt on the part of the drawer of this document or the person who verified it to state that I advised with the Los Angeles Bar Association or any of its Board of Trustees or members with regard to this proceeding is an absolute, unqualified falsehood, and could have been ascertained, if the drawer of this document, or its verifier, had made an investigation of any kind concerning it." It would serve no useful purpose to quote from the rest of the statement. Sufficient has been set forth to show the character of the statement and to indicate the state of mind of the judge at the time it was made.

Petitioners contend that Judge Collier has clearly made it appear that it is "probable that by reason of bias or prejudice * * * a fair and impartial trial cannot be held before him," for the reason that by his statement of June 2, 1930, he has shown that he will start the trial with the settled conviction that petitioners have been capable and guilty of deliberately misstating certain facts in the verified statement filed by them in this proceeding. With this basic premise as the starting point, it is argued that, if Judge Collier be permitted to try the case, at such trial he will be both the trier of the fact and of the law; that, as the trier of fact, it will be necessary for him to pass upon the credibility of the witnesses, the most important of whom will be petitioners; that, in order to determine the qualifications of a judge in such a case, the same test that is applied to a prospective juror should be applied; that a juror would be disqualified if he had the belief that any of the parties to the action had been guilty to his knowledge of having deliberately told a falsehood.

Judge Collier not only admits having made the statements set forth by petitioners, but sets forth these statements verbatim by way of answer to the original statement of petitioners. After the supplemental statement of petitioners had been filed setting forth the statement of June 2, 1930, as an additional ground of disqualification, Judge Collier filed a supplemental answer thereto, in which he admits that, when he ascended the bench on that morning, he "was visibly shaken with emotion, but he denies that his attitude toward the defendants was either of anger or disdain, but on the contrary that this affiant was then moved by a desire of great earnestness and sincerity to deny and refute so far as possible all of the statements contained in the affidavit of bias and prejudice * * *"; he also specifically denies that he took advantage of his position as a judge to denounce the defendants. It is then alleged in various forms that by the use of the words "false," "unqualifiedly false," "absolutely false," etc., he did not intend to imply that the petitioners had knowingly made false statements, but used that form of expression simply as a denial of the allegations in petitioners' statement. On this state of the record Judge Warne ruled that "in the absence of any proof to the contrary (as to the intent with which the words were used) this court is bound to resolve the matter in the Judge's favor," and for that reason held that Judge Collier was not disqualified. It is the correctness of that determination that is challenged in this proceeding.

[1] The first question presented is whether or not prohibition can be used to test the correctness of Judge Warne's decision. Prior to 1927, when the qualifications of a judge were questioned, it was necessary for the challenged judge to pass on the question himself. It was held that under the law, as it then existed, the correctness of that determination could be tested by prohibition, even where the aggrieved party had a remedy by appeal. Hall v. Superior Court, 198 Cal. 373, 245 P. 814; Lindsay-Strathmore Irr. Dist. v. Superior Court, 182 Cal. 315, 187 P. 1056; Quatman v. Superior Court, 64 Cal. App. 203, 221 P. 666. In 1927 section 170 of the Code of Civil Procedure was amended (St. 1927, p. 1403) to provide that, when the qualifications of a judge are challenged, the challenged judge may consent to have the action tried before another judge, or he may file his written answer admitting or denying the charges, and may set forth "any additional fact or facts material or relevant to the question of his disqualification. * * * No judge * * * who shall deny his disqualification, shall hear or pass upon the question of his own disqualification; but in every such case, the question of the judge's disqualification shall be heard and determined by some other judge." No reason has been suggested why these changes in the procedure in determining a judge's qualifications have in any way changed the rule that the validity of that determination may be tested by prohibition. The same reasons why prohibition was permitted under the old law still exist. If a judge is disqualified as a matter of law, every order entered by him is as equally void under the new law as it was under the old, and no reason appears why the parties should be forced to trial before a disqualified judge, only to have the judgment set aside when it later appears that as a matter of law the judge was disqualified. It may be conceded that, when the disqualification of a judge is a question of fact, and the facts are disputed, the determination of the judge assigned to pass on the question is final and conclusive under the well-settled rule that appellate courts are bound by the determination of a lower court, based on conflicting evidence. But, where the facts are without substantial conflict, the question of disqualification is one of law, and prohibition will lie. It would seem to be to the interest of all

concerned that this should be so and that a final determination should be had at the earliest opportunity. Particularly is that so in the present case. If Judge Collier is disqualified as a matter of law, every order entered by him in the proceeding will, of course, be null and void. There is no independent appeal from Judge Warne's order holding Judge Collier to be qualified, and the correctness of that ruling cannot be tested on appeal from the judgment in the contempt proceedings, for the reason that there is no appeal from a judgment in a contempt proceeding. If petitioners are forced to trial before Judge Collier and are convicted, they could, perhaps, secure a review of Judge Warne's ruling by habeas corpus or certiorari, but that relief is certainly not adequate. This court has recently held that the amendments of 1927 to section 170 of the Code of Civil Procedure (St. 1927, p. 1403), in no way changed the rule that the correctness of the trial court's determination that a judge is or is not qualified can be passed upon by prohibition addressed to this court. Central Pacific Railway Co. v. Superior Court, 211 Cal. 706, 296 P. 883. We have no hesitancy in holding, therefore, that, if the question of the disqualification of Judge Collier is a question of law, this court has the power and jurisdiction to determine that question in the present proceeding. We turn, therefore, to a discussion of the question as to whether Judge Collier is disqualified as a matter of law.

The amendments of 1927 to section 170 of the Code of Civil Procedure not only made several important changes in procedure, but also changed the substantive law in reference to disqualifying a judge by reason of bias or prejudice. Before 1927 the section on bias and prejudice provided that a judge was disqualified when it "appears from the affidavit or affidavits on file that either party cannot have a fair and impartial trial before any judge * * * by reason of the prejudice or bias of such judge." Under this section it was necessary to show actual bias or prejudice. In 1927 the wording of the section was changed to read that a judge is disqualified "when it is made to appear probable that, by reason of bias or prejudice of such * * * judge * * * a fair and impartial trial can not be had before him." As amended, the section no longer requires a showing of actual bias or prejudice, but simply requires a showing that it is probable that such prejudice or bias exists. "Probable" is defined in Bouvier's Law Dictionary as "having the appearance of truth; appearing to be founded in reason." Webster's Dictionary and the Century Dictionary define the term as "having more evidence for than against; supported by evidence which inclines the mind to believe but leaves some room for doubt." This definition was approved in Brown v. Beck, 63 Cal. App. 686, 697, 220 P. 14.

[2] From the facts before us does it appear "probable" as a matter of law that Judge Collier is biased or prejudiced against these petitioners? It must be remembered that none of the facts are in dispute. Judge Collier does not deny that he made the statements alleged to have been made by him at the hearing on June 2, 1930, but in fact candidly admits having made said statements. When they are read as a whole, the only reasonable conclusion to be drawn from the words used is that Judge Collier meant to and did in fact charge these petitioners with having knowingly made false statements in their affidavit. This is the usual and ordinary meaning of the word "false" or "falsehood." Hatcher v. Dunn, 102 Iowa, 411, 71 N. W. 343, 36 L. R. A. 689; United States v. Ninety-nine Diamonds (C. C. A.) 139 F. 961, 968, 2 L. R. A. (N. S.) 185; Gilpin v. Merchants' Nat. Bank (C. C. A.) 165 F. 607, 611, 20 L. R. A. (N. S.) 1023. That this was the meaning intended to be conveyed at the time the statement was uttered is made certain by the terms "absolutely," "unqualifiedly," "wholly," used repeatedly in conjunction with the terms "false" and "falsehood," and by the repeated assertion that, if any investigation at all had been made, the falsity could have easily been ascertained. Respondents contend, however, that there is a conflict in the evidence which is binding on this court because Judge Collier in his answering affidavit gave it as his opinion as to his state of mind when he uttered these words that he did not mean by the terms used to charge petitioners with having deliberately made false statements, but simply intended to deny the truth of the allegations in the affidavit of petitioners. As already stated, Judge Warne ruled that this statement of Judge Collier as to his opinion as to what he intended by the use of the terms was binding on him. It is obvious that, if the affidavit of Judge Collier in this respect creates a conflict in the evidence, under the principles already discussed, Judge Warne's ruling is binding and conclusive on this court. But it is our opinion that the statement of Judge Collier as to his opinion regarding his state of mind was not binding on Judge Warne, and in fact did not raise a conflict in the evidence. It is obvious that the Legislature, by providing as it did in 1927 that the question of disqualification should be passed on by an impartial judge, different from the judge challenged, intended to deprive the challenged judge of the power as well as the somewhat delicate necessity of passing upon the question as to his state of mind toward the particular case. If it be held that the statement of the challenged judge as to his opinion as to his state of mind is binding or conclusive or can be con-

sidered as a fact by the judge appointed to determine whether it is probable that the challenged judge is biased or prejudiced, it is obvious that in every case the challenged judge himself will pass upon the question of his own qualifications, contrary to the letter and spirit of section 170 of the Code of Civil Procedure. It is our opinion that the state of mind and the probability of the bias or prejudice of the challenged judge must be determined by what he said or did, and not by what he may think his state of mind to be. Any other rule would avoid the very purpose of the 1927 amendments.

[3, 4] Interpreted in view of these principles, it is obvious that there is no conflict in the evidence. The statements were made, and, reasonably interpreted, they could mean but one thing, namely, that Judge Collier believed that these petitioners had deliberately misstated the truth in their affidavit, and charged them with having done so. Under these circumstances, is it fair to Judge Collier or to petitioners that he should be called upon to preside at the trial of the case? We think it would be fair to neither party. The trial judge in the contempt case will be both the trier of the facts and of the law. As the trier of facts, he will be called upon to pass upon the credibility of these petitioners as the principal witnesses in their own behalf. Is it humanly possible or probable that a judge who has stated under oath that it is his opinion that these petitioners have deliberately falsified can pass upon the credibility of these parties with that impartial judicial mind which should exist in the trial of a case? We think it not probable. We think that, in a case where the trial judge acts as both the trier of the facts and the trier of the law, his qualifications, so far as bias or prejudice are concerned, should be the same as the qualifications of a juror. No one would doubt that, if a juror stated that he was of the opinion that one of the parties to the action was not only capable of being, but had, to his knowledge, been, guilty of making false statements under oath, such juror would and should be disqualified, even if that juror stated that he could give the parties a fair trial. Quill v. Southern Pacific Co., 140 Cal. 268, 73 P. 991.

The District Court of Appeal has recently decided a case closely in point with the instant case. Evans v. Superior Court, 107 Cal. App. 372, 290 P. 662. In that case Judge Tappaan had presided at the trial of a certain action. At the close of the trial, he rendered an oral opinion in which he stated that two of the defendants, naming them, had been guilty, in his opinion, of deliberately falsifying while under oath. Later, another case in which these two individuals were parties defendant was assigned to Judge Tappaan for trial. The two individuals objected to Judge Tappaan on the ground that he had an opinion as to the credibility of these parties gained from the prior case. An impartial judge was appointed to pass upon the question of the qualifications of Judge Tappaan. He ruled that Judge Tappaan was qualified. Defendants sought by prohibition to prevent Judge Tappaan from trying the case. The writ was granted. It was held that prohibition was the proper remedy, and that as a matter of law Judge Tappaan was disqualified because he had admittedly expressed an opinion as to the lack of credibility of the petitioners.

We are in accord with the theory of the above case, and are of the opinion that the principles therein stated are conclusive in the case at bar, and that the petitioners are clearly entitled to the writ.

[5] In directing the issuance of the writ, it is obvious that it should be confined in its application to the particular judge whose disqualifications are herein passed upon.

Let the peremptory writ, as thus limited, issue.

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215 Cal. 268

COMMUNITY LUMBER CO. OF BALDWIN PARK et al. v. CHUTE et al., and four other cases.

L. A. 10156.

Supreme Court of California.
March 29, 1932.

1. Mortgages 🔑151(3).

Contractor's note, secured by owner's first lien trust deed, *held* prior to mechanics' liens to extent of amount remaining after deducting usurious bonuses and additional interest (Usury Law, § 2 [St. 1919, p. lxxxiii]).

2. Mortgages 🔑151(3).

Corporation taking contractor's note for loan and treasury stock, with knowledge that owner's first lien trust deed, assigned as security, was for erection of building, *held* estopped to claim preference of price of stock over mechanics' liens.

3. Licenses 🔑39.

Failure to allow mechanics' lien claimants to show that transfer of corporation stock to contractor as part consideration for latter's note violated corporation commissioner's permit *held* erroneous.

4. Mortgages 🔑151(3).

Mechanics' lien claimants *held* subrogated to contractor's right to proceeds of owner's note, indorsed by contractor without recourse as security for loan.

🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

5. Mortgages 🔑151(3).

Mechanics' lien claimants *held* entitled to payment from proceeds of owner's note to contractor after satisfying legitimate demands of corporation, to which he assigned it, and priority of balance due, if fund proved insufficient after paying owner's vendor.

In Bank.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Consolidated actions by the Community Lumber Company of Baldwin Park and others, George H. Whyte, Jr., the Truscon Steel Company, and C. W. Grizzelle and others, respectively, against W. H. Chute and others, and by the Weaver Roof Company against the West Coast Trimmings Company and others. From the judgments rendered, plaintiffs appeal.

Reversed and remanded.

Superseding opinion, 292 P. 1069, which superseded opinion (Cal. App.) 284 P. 466.

Zach Lamar Cobb, of Los Angeles, James B. Ogg, of Alhambra, and Earl A. Littlejohns, of Los Angeles, for appellants Community Lumber Co. of Baldwin Park, Golden State Portland Cement Co., L. L. Root, Johnson & Peel, and George H. Whyte, Jr.

Mitchell, Silberberg & Davis (by H. C. Mabry), all of Los Angeles, for appellant Weaver Roof Co.

Hulme, Hastings & Bartlett (by W. C. Bartlett), all of Los Angeles, for appellants C. W. Grizzelle, Robert, Edward, and William Preice.

Bush & Bush, of Los Angeles, for respondent C. A. Glore, as administrator of the estate of W. H. and Leotta Chute.

Harry W. Hanson, Musick, Burr & Pinney, Mitchell, Silberberg & Davis, Horace P. Babson, J. H. Van Law, and A. G. MacRobbie, all of Los Angeles, for respondent James A. Keeney.

Clarence E. Fleming and Fredericks & Hanna, all of Los Angeles, and M. W. Conkling, of San Diego, for respondents Title Guarantee & Trust Co. and Western Discount Corporation.

Arthur L. Veitch, of Los Angeles, for respondent Union Engineering Co.

Eli F. Bush, of Los Angeles, for estate of W. H. Chute.

Nathan Newby, Newby & Newby, and Dee Holder, all of Los Angeles, amici curiæ for appellants.

Woodruff, Musick & Hartke, and Laurence B. Martin, all of Los Angeles, amici curiæ for respondents.

Holbrook, Taylor, Tarr & Horton, of Los Angeles, amici curiæ on behalf of Hammond Lumber Co.

PRESTON, J.

Five actions to foreclose mechanics' and materialmen's liens on certain real property in Los Angeles, consolidated for trial and judgment.

The parity, verity, and amount of the claims are not in dispute; neither is the efficacy of the liens securing them. The sole question is one of priority as between the lien claimants and the holders of three sets of promissory notes secured by three deeds of trust upon the property, with the collateral question as to the true amount due, if it be found that the first deed of trust is entitled to priority.

The court below gave the lien claimants a third place, that is, a place between the second and third deeds of trust. Before taking up the discussion of the legal issues involved, we forecast that we shall be led to place plaintiffs, as to a large portion of their claims, between the first and second deeds of trust, and as to the remainder thereof, if any, where the court below placed them; and we shall also find that the amount secured by the first deed of trust should be scaled down below the amount found to be due thereon by the trial court.

The facts are: One Keeney, prior to June 1, 1925, owned the real property in question; same being vacant property. On said day one Chute, desiring to build a one-story masonry factory thereon, took a deed from Keeney. Chute and his wife, to secure the full purchase price of $5,000 for said property, executed a promissory note, secured by a deed of trust, which is deed of trust number two involved in this proceeding. This lien was agreed to be second and subsequent to a deed of trust securing a promissory note for $15,000 which was to be used in the construction of a building on said lot.

Simultaneously with this transaction, Chute entered into a construction agreement with the defendant Union Engineering Company, under which said company was to become the agent of the owner in the construction of said building, and was to handle and spend all sums provided for that purpose. Accordingly, Chute executed promissory notes to said corporation and secured them by deeds of trust upon said property. The first note was for $15,000 and the second set of notes aggregated $17,000. The first note was secured by the deed of trust which was to be and would become a first lien upon the property. The second set of notes was secured by a deed of trust which was to become a third lien on the property. Thus we have set forth the three deeds of trust in question.

The engineering company was to take these notes so issued to it and provide funds therefrom and cause the contemplated building to be erected, which it immediately proceeded with more or less sincerity to do. It procured plaintiffs to supply certain materials and perform certain labor involved in the various claims of lien. However, it did not attempt to cash the $15,000 note secured by the first lien but instead entered into negotiations with the Western Discount Corporation, which acted in part through a go-between one Jones. The result was that on June 25, 1925, a note for $6,500, due in ninety days, interest eight per cent. per annum, was made out to Jones, a nominal payee, and to secure it an assignment of the Chute note and deed of trust was made. These several instruments were transferred to the Western Discount Corporation immediately. On August 4th following, a second note was made out direct to the Western Discount Corporation for the sum of $1,000, due in thirty days, interest eight per cent., and this too was to be secured by the above-enumerated collateral. Both of these transactions were without question loans by the discount corporation to the engineering company, as Jones put up no money and was the employee or agent of one or both of the other parties.

The building was completed September 25th, following which plaintiffs filed the various lien claims here involved, and later these suits were entered. The cause was tried and, as above noted, said claims were established. The court directed the trustee under the several deeds of trust to sell the property and from the fund so arising it directed payments in the following order: (1) The two notes to the discount corporation, but striking therefrom the bonus features, $500 out of the first note and $50 out of the second, making the items $6,000 and $950, respectively, with interest at eight per cent. and also allowing costs to the trustee of $670.30, attorneys' fees $1,200, and to the discount corporation the further sum of $609 for insurance and taxes. (2) The claim of Keeney for $5,000, with interest at eight per cent. from June 12, 1925. (3) The claim of plaintiffs. (4) It gave personal judgment for plaintiffs against the engineering company and the estate of Chute.

[1] The note for $6,500 was made up of cash $4,500, discount $500, and a block of stock of the discount corporation of the par value of $1,500. The note bore interest at the rate of eight per cent. per annum. The second note represented cash $950 and a bonus of $50. These notes were both palpably usurious due to the $500 and $50 bonuses, respectively, and the additional interest. The court disallowed both these items but it did not find that the contract to pay interest was null and void under the express provision of section 2 of the Usury Law. Stats. 1919, p. lxxxiii; Haines v. Commercial Mortgage Co., 200 Cal. 609, 254 P. 956, 255 P. 805, 53 A. L. R. 725. The items should stand, therefore, merely as $4,500 and $950, respectively, without interest at any rate for any period. The stock item of $1,500 represents a sale of its treasury stock by the discount corporation to the engineering company.

[2, 3] The evidence shows that the discount corporation knew of the terms and conditions of the first deed of trust; that it was for the erection of a building; and that it was negotiated for that purpose. It knew also that the engineering corporation had not paid a cent for it and should have known, if it in fact did not know, that the engineering company had no right to purchase stock with this item of security. We think the discount corporation should be estopped to claim the amount of this sale of its stock as a preference over plaintiffs' claims. Hence the only two amounts in these two items that are ahead of the claims of plaintiffs are $4,500 and $950, except the items of costs and attorneys' fees, and also taxes. These latter items we think should be re-examined upon a new trial of the action. The failure of the court below to allow plaintiffs to show that said transfer of stock was in violation of the terms of the permit from the corporation commissioner was also error.

[4, 5] This brings us to the Keeney claim of $5,000. Keeney, in his deed of trust, consented that his claim be subordinated to the claim of the first lien. The court found likewise that such was the fact. Indeed, he admitted when testifying that he knew the first lien note should be used in erecting the building in question here. The engineering company should have acted diligently and secured the proceeds of said first lien note and should have used them to pay the claims of plaintiffs. Instead it indorsed the note without recourse, bought stock in the discount corporation, and otherwise failed in the execution of the trust it assumed from the owner, Chute. We know of no rule of equity that will prevent plaintiffs from being subrogated to every right the engineering company has to reduce to cash this first lien note. Equity will intervene to protect these claimants to the extent of securing to them what the engineering company should have paid them from the security. Smith v. Anglo-Calif. Tr. Co., 205 Cal. 496, 271 P. 898; W. P. Fuller & Co. v. McClure, 48 Cal. App. 185, 191 P. 1027. We therefore hold that any sums remaining out of said note after satisfying the legitimate demands of the discount corporation, as above outlined, shall be used ratably for the discharge of plaintiffs' demands. If this fund be insufficient, as doubtless it will be, the balance due shall be next in priority after the payment of the demand of said Keeney.

The judgment is reversed, and the cause is remanded for further proceedings not inconsistent with these views.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

215 Cal. 274

COMMUNITY LUMBER CO. OF BALDWIN PARK et al. v. CALIFORNIA PUB. CO. et al. (CALIFORNIA GUARANTY CORPORATION, Intervener).

L. A. 11166.

Supreme Court of California.

March 29, 1932.

1. Mortgages ⚷151(3).

Mechanics' liens *held* prior to advancements made to contractor by corporation, purchasing owner's note secured by first lien trust deed from contractor, with actual notice of liens.

2. Mortgages ⚷151(3).

Mechanics' liens *held* prior to trust deed held by vendor only to extent of unapplied portion of proceeds of first trust deed securing purchaser's note to contractor.

In Bank.

Appeal from Superior Court, Los Angeles County; George W. McDill, Judge.

Action by the Community Lumber Company of Baldwin Park and others against the California Publishing Company, James A. Keeney, the Title Guarantee & Trust Company, and others, in which the California Guaranty Corporation intervened. From a judgment establishing priorities between plaintiffs' mechanics' liens and two trust deeds, the intervener and defendants Keeney and trust company appeal.

Modified, and affirmed as modified.

Superseding opinion (Cal. App.) 5 P.(2d) 909.

Horace P. Babson, J. H. Van Law, A. G. MacRobbie, Harry W. Hanson, McGee, Robnett & Mather, and D. B. Robnett, all of Los Angeles, for appellants California Guaranty Corporation, James A. Keeney, and Title Guaranty & Trust Co.

James B. Ogg, of Alhambra, and Zach Lamar Cobb and Earl A. Littlejohns, both of Los Angeles, for respondents.

PRESTON, J.

The question presented by this appeal is one as to the priority between certain mechanics' liens and two certain deeds of trust, the first made to secure building funds for the erection of a building, and the second made to pay the purchase price of the lot upon which the building was to be erected.

Prior to June 1, 1925, defendant California Publishing Company desired to purchase a certain building lot owned by defendant Keeney. On May 29, 1925, a building contract was executed by said purchaser and the Union Engineering Company, which provided that the owner agreed to execute forthwith and deliver to the superintendent promissory notes in his favor aggregating $22,500, $10,000 thereof to mature on or before January 1, 1926, to be secured by a deed of trust, "which shall be and constitute a first lien on the property above described, together with the improvements thereon," and the remaining $12,500 to be covered by notes in denominations as requested by said superintendent, $6,000 thereof to mature August 1, 1925, and $6,500 September 1, 1925, the entire $12,500 in notes to be secured by deed of trust "which shall be a third lien on the above mentioned property and improvements subject only to the trust deed first above mentioned and to a trust deed which shall be a second lien on said property in an amount not to exceed $6,250." The notes all carried 8 per cent. per annum interest.

Said contract further provided that the superintendent accept said notes so secured as agent of the owner and use them for the payment of all material and labor necessary to erect and construct to completion said building; that the superintendent have full authority to pay subcontractors and materialmen, etc., by said trust deed notes by assignments thereof without recourse, and also to sell such portion of the notes as he might deem necessary to obtain cash needed in erection of the building. The contract further provided that the superintendent should construct the building and pay the costs as aforesaid, and the superintendent thereby guaranteed that no other cost or expense should attach to the owner because of said construction; that in the event that the cost of the building could not be defrayed by the superintendent as such agent of the owner, from said notes and proceeds thereof, the superintendent should bear and pay any such additional cost.

Thereafter the purchaser executed a $6,250 note, and deed of trust securing it, in favor of said James A. Keeney and also a $10,000 note, and deed of trust securing it, payable January 1, 1926, in favor of Union Engineering Company. Both deeds of trust named Title Guarantee & Trust Company, as trustee and, by agreement, on June 4, 1925, the latter deed of trust was recorded first and the former recorded immediately thereafter. Work on

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

the building started June 5, 1925. The Union Engineering Company, prior to July 1, 1925, bargained to sell the $10,000 note to the intervener for $9,500, which sale was consummated as of that date, and $1,450 of the proceeds thereof was used in payment of claims of mechanics and materialmen. The Engineering Company appropriated the balance to its own use. Default being made in payments on the Keeney note, he duly caused a sale to be had and bought in the property. The claims of plaintiffs were not paid and they thereupon instituted this action to foreclose their liens, naming as defendants said Keeney, said trustee, and others. Defendants answered, and said holder of the $10,000 note intervened, pleading the note and trust deed, and praying that its lien be adjudged a first lien on the premises. The court found, except as to the item of $1,450 on which priority was accorded the intervener, that the claims of plaintiffs had priority. The intervener, Keeney, and other defendants appealed.

[1] The defendant Engineering Company was the agent and trustee of the owner of the lot for the benefit of the plaintiffs as laborers and materialmen. Of this fact the court found the intervener to be in possession of actual notice. This finding is amply supported by the evidence. But ordinarily such fact would not impair the purchase, in due course, of the note by the intervener for it would not necessarily know of the intent of the Engineering Company to misappropriate the proceeds thereof. However, prior to the time of its purchase, plaintiffs' liens had attached. Having actual notice of this fact, unless the intervener was previously bound to complete the purchase, it would seem to follow that priority must be accorded the claims of plaintiffs over the advancements made by the intervener subsequent to such actual notice. Certainly this is true as to all sums that did not actually go to satisfy the labor and materialmen's claims.

The case before us is one where the intervener agreed to purchase the note and security as of July 1st, with knowledge that on June 5th work had begun upon the building. Under its offer to purchase it was not required to advance any payment until the roof was on and all bills paid and only $6,500 of the purchase price was to be then advanced, the remainder not being required until the building was completed and all bills paid. With actual knowledge of the terms of the agency and having purchased after accrual of the liens and not being bound to purchase except upon condition the liens were satisfied, we see no reason to withhold application of the doctrine announced in Fuller v. McClure, 48 Cal. App. 185, 191, 191 P. 1027, 1030.

There the question arose between a mortgage to secure future advances and a mechanic's lien. The advances not being compulsory, such of them as were made after the inception of the lien were held to be subject thereto. The court said: "Where a mortgagee has obligated himself to make advances, such advances tack, and the mortgage, when recorded, is a valid lien for all the advances actually made, although they may have been made after notice of a subsequent mortgage or incumbrance of the property. Where, however, the mortgagee is not obligated to pay the full amount of the sum named or to make all the advances mentioned in the mortgage, but it is optional with him to do so or not, and he makes advances or payments after having notice that a lien has attached in favor of a third party, his lien for payments or advances made after such notice will be postponed to that of the junior incumbrance, and each of such advances will be deemed the equivalent of a new mortgage. In such cases the mortgage lien attaches as and when the optional advancements are made." This rule is supported by the following cases: Tapia v. Demartini, 77 Cal. 383, 19 P. 641, 11 Am. St. Rep. 288; Savings, etc., v. Burnett, 106 Cal. 514, 39 P. 922; 41 C. J. 527, § 468. This doctrine is recognized and the rule again stated in Fickling v. Jackman, 203 Cal. 657, 662, 265 P. 810.

The fact that those cases applied to a mortgage and this applies to a conditional purchase contract does not seem to us to authorize a distinction. Here the first payment was not required until the existing liens were satisfied. If, after making the first payment, the subsequent liens were not satisfied so as to authorize the second payment, this payment would not have been compulsory, but the intervener could have rescinded the transaction and had a debt against the seller secured by lien upon the property for the amounts thus far advanced.

[2] However, under the doctrine of Community Lumber Co. v. Chute (Cal. Sup.) 10 P.(2d) 57, this day decided, the liens of plaintiffs are prior to the second deed of trust held by the seller only to the extent of the unapplied portion of the proceeds of the first deed of trust. This fact necessitates a modification of paragraph "2nd" of the judgment herein to read as follows:

"2nd: If any sum thereafter remains in the hands of said Sheriff of Los Angeles County, pay to the following named plaintiffs the sums hereinafter named in subdivisions (a), (b), (c) and (d) hereof, as follows:

"(a) To Community Lumber Company of Baldwin Park, a corporation, the sum of $1387.95, together with interest thereon at the rate of 7% per annum from September 1st, 1925, and the further sum of $1.90;

"(b) To Golden State Portland Cement Company, a corporation, the sum of $3099.59, together with interest thereon at the rate of

7% per annum from August 15th, 1925, together with the further sum of $1.70;

"(c) To L. L. Root, the sum of $635.00, together with interest thereon at the rate of 7% per annum from September 15th, 1925, together with the further sum of $1.70;

"(d) To R. E. Johnson and A. L. Peel, copartners, doing business under the firm name of Johnson & Peel, the sum of $375.00, together with interest thereon at the rate of 7% per annum from September 15th, 1925, and the further sum of $1.70.

"Provided, however, that the claimants under this paragraph and under the first paragraph hereof shall not in the aggregate receive more than the sum of $10,000 and interest thereon from June 1st, 1925, at 8% per annum, and should the fund be insufficient to pay the amounts named in subdivisions (a), (b), (c) and (d) hereof in full, then to each claimant is to be paid his pro rata share thereof."

As so modified, said judgment is affirmed, with costs to respondents.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

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215 Cal. 293

BOYCE v. SAN DIEGO HIGH SCHOOL DIST. OF SAN DIEGO COUNTY et al.

L. A. 13189.

Supreme Court of California.
March 30, 1932.

1. Schools and school districts ⟹89.

Pit unprotected by guard rail in dark air corridor, necessarily entered for purpose of inspecting school heating system, *held* "dangerous or defective condition" within statute making school district liable for dangerous or defective condition of buildings known to authorities (St. 1923, p. 675).

[Ed. Note.—For other definitions of "Dangerous Condition," see Words and Phrases.]

2. Schools and school districts ⟹121.

In action for injuries sustained by falling into pit while inspecting school heating system, evidence *held* to show actual knowledge of dangerous condition by persons authorized to install guard rail (St. 1923, p. 675).

3. Schools and school districts ⟹89.

School district may be liable for dangerous condition in building without actual notice thereof by authorities; long-continued neglect being sufficient constructive notice to fix liability (St. 1923, p. 675).

In Bank.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by William M. Boyce against the San Diego High School District of the County of San Diego and others. From a judgment for plaintiff, defendants appeal

Affirmed.

Superseding opinion of District Court of Appeal in 1 P.(2d) 1037.

Stearns, Luce & Forward, of San Diego, for appellants.

Arthur F. H. Wright, C. V. Winnek, and E. V. Winnek, all of San Diego, for respondent.

LANGDON, J.

This is an action for damages for personal injuries, brought by plaintiff and respondent against defendant San Diego high school district and the members of its board of education. Plaintiff was a member of a partnership in the business of installing electrical appliances. Harry Bertolucci was the electrical superintendent for defendant district. The Russ auditorium was erected by the district in 1925 for school activities. Some three years after its construction, the heating and ventilating system got out of order, and on October 22, 1928, Bertolucci requested plaintiff to look over the motor. On that day plaintiff, Bertolucci and Herbert Cordes, the manager of an electrical equipment concern, went to the auditorium to make an inspection. They found that the heating apparatus was in good condition, and decided to examine the air ducts. The main air corridor extended nearly across the building. In its center was a concrete lined pit, over eight feet long, five and one-half feet deep, and as wide as the corridor itself. There were two electric lights in the corridor, a considerable distance from the pit. Bertolucci led the other two men to the corridor, opened the door leading to it, and, going upstairs, turned on the electrical switch to light the corridor. Only the northerly light, some forty feet from the door, went on. Plaintiff walked forward into the corridor about eight feet and fell into the pit, sustaining the injuries for which this action was brought. Upon discovering the accident, Bertolucci turned another switch and the southerly light went on, illuminating the pit. Apparently the failure of the southerly light was due to the act of some one who had manipulated the switches.

The case was tried before a jury, and a verdict for $5,000 was returned. The court reduced it to $3,500 and denied a motion for a new trial. Defendants brought this appeal.

The liability sought to be imposed is based upon the statute (St. 1923, p. 675) which makes school districts and certain other public bodies liable for injuries resulting from the dangerous or defective condition of buildings, where the district or other officer or person having authority to remedy such condition had knowledge or notice of it, and failed or neglected for a reasonable time thereafter to take action to protect the public.

[1] Certain of the elements necessary to fix liability are clearly present. Plaintiff was an invitee, present at the request of a responsible agent of defendant district, on business of interest to both parties. See Dobbie v. Pacific Gas & Electric Co., 95 Cal. App. 781, 273 P. 630; Bush v. Weed Lumber Co., 63 Cal. App. 426, 218 P. 618; Madigan v. O. A. Hale & Co., 90 Cal. App. 151, 265 P. 574. The pit, lacking a guard rail, was in the nature of a trap for any one who entered the corridor. It was obviously necessary to enter the corridor upon occasion, for just such purposes as caused plaintiff to do so on the day of the accident; and, in contemplation of such necessity, there were doors leading to the corridor, and iron ladders leading into the pit. It is doubtless true that, had both lights been working at the time, the danger would have been visible and the accident would have been avoided. But this does not alter the fact that the pit was an unguarded trap. The light itself was not, under the circumstances, a sufficient safety appliance.

[2, 3] The important question is whether the defendants had knowledge or notice of the defect. The evidence shows that there had been an accident of the same type about two years previously, and that this accident was known to persons having authority to remedy the condition. John E. Thombs, the custodian of the school buildings and grounds, testified that he heard of the accident, and that he reported it to the principal of the school and also notified the superintendent of construction to put a rail around the pit. Thombs testified also that Connell, the superintendent of construction, had full charge of repair work. Bertolucci also said that he heard of the accident, and Claude Woolman, a member of the school board, testified that Bertolucci, as chief electrician, had the power to remedy any defective condition in the electrical system. In this state of the record, the verdict and judgment below must be upheld. It is apparent that there was actual knowledge on the part of persons having authority to install safety appliances. It may also be observed that actual knowledge is not necessary, long-continued neglect being such constructive notice as to fix liability on the district. Dawson v. Tulare Union High School, 98 Cal. App. 138, 276 P. 424.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; SEAWELL, J.; SHENK, J.

215 Cal. 362

LORANGER v. NADEAU.

S. F. 14401.

Supreme Court of California.
April 1, 1932.

As Amended April 23, 1932.

1. Pleading 🔑6.

Facts judicially known need not be pleaded (Code Civ. Proc. § 1875, subd. 3, as amended by St. 1927, p. 110).

2. Statutes 🔑281.

In action for injuries in Oklahoma accident, plaintiff *held* not required, as against general demurrer, to plead Oklahoma law (Code Civ. Proc. § 1875, subd. 3, as amended by St. 1927, p. 110).

> It being alleged that injury occurred in Oklahoma, such allegation will be regarded as laying before court whatever authority there may exist in law for plaintiff's cause of action, to same extent as if such authority were especially alleged, and since, by virtue of Code Civ. Proc. § 1875, subd. 3, as amended by St. 1927, p. 110, court takes judicial notice of laws of several states and interpretation thereof by highest court of appellate jurisdiction of such state, deficiencies in complaint could be supplied as against general demurrer.

3. Torts 🔑2.

Liability in tort action is governed by law of jurisdiction where tort was committed.

4. Courts 🔑7.

Tort action may be maintained in any jurisdiction where defendant is found.

5. Courts 🔑8.

Court having jurisdiction of necessary parties, and able to do substantial justice between them in accordance with own forms of procedure, will enforce foreign law, unless contrary to public policy of forum or to abstract justice or pure morals, or injurious to welfare of people of state of forum.

6. Automobiles 🔑181(1).

Oklahoma law permits recovery by automobile guest against host, based on ordinary negligence.

7. Courts 🔑8.

Liability of automobile host to guest, arising under law of sister state authorizing recovery for mere negligence of host, *held* enforceable in California, although California statute exempted host from liability except for gross negligence (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

> Trial court, having jurisdiction of parties who were both residents of California,

properly assumed jurisdiction of subject-matter of action, though no gross negligence was alleged, since law of sister state, where accident occurred, governed, such law not violating any fundamental principle of justice or public policy of California.

8. Jury 🔑26.

Before 1931 amendment, payment of jury fees immediately preceding trial *held* timely under statute requiring fees to be paid "within ten days prior to date set for trial" (Code Civ. Proc. § 631, subd. 5, as amended by St. 1929, p. 851, § 1; St. 1931, p. 1712).

Any ambiguity in Code Civ. Proc. § 631, subd. 5, which, as amended by St. 1929, p. 851, § 1, and before 1931 amendment, provided that trial by jury may be waived by failure to deposit one day's jury fees with clerk "within ten days prior to the date set for trial," should be resolved in favor of according to a litigant a jury trial, and, when ambiguity was thus resolved, no prior payment was necessary.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Guy D. Loranger, an infant, by Annette Lambert, his guardian ad litem, against Hubert J. Nadeau. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

Superseding opinion of the District Court of Appeal which is reported in 1 P.(2d) 1049.

B. P. Gibbs, of Los Angeles, and Barry J. Colding, Theodore Hale, and Carroll B. Crawford, all of San Francisco, for appellant.

Vincent W. Hallinan, Dan Malloy, and James J. Roach, all of San Francisco, for respondent.

SHENK, J.

This is an appeal by the defendant from a judgment on a verdict for $4,000 in an action for damages in an automobile accident case.

The defendant, with his mother and sister, all residents of San Francisco, made a trip to Montreal by automobile in 1929. When they started on their homeward journey, the plaintiff, a second cousin of the defendant, joined the party as a guest. The defendant's sister stopped at Lincoln, Neb., and the remaining three proceeded on their way toward San Francisco, their destination. While traveling on a paved highway in the vicinity of Oklahoma City at about 4 o'clock in the afternoon of November 15, 1929, an accident occurred in which the automobile operated by the defendant collided with an automobile coming from the opposite direction. An automobile about 100 feet ahead of the defendant's car slowed up, and, in order to avoid hitting it the defendant, turned upon the left-hand side of the highway and met the other car head on. In the accident the plaintiff received numerous injuries, one of which was a fractured right ankle, the latter crippling him for life.

In support of the appeal it is first contended that the complaint does not state a cause of action and the court had no jurisdiction of the subject-matter of the action for the reason that there was no allegation of gross negligence on the part of the defendant as required by section 141¾ of the California Vehicle Act (as added by St. 1929, p. 1580), as the same was in effect in November, 1929, when the alleged tort was committed. It is here noted that the section was amended in 1931 by striking out the words "gross negligence." Stats. 1931, p. 1693. But in view of our conclusions on the merits of the appeal, and under the authorities to be cited, it was unnecessary for the plaintiff either to allege or prove gross negligence.

[1, 2] Again, it is contended that the complaint fails to state a cause of action in that it does not specifically plead the law of Oklahoma where the cause of action arose. Prior to 1927 whenever a foreign law was relied upon, it was necessary to plead and prove the same as any other fact of which the courts of this state did not take judicial notice. Peck v. Noee, 154 Cal. 351, 97 P. 865; 5 Cal. Jur., pp. 427, 428. Or, in the absence of such pleading and proof, the law of the foreign jurisdiction was presumed to be the same as the law of this state. Peck v. Noee, supra; O'Sullivan v. Griffith, 153 Cal. 502, 95 P. 873, 96 P. 323. By the amendment of subdivision 3 of section 1875 of the Code of Civil Procedure in 1927 (St. 1927, p. 110), the courts of this state now take judicial notice of the laws of a sister state. The amended section, as formerly, provides that the courts of this state take judicial notice of the matters therein enumerated as facts. If the science of pleading be strictly pursued, it would seem to follow that, since the foreign law now comes in the case by judicial knowledge as a fact, it would still be necessary to plead it, and the judicial knowledge would merely dispense with the proof. See Ryan v. North Alaska Salmon Co., 153 Cal. 438, 95 P. 862; Colm v. Francis, 30 Cal. App. 742, 752, 159 P. 237. But when judicial knowledge is supplied, a more liberal rule with reference to pleading has so often been indulged that it must be deemed settled that facts judicially known need not be pleaded. In Altoona Q. M. Co. v. Integral Q. M. Co., 114 Cal. 100, 45 P. 1047, 1048, it was said: "It is not necessary either to aver or prove facts which are within the judicial knowledge of the court." In French v. Senate, 146 Cal. 604, 80 P. 1031, 1033, 69 L. R. A. 556, 2 Ann.

Cas. 756, it was said: "Only those facts are admitted by a demurrer which it is necessary to allege in the pleading. It is not necessary to allege facts of which the court will take judicial notice. Such facts will be considered by the court although not pleaded." In Chavez v. Times-Mirror Co., 185 Cal. 20, at page 23, 195 P. 666, 668, it was said: "There is apparently no dissent from the proposition that in the consideration of a pleading the courts must read the same as if it contained a statement of all matters of which they are required to take judicial notice, even when the pleading contains an express allegation to the contrary." See, also, cases cited in 10 Cal. Jur. p. 698. Even though the foregoing rule go unnoticed, it may fairly be said that the present pleading is sufficient. It is alleged that the injury occurred in Oklahoma. This allegation will "be regarded as laying before us whatever of authority there may exist in the law" for the plaintiff's cause of action "to the same extent as if such authority were expressly alleged." Mullan v. State, 114 Cal. 578, 46 P. 670, 34 L. R. A. 262. In other words, "with the aid of certain facts, of which the courts may take judicial notice," the deficiencies in the complaint can be supplied as against a general demurrer. De Baker v. Railway Co., 106 Cal. 257, 39 P. 610, 46 Am. St. Rep. 237; see, also, Cole v. Segraves, 88 Cal. 104, 25 P. 1109; Faekler v. Wright, 86 Cal. 210, 24 P. 996; People v. Oakland Water Front Co., 118 Cal. 234, 50 P. 305.

[3-5] It is the settled law in the United States that an action in tort is governed by the law of the jurisdiction where the tort was committed, and, as it is a transitory action, it may be maintained in any jurisdiction where the defendant may be found. It is the general rule in tort actions that the court will, if it has jurisdiction of the necessary parties and can do substantial justice between them in accordance with its own forms of procedure, enforce the foreign law if it is not contrary to the public policy of the forum, to abstract justice, or pure morals, or injurious to the welfare of the people of the state of the forum. 12 Cor. Jur., p. 453. In Loucks v. Standard Oil Co. of New York, 224 N. Y. 99, 120 N. E. 198, 202, it was said: "The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors, unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal." In Reynolds v. Day, 79 Wash. 499, 140 P. 681, 683, L. R. A. 1916A, 432, it was said: "Under the rule of comity, rights which have accrued by the law of another state or nation are treated as valid everywhere. When the action is transitory and the jurisdiction of the parties can be obtained by service of process, the foreign law, if not contrary to the public policy of the state where the action is brought, nor contrary to abstract justice or pure morals nor calculated to injure the state or its citizens, will be recognized and enforced. This rule applies alike to actions ex contractu and actions ex delicto. In all such cases, the right to recover is governed by the lex loci and not by the lex fori."

[6, 7] The state of Oklahoma follows the common-law rule and permits a recovery on the part of a guest based on the ordinary negligence of the operator of the car. Prior to the enactment of section 141¾ of the California Vehicle Act in 1929 the law of this state was the same. Did the requirement of proof of gross negligence foreclose here the enforcement of the right which arose in Oklahoma? We are persuaded that it did not. The liability of a host to his guest for negligent injuries existed in both states. The trial court assumed jurisdiction of the subject-matter of the action and acquired jurisdiction of the parties, both residents of this state. It cannot be said that in doing so the court violated any fundamental principle of justice or public policy of this state, and no question of good morals would seem to be involved. Cases directly in point are, one decided by the Supreme Judicial Court of Massachusetts in 1923 (Hall v. Hamel, 244 Mass. 464, 138 N. E. 925), and another, by the Supreme Court of Iowa in 1931 (Redfern v. Redfern, 236 N. W. 399). The case of Hudson v. Von Hamm, 85 Cal. App. 323, 259 P. 374, is not applicable or controlling. There it was held in effect that the law of the foreign jurisdiction was so fundamentally opposed to the public policy of this state as to justify the trial court in refusing to assume jurisdiction of the cause.

It is next contended that the evidence is insufficient to establish even ordinary negligence, and that therefore the plaintiff may not recover in any event. It would serve no useful purpose to relate the facts in more detail. We have examined the record and find therein sufficient evidence upon which the jury could rightly find for the plaintiff.

[8] When the case was called for trial, jurors were in attendance and ready to take the jury box. Whereupon the defendant's counsel interposed an objection to a jury trial on the ground that the jury fees had not been deposited ten days in advance of trial. The objection was overruled, and, pursuant to a direction by the court, the case proceeded to trial before a jury. The objection was apparently based on subdivision 5 of section 631 of the Code of Civil Procedure as amended in 1929 (St. 1929, p. 851, § 1), wherein it was provided that failure to deposit one day's jury fees with the clerk "within ten days prior to the date set for trial" may constitute a waiver of trial by jury. Just what the last-quoted language of the section means is problemati-

cal. Its unfortunate wording is subject to the construction that the required deposit might be made at any time within the ten-day period prior to the trial, which would include the last minute before the trial. When the objection to the trial by jury was made, the plaintiff's counsel announced that he was then ready to pay the fees. Any ambiguity in the Code section as it then read should be resolved in favor of according to a litigant a jury trial. When so resolved no prior payment was necessary. In 1931 (St. 1931, p. 1712) the sentence was amended so as to eliminate the word "within" before the words "ten days prior," and the difficulty arising under the old law has been obviated.

No other points made require discussion. The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.

CALIFORNIA SAVINGS & COMMERCIAL BANK v. WHEELER et al.*

L. A. 11369.

Supreme Court of California.
April 1, 1932.

Rehearing Granted April 28, 1932.

1. Alteration of Instruments 🔑5(1), 17.

Unauthorized alteration of mortgage, placing property for first time under mortgage lien, *held* "material alteration" relieving mortgagor of all liability (Civ. Code, § 1700).

[Ed. Note.—For other definitions of "Material Alteration," see Words and Phrases.]

2. Alteration of Instruments 🔑5(1).

Material alteration of mortgage by adding property thereto, was not rendered harmless because not in furtherance of fraudulent purpose (Civ. Code, § 1700).

3. Alteration of Instruments 🔑29.

Authority to make or consent to alteration in executed contract must plainly appear from evidence, and will not be presumed from relation of principal and agent.

CURTIS, LANGDON, and PRESTON, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action by the California Savings & Commercial Bank against Harriette E. Wheeler and others. From part of judgment in favor of the defendant named, the plaintiff appeals. Pending the appeal, the defendant named died, and Frazier McIntosh, the executor of her will, was substituted as respondent.

Affirmed.

Superseding opinion of the District Court of Appeal reported in 1 P.(2d) 1080.

Edgar K. Brown and Leo B. George, both of Los Angeles, for appellant.

Frazier McIntosh, of Los Angeles, in pro. per.

PER CURIAM.

Plaintiff appeals from a judgment in favor of defendant Wheeler in an action brought by plaintiff to foreclose a mortgage.

The original complaint named Harriette E. Wheeler as sole defendant. This complaint was in the usual form for a foreclosure action, alleging that defendant Wheeler and others had executed a note in favor of plaintiff in the sum of $24,500, bearing interest at the rate of 7 per cent. per annum; that certain payments had been made; that the balance was unpaid; that to secure this note defendant Wheeler and others executed a mortgage on certain lots in Venice, Cal. Plaintiff prayed that the mortgage be foreclosed; that the lots be sold; and that plaintiff be given a personal judgment against defendant Wheeler for the difference between the amount received on such sale and the amount owed, if any be found to exist. Defendant Wheeler admitted the execution of the note and mortgage alleged in the complaint, and, by way of affirmative defense, alleged that at the time of the execution of the note and mortgage one Edgar K. Brown was the attorney and business associate of defendant's deceased husband; that at such time Brown was the vice president and liquidating agent of plaintiff corporation; that said Brown is now one of the attorneys for plaintiff; that defendant's signature to the note and mortgage was secured by certain alleged representations of Brown; that defendant's husband was to be credited with all expenditures made by him for improvements on the property; that such credit has not been given; that plaintiff has erroneously applied all payments on the note to the release of lots owned by Brown.

At the trial it developed that the note and mortgage relied on differed in several important respects from those pleaded, and that Brown and his wife were parties to the note and mortgage. Plaintiff contended that the note and mortgage pleaded had been altered by the consent of the parties thereto. The trial court permitted plaintiff to amend to set up the alterations and to join the Browns as party defendants. The amended complaint

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*For subsequent opinion see 16 P.2d 737.

joins the Browns and alleges the alterations. The Browns answered, admitting all of the allegations of the amended complaint. Wheeler answered, denying that any of the alterations had been made with her knowledge or consent. During the trial on the issues thus formed, it developed that the note and mortgage had been altered in three material respects:

(1) The interest rate on the note had been changed from 7 to 6 per cent.

(2) Eleven lots were eliminated from those described in the mortgage, because it was discovered that said lots were not owned by the mortgagors.

(3) The original mortgage had expressly excluded from its operation a 12-foot strip along the side of one lot. This strip had been excluded because it had been deeded to a city for a public purpose. Subsequently, this strip was deeded back to the mortgagors, and the plaintiff bank crossed out the excluding clause, thus attempting to include within the mortgage this strip. This was undoubtedly done with intent to include the strip within the mortgage.

The trial developed into a controversy as to whether these alterations had been made prior to the execution of the note and mortgage, or subsequent thereto, and whether such alterations had been made with the knowledge and consent of defendant Wheeler. The court found, on evidence which appellant admits is substantially in conflict, that the alterations were intentionally made by the plaintiff subsequent to the execution of the note and mortgage, with the knowledge and consent of the Browns, but without the knowledge or consent of defendant Wheeler, and that each of said alterations was a material one. Based on these findings, the trial court entered judgment against the Browns and in favor of defendant Wheeler, extinguishing in her favor all executory obligations on her part under the mortgage. Plaintiff appealed from the judgment in favor of defendant Wheeler. The Browns did not appeal and, as to them, the judgment has long since become final. Pending appeal, defendant Wheeler died, and the executor of her estate has been substituted as respondent.

The District Court of Appeal, Second Appellate District, Division 1, in an opinion prepared by Bishop, Justice pro tem., and concurred in by Conrey, P. J., and Houser, J., 1 P. (2d) 1080, affirmed the judgment of the trial court. We are of the opinion that the decision of that court correctly and properly disposes of the questions involved on this appeal. We, therefore, adopt as part of the opinion of this court the opinion of the District Court of Appeal, which is as follows:

Plaintiff was denied all relief against defendant Wheeler in this action to foreclose a mortgage, because her (Wheeler's) consent was not given to a post execution alteration of a mortgage by which some of her property was added to its embrace. We are of the opinion that the unapproved alteration was properly found to have relieved her of all liability under the mortgage.

[1, 2] The lot involved was one of a number deeded to defendant Wheeler's husband and to her codefendant Brown in September, 1923. At the time of the execution of the mortgage, which followed soon after the deed, the northwesterly twelve feet of this one lot had been deeded to a city for some public purpose, so that portion of the lot was omitted from the property included in the mortgage by employing the words, immediately following the reference to the lot, "excepting the northwesterly twelve feet thereof." Some time later, after March 26 of the succeeding year, probably, when the city reconveyed the strip, the mortgagee, plaintiff here, made several changes on the face of the mortgage, among others being the elimination of the words last quoted, which resulted in the mortgage reading as though the whole of the lot were included. This tinkering was done with the approval of defendant Brown, who was potent in plaintiff's councils, and for the purpose of this opinion we are assuming it was done with the consent of defendant Wheeler's husband. It was not done with her consent.

The effect of the unauthorized alteration of an executed contract is declared in section 1700, Civil Code, in these words: "Extinction, Unauthorized Alteration. The intentional destruction, cancellation, or material alteration of a written contract, by a party entitled to any benefit under it, or with his consent, extinguishes all the executory obligations of the contract in his favor, against parties who do not consent to the act." That an alteration which results in placing property for the first time under a mortgage lien is a material one is obvious. Appellant would escape the paralyzing effect of the section by securing a finding that there was no fraud involved here, and the alterations were made to correct a mutual mistake. So far as concerns the change in the mortgage whereby eleven lots were eliminated from its burdens, because included in the mistaken belief that they belonged to the mortgagors, such a finding might be made, but there is no serious contention advanced that the trial court could have found, and it did not find, that the northwesterly twelve feet was originally omitted through error or subsequently included to correct a mistake. The absence of a fraudulent purpose in making the alteration does not cure it of its deadening influence. Section 1700, Civil Code, does not recognize any such limitations, and the cases cited by appellant do not support the conclusion that a material alteration, i. e., "one that works some change in the rights, interests, or obligations of the parties to the writing" (Lasky v. Bew [1913] 22 Cal. App. 393, 134 P. 358, 360), is harmless if not in furtherance of a fraudulent purpose.

[3] The finding that defendant Wheeler did not consent is challenged on the ground that her husband consented and he as her agent thus bound her. The twelve-foot strip in question was community property. Appellant so contends, and the evidence, so far as brought to us, is in harmony with this conclusion. Defendant Wheeler's signature to the mortgage, then, was not an idle act, but was required. Section 172a, Civ. Code. Her husband's agency did not, apparently, include the right to sign for her. At least he did not. Furthermore, authority to make or consent to an alteration in an executed contract must plainly appear from the evidence; it will not be presumed from the relation of principal and agent. Langenberger v. Kroeger (1874) 48 Cal. 147, 17 Am. Rep. 418; Walsh v. Hunt (1898) 120 Cal. 46, 52 P. 115, 39 L. R. A. 697; Dozier v. National Borax Co. (1917) 35 Cal. App. 612, 170 P. 638; Hengehold v. National Creamery & Produce Co. (1922) 60 Cal. App. 79, 212 P. 239. We assume that a finding that defendant's husband was her agent would be supported by the evidence. This does not better appellant's position, however, for there is no evidence that within the scope of the agency he had authority to add property to the mortgage she had executed.

Even if appellant is correct in the other points it presents, the result will not be changed. There may be no evidence supporting the finding that certain representations were made, but a contrary finding would not remove the obstacle to its recovery already discussed. It may be that the evidence does not support the finding that lot 22 was released, but, as the appeal is not from the judgment as it affects defendants Brown, this is an error which, if corrected, would still leave defendant Wheeler entitled to judgment. Appellant argues that the reduction in the interest rate in the note, which the mortgage secured, was not a material alteration. We do not need to determine whether it was or not, for a deficiency judgment against defendant Wheeler was waived, and there can be no recovery on the note in any event.

The judgment appealed from is affirmed.

CURTIS, J.

I dissent.

A fair and reasonable construction of the evidence shows that the alteration in the mortgage was made with the consent of the husband of the defendant Wheeler. The defendant Wheeler's signature to the mortgage was necessary only because the property covered by the mortgage was community property. All of the transactions leading up to the execution of the mortgage and subsequent thereto and up to the time of the alteration of the mortgage were carried on by the husband on behalf of himself and wife. The only part the wife took in the whole proceeding was to sign and acknowledge the mortgage after the details thereof had been agreed upon by her husband and the bank. The husband by consenting to the alteration in the mortgage undoubtedly was estopped from relying on such alteration to defeat and forfeit the mortgage. As he had authority from his wife to act for her in all these matters, she also is estopped from claiming that the mortgage was extinguished by such alteration.

We concur: LANGDON, J.; PRESTON, J.

215 Cal. 357

PACIFIC FINANCE CORPORATION v. BANK OF YOLO.

Sac. 4619.

Supreme Court of California.

April 1, 1932.

Rehearing Denied April 28, 1932.

Banks and banking 🔑138.

Bank cashing drafts for shipments of automobiles and placing proceeds thereof at dealer's disposal, contrary to directions contained on face of drafts, *held* liable in conversion, where dealer misappropriated proceeds of drafts to his own use.

Facts disclosed that plaintiff, seeking to recover against defendant bank cashing drafts drawn by plaintiff in favor of defendant bank, was financing automobile dealer in his business; that it had been the practice of the distributor to ship automobiles to itself, and, upon dealer entering into conditional sales contract with plaintiff, it paid the sight drafts therefor and caused the automobiles to be placed on dealer's floor; and that in the transaction involved plaintiff sent drafts to defendant bank to take up shipments of automobiles, that drafts recited that they were in payment of sight drafts for automobiles purchased on account of dealer, that the sight drafts and bills of lading were sent to bank for collection and delivery, and that bank cashed the drafts and placed the proceeds thereof at dealer's disposal contrary to directions contained on face of drafts, and that dealer appropriated proceeds to his own use.

In Bank.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action by the Pacific Finance Corporation against the Bank of Yolo. From a judgment for defendant, plaintiff appeals.

Reversed.

Superseding opinion in 1 P.(2d) 465.

G. J. Irwin and Samuel B. Russell, both of San Francisco, for appellant.

Gaddis & McDonald, of Woodland, for respondent.

PRESTON, J.

This cause arises out of two so-called "flooring" transactions between plaintiff finance corporation and one J. T. Hendley, a automobile dealer at Woodland. Defendant was drawn into the transactions by cashing two drafts and crediting to the account of Hendley the proceeds thereof. Both drafts were drawn by plaintiff's Sacramento office upon its Los Angeles office, the first on February 2, 1928, for $4,610, the second on March 5, 1928, for $2,323.51; both were made payable to defendant bank, and both contained in the body thereof the following recital: "In payment Sight Draft Automobiles Purchased for Account of J. T. Hendley."

A series of transactions, differing in only one respect from the two above noted, had been theretofore had between the parties. The system usually employed by them may be briefly described as follows: Vendors or distributors of automobiles shipped to Woodland carloads of automobiles and at the same time sent to a bank there a bill of lading to its own order, invoice and sight draft covering the amount of the shipment, with instructions to notify Hendley. Upon receiving notice of the arrival of the goods, Hendley would call upon plaintiff at its Sacramento office. Plaintiff would then prepare conditional sales contracts, naming itself as the vendor of the cars and Hendley as vendee, and providing for payment by installments of the purchase price thereof. Hendley was also required to make a small cash payment from his own funds on account of the said purchase price. Plaintiff's agent would then go in person to the bank at Woodland, to which had been sent the said bill of lading and accompanying documents, and, in return for the documents, would pay for the shipment. In other words, plaintiff meticulously followed a system designed to vest in it directly from the shipper the title to the goods; the object of this conduct, being to prevent the claim that it held them merely as security. The procedure so followed and its effect have been approved by the appellate courts of this state in the cases of Mohr v. First National Bank of Hanford, 69 Cal. App. 756, 232 P. 748, and Pacific Finance Corp. v. Hendley, 103 Cal. App. 335, 284 P. 736.

In the two transactions here under review. the customary procedure was again attempted with the variation that, instead of accompanying Hendley to Woodland to pay for the shipments, plaintiff made its drafts payable to defendant bank and intrusted the delivery of them to Hendley, thus making him its agent for this limited purpose. As above noted, the drafts bore on their face directions to defendant as to disposition of the proceeds thereof. Hendley, however, recreant to his trust, instead of delivering the drafts personally to the bank, took them to his office, indorsed them as though he were the payee, and forwarded them with deposit slips to defendant, who thereupon passed the proceeds thereof in each case to his account and he, in turn, appropriated the entire amount to his own use. Plaintiff received nothing for its outlays except the sum of $1,315, representing the first payments made to it by Hendley and small subsequent payments. In the transaction of February 2d, there was in fact no bill of lading or other document at defendant bank. A shipment, and the documents covering it, had arrived but Hendley had secured another finance company to "floor" it for him, thus again demonstrating his bad faith. In the transaction of March 5th, the bill of lading and other documents were actually at defendant bank and, while holding them, it paid the proceeds of the draft of plaintiff, of which it was the payee, into the account of Hendley, ignoring altogether the purpose for which the draft had been drawn as noted on the face thereof. The bill of lading and other documents were returned to the shipper, and for this outlay plaintiff likewise received nothing.

For the conversion by defendant of these drafts, plaintiff instituted this action. Issue was joined and the trial resulted in the making of findings and judgment in favor of defendant. Plaintiff appealed. The court, in elaborate findings, declares that the transactions were loans by plaintiff to Hendley; that Hendley owned each of the drafts absolutely and was entitled to the entire proceeds; that he had the right to negotiate them to defendant bank or any other persons; and that, in buying them from Hendley, defendant bank assumed no risk whatever, and therefore may not be held liable in any amount.

But, in our judgment, under the undisputed facts, these findings are without support. Appellant contends that the transactions were plainly ones where plaintiff took title from the shipper direct; hence they were conditional sales and in no sense loans. Respondent's position is in accord with the findings of the court above noted. Appellant, however, further urges that, whether the transactions be classed as loans or whether they be classed as conditional sales, the conclusion of the court below is nevertheless erroneous. This latter position seems to us to be entirely sound and logical, for under the facts of this case even if the drafts had been made directly payable to Hendley but with the condition attached that he must, before the loans took effect, apply the proceeds thereof to bringing into being the security to be pledged, he would in each case have been guilty of a breach of trust in the violation of such agreement. But here we have drafts which were intended for specific purposes, and it was not within the power of Hendley to authorize defendant to divert the proceeds into altogether unauthorized channels. In other words, were the transactions conceded to have been loans, such loans were not complete until the security was created for them and the existence of that security was a prerequisite to their taking effect.

In Sims v. United States Trust Co., 103 N. Y. 472, 9 N. E. 605, 606, we have a case somewhat similar in fact and identical in principle with the case before us. There one Sims delivered to Crowell his $5,000 check drawn on the People's Bank and made payable to defendant trust company, with verbal instructions to deposit it to his credit with defendant. Instead of so doing, Crowell delivered the check to defendant and requested and received from it a certificate of deposit payable to himself as trustee for Sims; shortly thereafter he drew the money thereon, and converted it to his own use. The main question was whether defendant had authority to make the said payment to Crowell. The court said: "The check, upon its face, imported the ownership of the moneys represented in it by Dr. Sims, and his desire that its custody should be transferred from the People's Bank to the defendant. This certainly did not warrant the defendant in supposing that Dr. Sims thereby intended to pay $5,000 to Crowell, or place him, for any purpose, in possession of the fund. If he had so intended, the check would have been made payable to Crowell's order, and there would have been no need of the agency of the defendant in the transaction. The use of the defendant's name as payee of the check indicated the drawer's intention to lodge the moneys in its custody, and place them under its control, and nothing further than this was inferable from the language of the check."

The court there further said: "The defendant could have refused to receive the deposit, or act as Dr. Sims' agent in transferring the funds from one custodian to another, but having accepted the office of so doing, it was bound to keep Dr. Sims' moneys until it received his directions to pay them out. The language of the check making the funds payable only upon the order of the defendant imposed upon it the duty of seeing that they were not, through its agency, improperly disbursed after it had received them. They could not safely pay out such funds except under the direction of their lawful owner." To the same effect are the following cases: Apostoloff v. Levy, 186 App. Div. 767, 174 N. Y. S. 828; Bjorgo v. First National Bank, 127 Minn. 105, 149 N. W. 3, L. R. A. 1915B, 287; Bowles Company v. Clark, 59 Wash. 336, 109 P. 812, 31 L. R. A. (N. S.) 613.

Respondent, in justification of the action of the court below, relies chiefly upon the case of Bank of Venice v. Clapp, 17 Cal. App. 657, 121 P. 298. But to our view this case does not present a parallel situation. There the defendant had made an unconditional promise to loan to one Widrig a certain sum of money, and he issued his checks therefor on one bank, but, instead of making them payable to Widrig, he made them payable to another bank which had a claim against Widrig. This payee bank accepted the checks and applied their proceeds to the obligation of Widrig to it. This it could legally do, as Widrig had an unconditional right to the checks or their proceeds. But in the instant case Hendley had no such right to the drafts or their proceeds. He had only a limited agency to deliver the drafts to the payee named therein, who was duty bound to use the proceeds as directed; delivery thereof to Hendley was not the equivalent of performance of such duty. If Hendley, with the consent of defendant bank, had himself used the drafts and their proceeds to pay for the cars and plaintiff was suing the defendant because of its connivance in the transaction, then the defense that the funds went where they were intended to go would lie in favor of defendant. In such a case we would be able to apply a principle similar to that found in the Bank of Venice Case, supra. Moreover, the latter case recognizes that the situation there presented was an exception to the general rule, and in effect it indorses the holding here announced by stating that no question of agency was there involved, and by using the following language: "Sims v. Trust Co., 103 N. Y. 472, 9 N. E. 605, is an authority to the effect that, where checks upon one bank payable to another are delivered to a third person, the use of the payee's name indicates the drawer's intention to lodge the money in the payee's control, and nothing further is inferable from the language of the check. This may be accepted as the rule in the absence of any other agreement, but, where checks are delivered to a third person under an agreement of the character disclosed by this record, the agreement, and not the inference must control."

These views require a reversal of the judgment of the court below, and it is so ordered.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; LANGDON, J.

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215 Cal. 368

MIZPAH INV. CORPORATION et al. v. CITY OF LOS ANGELES et al.

L. A. 12420.

Supreme Court of California.

April 1, 1932.

1. Municipal corporations ⚷122(2).

In action to restrain city from selling plaintiffs' property for park purposes, plaintiffs contending that ordinance under which city proceeded was altered after its adoption had burden of proving city officer made such alteration (St. 1909, p. 1066, as amended; Code Civ. Proc. § 1963, subds. 1, 15, 33; Pen. Code, §§ 113, 114).

In such case, plaintiff had the burden of establishing the alleged unauthorized change in the ordinance, especially in view of Pen. Code, §§ 113, 114, providing that an officer who falsifies any record placed in his hands is guilty of a felony, and Code Civ. Proc. § 1963, subds. 1, 15, 33, providing that the following presumptions have the weight of evidence unless controverted: That a person is innocent of crime; that official duty has been regularly performed; and that the law has been obeyed.

2. Municipal corporations ⚷122(4).

In action to restrain city from selling plaintiffs' property for park purposes, evidence *held* insufficient to sustain plaintiffs' allegation that ordinance under which city proceeded was altered after its adoption (St. 1909, p. 1066, as amended).

3. Eminent domain ⚷55.

Ordinance of intention to acquire realty for park "and" playground purposes *held* not material departure from statute authorizing municipalities to acquire realty for park "or" playground purposes (St. 1909, p. 1074, § 32, as amended by St. 1913, p. 420, § 7).

Such ordinance was not illegal as a material departure from St. 1909, p. 1066, as amended, especially in view of page 1074, § 32, as amended by St. 1913, p. 420, § 7, providing that the provisions of the act shall be liberally construed to promote the objects thereof, and that the act might be designated as the "park and playground act of 1909."

4. Municipal corporations ⚷488, 489(6).

Property owners within municipal assessment district could not, four years after creation of district, for first time contest its validity (St. 1909, p. 1066, as amended).

Facts disclosed that such owners were served with due notice of the proposed creation of the assessment district for public parks and playground purposes, but that at no time did they appear to protest its formation or the fairness of the assessments until some time after they had been levied; and that for four years the council and the public, including these owners, had treated the ordinance as valid.

5. Eminent domain ⚷243(3).

Property owners within assessment district created under park and playground act who received statutory notice of proceeding condemning realty therein *held* bound by judgment therein, although not made parties thereto (St. 1909, p. 1068, § 9, as amended by St. 1913, p. 418, § 4).

In Bank.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action for an injunction by the Mizpah Investment Corporation and another against the City of Los Angeles and others. From the judgment of nonsuit, plaintiffs appeal.

Affirmed.

Winslow P. Hyatt, of Los Angeles, for appellants.

Erwin P. Werner, City Atty., Frederick Von Schrader, Asst. City Atty., and Sam H. Erwin, Deputy City Atty., all of Los Angeles, for respondents.

SEAWELL, J.

Appeal from a judgment of nonsuit in a proceeding to restrain the defendant city of Los Angeles and its board of public works from making sales of certain described real property belonging to plaintiffs and from issuing bonds to represent any assessments made under and by virtue of City Ordinance No. 47159, N. S., adopted by the city council of the city of Los Angeles on October 8, 1923, and approved by the mayor of said city October 10, 1923. Said real property is situated within the district benefited by the improvement.

The proceedings in question were initiated by said city under the authority of the provisions of an act entitled "An act to provide for the acquisition by municipalities of land for public park *or* playground purposes by condemnation, and for the establishment of assessment districts and the assessment of property therein to pay the expenses of acquiring and improving such land." Stats. 1909, p. 1066; Stats. 1913, p. 414; Stats. 1921, p. 349. The word *or* is italicized to distinguish it from *and.* Plaintiffs own a large number of lots and parcels of land which are embraced within the limits of said assessment district upon which the total sum of the assessments, including penalties for delinquencies and costs, aggregate $8,072.42. None of the plaintiffs' lands was sought to be taken by condemnation, but other lands within the district were acquired by condemnation proceedings.

Plaintiffs urge and rely upon the following major grounds for a reversal of the judgment: (1) The sufficiency of the evidence to pass a nonsuit; (2) that the ordinance of intention, No. 47159, N. S., as originally enacted by the city council of the city of Los Angeles and approved by the mayor of said city, was, after its passage, changed by some person not authorized to change it in a material respect, and said ordinance was not thereafter readopted or re-enacted by said council; (3) that certain real property owned by one Wm. H. De Wolfe, and which was included in the condemnation proceeding and for which an award was made in the sum of $125,000, had been actually purchased by the city some months before the proceedings were initiated to create said assessment or improvement district, and therefore said sum of $125,000 should not have been included as a charge against the real property of the district inasmuch as the city had acquired said real property prior to the formation of said district; (4) the exclusion by the court of certain evidence offered by plaintiffs as tending to impeach the judgment entered in said condemnation proceedings with respect to the question of ownership of said De Wolfe property at the time said condemnation proceedings were commenced.

[1] The order granting the motion for a nonsuit and the judgment entered thereon are so closely correlated with the obliteration of certain words from the title and from the body of the ordinance declaring the council's intention to establish the district, and which obliterations are alleged to have been made after the adoption of said ordinance, that both questions will be considered together. Said ordinance was typed and a photostatic copy showing the changes and alterations made therein is included in the reporter's transcript. The title as originally typed read:

"Ordinance No. 47159.

"(New Series.)

"An ordinance declaring the intention of the City Council of the City of Los Angeles to order the acquisition by condemnation for public park [and playground] purposes, of certain lands situated in the City of Los Angeles, County of Los Angeles, State of California, being in the Arroyo Seco, between avenue 58 and Pearl Street."

The bracketed words [and playground] are the words which were obliterated from the title and from three other places in the body of the ordinance where they had originally followed the words "public park" as defining the purposes of the council in creating the district. The obliterations were made by drawing a pen heavily inked through said words and the obliteration is so complete as to make it almost impossible to discern the words originally typed. Mr. Keith's testimony makes it clear that the words stricken out were "and playground." Other alterations appear to have been made in said ordinance but no objection is raised as to them. There is no mystery as to who made the obliterations, as on the margin of the page opposite each change appear the letters "D. M. K." which are the initials of Donald M. Keith, deputy city attorney of the city of Los Angeles. He testified that he made the alterations or obliterations herein discussed, as well as others, and placed his initials as witness thereto at the time he made them. An important question bearing upon the court's ruling granting the motion for the nonsuit is whether the changes were made in said ordinance before or after its adoption by the council. Plaintiffs stress the importance of this issue and contend that the evidence, much of which consists of official records, tends to establish the claim that said changes were made after the ordinance had been enacted. The city does not claim that there was any attempt to remodel or re-enact said ordinance into its present form. The burden of proving facts which would directly or inferentially justify the conclusion that an officer of said city altered said ordinance after its passage was upon plaintiffs. The following presumptions have the weight of evidence unless controverted by other evidence:

"1. That a person is innocent of crime or wrong; * * *

"15. That official duty has been regularly performed; * * *

"33. That the law has been obeyed. * * *" Section 1963, Code Civ. Proc.

The above presumptions are important in view of sections 113 and 114, Penal Code, which make every officer, and every person not an officer, who mutilates, defaces, or falsifies any record placed in his hands for any purpose, guilty of a felony. Deputy City Attorney Keith, called as a witness by the plaintiffs, testified that said ordinance as originally drafted was placed in his hands, as shown by the record, on October 4, 1923, four days before its adoption by the council. The witness was called upon to testify to dates and matters which had occurred six or seven years prior to the day on which he gave his testimony. He assumed from the date of his approval of the ordinance, to wit, October 4th, that he made the alterations and obliterations as initialed by him on the same day that he gave it his approval for passage. Upon the passage of an ordinance the original is turned over by the city clerk to the printer. The evidence conclusively shows in the instant case that the original ordinance went into the printer's hands from which the publications were made. This being so, the probability would seem to be that Mr. Keith never saw it again after he changed and initialed it, thereby approving it for adoption by the council. The witness was interrogated by Mr. Hyatt, plaintiff's attorney, as follows:

"Q. After it [ordinance] passed your hands, where was it delivered by you? A. The ordinance was prepared in my office and approved by me and sent to the city clerk.

"Q. At the time that it was prepared in your office, these erasures were not there, were they? A. Yes, sir.

"Q. At that time in October? A. I presume so; yes, sir.

"Q. Do you mean to swear that your initials were put on there October 4, 1923? A. Why, I can't say, so far as the date is concerned. That ordinance may have been approved on the 4th and not sent to the clerk's office, you see, until some subsequent time.

"The Court: But the erasures were in at the time it was approved, is that it? A. The erasures were in at that time—not necessarily, of course—I may have made the erasures subsequent to the approval, but probably about that time.

"Q. By Mr. Hyatt: And isn't it a fact, Mr. Keith, that it was made after the publication on the 16th day of October? A. Why, I don't know."

Cross-examination by Mr. Erwin:

"Q. Do you know whether or not these changes were made before or after it passed the council? A. Before.

"Q. Before it passed the council? A. Yes, sir."

While the witness was not able to definitely fix dates from memory in a matter so ordinary as the subject in controversy, he did recall incidents and events which enabled him to say definitely that the alterations shown upon the face of the ordinance were made before its passage.

[2, 3] Omitting from the case any consideration of the weight of presumptions in support of the validity of said ordinance, it could not be held from the evidence of the person who actually made the changes that they were made subsequent to the adoption of said ordinance. The facts would impel a contrary finding. Other officers of the city were called by the plaintiffs, but their testimony presented nothing of a substantial character in support of the error claimed to have been committed by the trial court in granting the motion for nonsuit.

The ordinance was published on October 16, 1923, for the first time in the Los Angeles Daily Journal, the official newspaper of the city of Los Angeles. In that issue of the Daily Journal the ordinance was printed as it was originally typed, without change or alteration of any kind whatever. No affidavit as to the publication of said ordinance on October 16th appears to have been made by the publisher of said official newspaper. Three days thereafter, to wit, October 19, 1923, a republication, or, more strictly speaking, the publication of said ordinance appeared in said newspaper, agreeing in language, substance, and matter with the ordinance as changed by the deputy city attorney in the respect testified to by him. No satisfactory explanation was given by the publisher of the newspaper, or any one else who was in a position to know, why the first publication appeared as it did. One or two theories are advanced as to the manner of its occurrence, but they amount to no more than speculative theories which do not as much as controvert the presumption which supports the validity of an ordinance regular upon its face. Besides the testimony of the deputy city attorney, other city officials testified that the ordinance was placed in its present form by the deputy city attorney before it was sent to the council for passage. It was not for the city in the first instance to prove the validity of the ordinance. The burden of establishing its invalidity was upon the challengers. We think the court did not err in granting the motion for nonsuit. There are other reasons which would make us pause before condemning the ordinance in question. It is very doubtful if the changes complained of are of sufficient importance in substance as to justify a court in condemning the ordinance on the ground of a material departure from the statute. Section 32 of said act (as amended by St. 1913, p. 420, § 7) provides: "The provisions of this act shall be liberally construed to promote the objects thereof. This act may be designated and referred to as the '*park and playground* act of 1909.'" (Italics ours.) Plaintiffs contend that because the act provides that land may be acquired for "public park *or* playground purposes" it could not be acquired for public "park *and* playground purposes." With this contention we cannot agree. The purposes are practically the same. A public park is in effect a playground, and both are acquired for recreational purposes. There is strong reason to believe that the two words of designation were used to include in a most comprehensive sense all such public recreational uses or purposes as are commonly understood by the public. It is common knowledge that all public parks are also used as playgrounds. The act designates itself as the "park and playground act." The ordinance would not have been invalid had it retained the deleted words "and playground." Plaintiffs concede that an ordinance designating the purposes of acquiring land for a "public park" would be within the statute. We are of the view that any other construction than the one we have placed upon the act would be to narrow its purpose and impede rather than promote its objects.

[4] We would not be inclined to invalidate the assessment district for another reason. The district was created approximately four years before the appellants made any objection to its organization or to the regularity of the assessments which they now contest. They were served in due time with notice as required by the act, both by publication, posting and by mailing. At no time did they appear to protest the formation of the district or the fairness of the assessments until some time after they had been levied. They then made tender of $3,775 in full satisfaction of said assessments, claiming that the $125,000 represented by the De Wolfe purchase, hereafter discussed, should not have been included as an item of costs against the real property of the district. During this period of four years the council and the public, including the plaintiffs, had treated said ordinance as a valid, existing ordinance. The council, upon the faith of its validity, which passed unchallenged, brought suits and transacted business involving property rights. Its adoption was ratified in many ways, if such be possible, by a long course of municipal transactions. In the light of the facts shown it would require a clearer lack of jurisdiction on the part of the city to proceed under said ordinance than plaintiffs have presented upon this appeal.

The next objection made by plaintiffs is as to the De Wolfe purchase. The mayor and city council having in contemplation the creation of said district made overtures to De Wolfe to purchase a body of land owned by him and situated within the boundaries of the proposed district, the acquisition of which was necessary for the purposes of the district. The mayor in the name of the city of Los Angeles, on June 15, 1923—some three months before the adoption of the ordinance declaring the intention of the city to create said district—entered into a memorandum agreement of option in consideration of the sum of $10 with De Wolfe to purchase the lots and pieces of land described in the option agreement at the price of $125,000. Before the option expired another agreement was similarly entered into by said city, executed by the mayor. This second agreement was executed on February 1, 1924, approximately three months after the adoption of said ordinance. This second agreement inter alia provided that the city would pay to De Wolfe the sum of $125,000 for said lands, $75,000 upon demand, "as a part of the principal consideration to be paid to said second party [De Wolfe] in the condemnation proceedings which will be instituted under the provisions of the 'Park and Playground Act' * * * and when any judgment of condemnation shall have been secured by said first party [City] then upon the payment of the difference between the sum found in any such judgment and the sum of $75,000, said second party shall cause to be entered in due form a complete satisfaction of judgment in such condemnation action."

It was further provided in said second agreement "that the payment of the said sum of Seventy-five thousand ($75,000.00) Dollars at this time is in the nature of a loan by said 'First Party' to the Assessment District, which will ultimately be assessed to pay the judgment in the condemnation action hereafter to be instituted, and that nothing in this Agreement shall be construed to prevent the assessment and collection from said Assessment District of the entire sum of any such Judgment as provided in the said 'Park and Playground Act,' hereinabove mentioned."

Ordinance No. 47865, N. S., was subsequently adopted in due order, directing the institution of a condemnation proceeding against the real property described in said option, including other real property not material to the issues of this proceeding. The action which resulted in the condemnation of said De Wolfe real property was entitled The City of Los Angeles v. Frank Leeper et al., Superior Court No. 145852. The record in that case is not before us. It was stipulated at the trial of the instant case that the trial court might have access to the files of the Leeper et al. proceedings in considering the instant case. It was in the latter case, apparently, that the compensation for the taking of the De Wolfe real property was fixed at $125,000, the exact amount named in the option of purchase.

We are unable to follow plaintiffs in their contention that said sum of $125,000, fixed by the order of condemnation as damages to be paid to De Wolfe as the owner of said property, because of the steps taken to acquire it, should not be included in estimating the expense of the improvement to the district. Any steps taken by the city in advance of the adoption of the ordinance of intention which might inure to its benefit could not have prejudiced the plaintiffs. The price of the lands was more than likely held down by said option agreements. But be this as it may, the land was condemned in the manner provided by the Park and Playground Act. Its value was determined according to the rules and standards of the law and that is all that is required.

[5] Plaintiffs suggest that they were not made parties in the Leeper Case and therefore are not bound by that judgment. The notices required by section 9 of the Park and Playground Act (as amended by St. 1913, p. 418, § 4) were given in the manner provided by law, to all persons, including plaintiffs, owning or having an interest in any property within the assessment district. This is not disputed. Plaintiffs are, therefore, bound by the proceedings taken. City of Los Angeles v. Glassell, 203 Cal. 44, 262 P. 1084.

From what has been said it is not necessary to discuss the exclusion by the court of certain oral evidence offered by plaintiffs and directed against the judgment in the Leeper case, as it was but a collateral attack made upon a judgment rendered in a case in which plaintiffs made no appearance. Sufficient record evidence, however, was introduced in the instant case to show that said judgment was impregnable to attack upon the grounds urged.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; PRESTON, J.; SHENK, J.

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215 Cal. 328

In re McDOLE'S ESTATE.

BARNES et al. v. RESER et al.

L. A. 12001.

Supreme Court of California.

March 31, 1932.

1. Charities 🔑33.
Gift to Stubblefield Home for Aged at named place was gift to trustees maintaining that home under another's will.

2. Wills 🔑16.
Codicil leaving household goods to sister, executed seven days preceding death, did not invalidate will leaving bulk of estate to charity, otherwise valid, executed over six months preceding death (Probate Code, §§ 41-43).

3. Charities 🔑34.
Gift to charitable home is gift for benefit of its inmates.

4. Charities 🔑34.
Named devisee, being established charitable institution but not entity capable of holding realty, is deemed beneficiary, not devisee required to hold title directly.

5. Trusts 🔑160(2).
Equity will not permit trust to fail for want of trustee, but, if necessary, will appoint one.

6. Charities 🔑33.
Devise to named charitable institution which is not entity capable of holding title is devise to trustees maintaining institution.

7. Charities 🔑22(1).
Devise to trustees maintaining charitable institution is upon trust to apply property for inmates' care, notwithstanding purpose of gift is not declared.

> The purposes of a charitable trust need not be declared, since it is the essence of a charity that the beneficiaries are indefinite and the class only indicated; and frequently the manner of carrying out the trust is not declared; and, the general nature of the trust being stated, the details of its administration are settled by trustees under the supervision of a court of chancery.

8. Charities 🔑22(1).
That testator designated charitable devisee as home for aged did not invalidate gift, although, known to him, it also cared for children.

9. Charities 🔑4.
That trustees receiving gift were conducting charity in sister state under nonintervention will, invalid in state of testator's domicile, did not invalidate gift.

In Bank.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Petition for distribution of estate of William M. McDole, deceased, filed by W. R. Barnes, as executor, in which Rufus M. McDole and others filed objections. From a decree denying distribution to them, E. A. Reser and others, beneficiaries, appeal.

Reversed with directions.

Superseding opinion in 2 P.(2d) 435.

Will R. King, of Los Angeles, and Cary M. Rader, of Walla Walla, Wash. (Head, Wellington & Jacobs, of Santa Ana, of counsel), for appellants.

R. Y. Williams, Charles D. Swanner, and Roland Thompson, all of Santa Ana, for respondents.

SEAWELL, J.

Appeal from a decree of distribution. By his last will and testament the decedent, William M. McDole, bequeathed the residue of his estate to "the Stubblefield Home for the Aged, at Walla Walla, Washington." Upon objections filed to the executor's petition for distribution by decedent's three brothers, his sister, and three nieces, who, with a brother of decedent not joining in the objections, are his heirs at law, the court found, in their favor, that said provision was invalid for the reason that the Stubblefield Home for the Aged was not a "person, corporation or society authorized by the laws of the state of California to take a gift by will."

A home for aged women and indigent children known as the Stubblefield Home is maintained at Walla Walla, Wash., by three trustees to whom one Joseph L. Stubblefield, in 1902, bequeathed the residue of his estate "for the establishment, maintenance and support of a home for fatherless or motherless and indigent children, residents of the state of Oregon and Washington and worthy elderly indigent widows, residents of Oregon and Washington, and to their maintenance and to the giving of a common school education and the teaching of some useful trade or occupation to the children inmates thereof."

[1] It is the contention of appellants herein, who are the trustees of said Stubblefield trust, that the provision in the will of William McDole now before us may be construed as a devise to said trustees to be held and administered by them for the benefit of the charitable institution known as the Stubblefield Home. We are in accord with this contention.

[2] William McDole, a resident of the county of Orange, this state, died on March 25, 1925, at the age of seventy-three years, leaving property in this state valued at between $30,000 and $40,000. By his will, executed on November 21, 1922, he bequeathed $2,000 to his only sister, the sum of $75 a month to his brother Henry for the term of his life, and $1 to each of his three other brothers, and to the heirs of a predeceased brother, $1. The residuary clause, now before us for construction, reads as follows: "I hereby will and bequeath all the rest and remainder of my estate to the Stubblefield Home for the Aged, at Walla Walla, Washington." By a codicil, executed on March 18, 1925, seven days before his death, he bequeathed his household goods and furniture and his automobile to his sister. Otherwise the codicil made no change in the terms of the will. Decedent left no spouse, child, grandchild, or parent surviving him. Therefore, by will executed at least six months prior to his death, he could validly dispose of his entire estate to charity. Section 1313, Civ. Code; now sections 41–43, Probate Code.

The provision in the will before us was not rendered invalid by said codicil, executed seven days before the testator's death, which did not in any manner change the terms of decedent's will as to the bequest to charity, nor enlarge the portion of his estate subject to said provision for charity. It is a fact that the effect of the bequest made in the codicil was to cut down slightly the residue available for the charity named, but that did not invalidate the bequest made to charity. In re Estate of McCauley, 138 Cal. 432, 71 P. 512; In re Estate of Pence (Cal. App.) 4 P.(2d) 202.

[3, 4] It is conceded by the heirs of William McDole that a gift to the home or the inmates thereof could be effected by a devise to the trustees named in the will of Joseph Stubblefield. They alleged: "The only manner in which said William M. McDole, deceased, could have devised or bequeathed his estate by last will and testament to said Stubblefield Home, would be by devising and bequeathing the same to the said trustees under the last will and testament of Joseph L. Stubblefield, deceased." It is their contention that a devise to the "Stubblefield Home," where no words of trust or other restriction or limitation are used, cannot be construed as a devise to said trustees, without doing violence to the express language of the will. In consequence the devise must fail since there is no equity bearing said name which can hold title to real property. This question of construction presents the main problem of the case.

William McDole formerly resided near Walla Walla, Wash., according to a statement in appellants' brief. That he had said home in mind when he drew his will there can be no doubt, and the court so found. This court expressly held in Re Estate of Upham, 127 Cal. 90, 59 P. 315, 316, that an unincorporated orphans' home may be the beneficiary of a trust for charitable uses. In that case the bequest was as follows: "I give and bequeath to the legally qualified and constituted trustees or managers of the Good Templars' Orphans' Home of Vallejo, said county of Solano, in trust for the use and benefit of the orphan children of said institution, any residue and remainder of my estate." This court said: "It must be remembered that charities—both as to the trustees and beneficiaries—are more liberally construed than are gifts to individuals. See 2 Story, Eq. Jur. §§ 1165, 1167, et seq. That the gift here was for charity is beyond question. It was shown by the evidence—which was properly admitted, under section 1340 of the Civil Code—that the Good Templars' Orphans' Home at Vallejo had been in existence for a great many years, that its purpose was to take care of orphan children, that it accommodated about 200 of such children, and that about that number were usually and continuously maintained there. To sustain the proposition that this constitutes a charity within the legal meaning of the word, no further authority is necessary than that of People v. Cogswell, 113 Cal. 129, 45 P. 270 [35 L. R. A. 269]; but the truth of the proposition is further illustrated by the numerous cases referred to in the opinion of the supreme court of the United States in Russell v. Allen, 107 U. S. 163, 2 S. Ct. 327, 27 L. Ed. 397." The same reasoning is obviously applicable to a home which receives elderly indigent widows as well as orphan children. A gift to a charitable home is a gift for the benefit of the inmates thereof.

We find no difficulty in upholding the validity of the devise in the case herein, although words of trust are not used as in the Upham Case. Concerning that case, this court said in Re Estate of Winchester, 133 Cal. 271, 277, 65 P. 475, 477, 54 L. R. A. 281: "The fact that in that case [Estate of Upham] the bequest was to the trustees of the orphans' home, and not directly to the orphans' home, makes no difference. In either case the intention would be the same, and the capacity to take would be the same." We are in accord with this reasoning. Upon proof establishing the fact that the Stubblefield Home is not an entity capable of holding title to real property, but the name of an established charitable institution, it becomes apparent that the Stubblefield Home is not a devisee required to hold title directly, but the beneficiary of a gift to a charitable use.

[5, 6] The policy of equity to favor charitable gifts is exemplified in the rule that equity will not permit a trust to fail for want of a trustee. In re Estate of Winchester, 133 Cal. 271, 274, 65 P. 475, 54 L. R. A. 281; In re Estate of Upham, 127 Cal. 90, 59 P. 315; Tillinghast v. Council at Narragansett Pier, 47 R. I. 406, 133 A. 662, 46 A. L. R. 823. In such cases equity will appoint a trustee. In the case herein it is not necessary for a court of equity to go to this extent to carry out the plain intent of the testator to make a gift to the Stubblefield Home. This may be done by vesting title to the property which is the subject of the gift in those trustees who hold title to the physical property of the home. The devise to the Stubblefield Home is in legal effect a devise to the trustees by whom said home is maintained.

The dominant intent of the testator was to benefit the inmates of the Stubblefield Home. The respondent heirs ask us to infer an intent to make a gift to the Stubblefield Home only in the event that it was an entity capable of holding title, because the form of language used would be equally appropriate to make a devise to a corporation or society bearing that name had one existed. The word "trust" may be omitted from the instrument creating the charity. Tillinghast v. Council at Narragansett Pier, 47 R. I. 406, 133 A. 662, 46 A. L. R. 823; Dickenson v. Anna, 310 Ill. 222, 141 N. E. 754, 30 A. L. R. 587; In re Estate of Winchester, 133 Cal. 271, 277, 65 P. 475, 54 L. R. A. 281.

There are numerous instances where homes maintained by charitable corporations do not bear the exact name of the corporation holding title to the physical properties of the home. Incorporated lodges and fraternal organizations of nation-wide membership maintain homes for aged and indigent members at various places throughout the territory where lodges or chapters exist. Applying the rule for which respondent heirs contend, it would be necessary to hold that a bequest to the fraternal home at a certain place would fail because the corporate entity which maintained the home and held title to the property upon which it was operated did not include in its title either the word "home," or the name of the town where the particular home was located.

In re Estate of Doane, 190 Cal. 412, 213 P. 53, 54, is not in conflict with the decision here made. In that case the testator devised the residue of his estate to the "National Bank & Trust Company of Pasadena, a national banking association." We there held that to admit evidence aliunde the will, consisting of written directions to the bank that it should hold upon certain charitable trusts, would violate the rule that a will cannot be varied by an instrument not referred to therein. The bank, a business corporation, was incapable of receiving property by will except as a trustee (section 1313, Civ. Code), and the court therefore held that the devise failed. In the Doane Case the "National Bank & Trust Company of Pasadena" was the name of a business corporation, which under written directions not a part of the will was to act as trustee, and there was no indication in the will of the charitable objects to which the devise was to be applied. In the case herein, the Stubblefield Home is the designation of a charitable institution which is the beneficiary of a gift.

[7] Respondents also argue that if the provision be interpreted as a devise to the trustees of the Stubblefield Home, it must nevertheless fail because no specification is made of the trusts upon which the property is to be held. In re Estate of Upham, supra, to which reference has heretofore been made, is also authority against respondents on this proposition. In that case the devise was "in trust for the use and benefit of the orphan children" of the Good Templars' Orphans' Home at Vallejo. A devise to a society or corporation organized for a charitable purpose without further declaration of the use to which the gift is to be put, is given in trust to carry out the objects for which the organization was created. In re Estate of Winchester, 133 Cal. 271, 277, 65 P. 475, 54 L. R. A. 281; Dickenson v. Anna, 310 Ill. 222, 141 N. E. 754, 30 A. L. R. 587; Rhode Island Hos. Trust Co. v. Williams, 50 R. I. 385, 148 A. 189, 74 A. L. R. 664; 2 Perry on Trusts (7th Ed.) p. 1258. Similarly a devise to trustees who maintain a home for orphan children and indigent widows is upon trust to apply the property for the maintenance and care of those persons who reside in the home.

It is of the essence of a charity that the beneficiaries are indefinite, the class only being indicated. It is a frequent characteristic of charitable trusts that the manner in which the trust is to be carried out is not declared. "If the founder describes the general nature of the charitable trust, he may leave the details of its administration to be settled by trustees under the superintendence of a court of chancery." In re Estate of Upham, 127 Cal. 90, 95, 59 P. 315, 317. Although the trustees under the will of Joseph L. Stubblefield are given broad discretionary powers, they nevertheless remain subject to a court of equity, which will secure a proper administration of the trust both as to the original trust property and that received under the will of the testator herein.

[8] That the institution which the testator refers to as the "Stubblefield Home for the Aged" also receives and rears and educates children, and is also known as the Stubblefield Home for Children, Stubblefield Home for Orphans and Aged, and Stubblefield Home for Old Women, does not invalidate the gift; it being apparent that he could have intended no other institution, and that he must have been familiar with the nature and purposes of said institution.

[9] Nor are we concerned in this proceeding with the fact that the will of Joseph L. Stubblefield, under which appellant trustees are acting, was a nonintervention will not recognized as valid in this state, or with other questions as to the procedure followed by the executors of the Stubblefield will, who were also the trustees named to found the home. In Rader v. Stubblefield, 43 Wash. 334, 86 P. 560, 10 Ann. Cas. 20, wherein an injunction was granted upon application of said trustees to restrain the widow of Stubblefield from instituting probate proceedings in the state of Oregon after the trustees and executors had brought proceedings in both Washington and Oregon, the Supreme Court of Washington as one of the grounds of its decision sustained the validity of the trust. The evidence shows that the said trustees have continuously since 1904 maintained a home at Walla Walla, Wash., with property derived from the estate of Stubblefield. We find nothing in the evidence in the case herein, nor in the proceeding reported in Rader v. Stubblefield, supra, which would indicate any public policy to be served by withholding the gift from said trustees.

We may say in this case, as the court said in the concluding paragraph of its opinion in Re Estate of Upham, 127 Cal. 90, 98, 59 P. 315, 318: "We do not see how the disputed clauses of the will, which we hold to be good, can be overthrown without wrongfully applying to a charity those strict and technical rules which can be rightfully invoked only as against private trusts."

The decree appealed from is reversed, with directions to the court below to distribute the residue of the estate of William M. McDole, deceased, to said trustees of the Stubblefield trust.

It is so ordered.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; CURTIS, J.; SHENK, J.

122 Cal.App. 437

MOLFINO v. PIPPO.

Civ. 8081.

District Court of Appeal, First District, Division 1, California.

April 9, 1932.

Rehearing Denied May 9, 1932.

1. Appearance ⚷19(2).

Appearance by general demurrer and by answer without "specially appearing" constituted waiver of question of jurisdiction of defendant's person.

2. Courts ⚷472(6).

Superior court of San Mateo county had jurisdiction of action on $400 note notwithstanding it was made payable at San Francisco, where defendant had waived question of jurisdiction of person, and there was no municipal court in San Mateo county (Code Civ. Proc. §§ 395–397, 1014, and § 832, subd. 7; St. 1929, p. 838, § 2).

This was so, since fact that note was made payable by its terms in San Francisco did not confer jurisdiction on municipal court of that place or oust the superior court of San Mateo county of jurisdiction.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Albert A. Molfino against Pietro Pippo. Judgment for plaintiff, and defendant appeals.

Affirmed.

M. Martino and John L. McVey, both of Oakland, for appellant.

A. L. O'Grady, of San Francisco, and Gilbert D. Ferrell, of Redwood City (Fred W. Comba, of Redwood City, of counsel), for respondent.

ROBINSON, Justice pro tem.

This action was commenced in the superior court of San Mateo county, Cal., on a promissory note for $400, dated April 6, 1926. The note was dated "San Francisco," and was made payable to the plaintiff at San Francisco, Cal., four months after its date. The action was commenced July 22, 1930.

An amended complaint was filed on October 15, 1930, which alleged that "at all the times herein mentioned the plaintiff was and now is a resident of the County of San Mateo, State of California," and that during all of said times "the defendant was and now is a resident of the County of Contra Costa, State of California." It was further alleged as follows: "That on the 6th day of April, 1926, the defendant, in the County of San Mateo, State of California, made and delivered to the plaintiff his promissory note in the words and figures" set forth in said amended complaint.

The defendant demurred as follows:

"Now comes the defendant, and demurs to the amended complaint of plaintiff on file herein and, for grounds of demurrer, specifies and alleges:

"1. That the above entitled court has no jurisdiction of the *person* of the defendant or the *subject* of the action;

"Wherefore defendant prays that he be hence dismissed without day and with his costs of suit." (Italics ours.)

The demurrer was overruled and defendant answered, admitting the residence of the plaintiff and defendant and that the note was made and delivered in San Mateo county as pleaded, but alleging that "at all times mentioned in said amended complaint the plaintiff had and maintained law offices in the City and County of San Francisco, State of California"; denied that $200 or any part thereof was a reasonable sum of money to be allowed to plaintiff for and as attorneys' fees; does not deny nonpayment of principal or interest or attorneys' fees, but does deny that plaintiff is the owner and holder of the note.

[1] Defendant pleaded affirmatively that the said court had no jurisdiction of the subject of the action, and that the same was barred by the statute of limitations under the provisions of section 337 of the Code of Civil Procedure, and prayed that plaintiff take nothing by his action.

The case went to trial, and the court found that all the allegations of the amended complaint were true, except:

1. That $100 was allowed for attorneys' fees; and

2. That it was not true that the court had no jurisdiction of the subject-matter of the action, and was not true that the cause of action was barred by the provisions of said section 337, Code of Civil Procedure, and gave judgment, including interest, for the sum of $624.60 and costs.

The testimony of the plaintiff shows without contradiction that all of the allegations of the amended complaint are true. No evidence was offered by the defendant.

The appearance by general demurrer and by answer without "specially appearing" is a general appearance as to the *person.*

In Olcese v. Justice's Court, 156 Cal. 82, 103 P. 317, a demurrer was filed reading as follows: "The defendant in the above-entitled action, specially appearing for said purpose, demurs to the complaint in said action on the ground that the court has no jurisdiction of the person of this defendant or of the subject-matter of said action. Wherefore said defendant prays to be hence dismissed with his costs herein incurred." The demurrer was overruled. The defendant declining to amend, judgment by default was entered against him. The judgment was affirmed on appeal to the superior court. Thereupon the defendant sued out certiorari to review the judgment of the justice's court. Other matters were considered, not germane here. The court, at page 87 of 156 Cal., 103 P. 317, 319, says: "If a defendant wishes to insist upon the objection that he is not in court for want of jurisdiction over his person, he must specially appear for that purpose only, and must keep out for all purposes except to make that objection. Another reason, equally valid, is that if such defendant shall ask for any relief other than that addressed to his plea, he is seeking to gain an unconscionable advantage over his adversary, whereby, if the determination of the court be in his favor, he may avail himself of it, while, if it be against him, he may fall back upon his plea of lack of jurisdiction of the person. So it is well settled that, if a defendant, under such circumstances, *raises any other question,* or asks for any relief which can only be granted upon the hypothesis that the court has jurisdiction of his person, his appearance is general, though termed special, and he thereby submits to the jurisdiction of the court as completely as if he had been regularly served with summons. [Citing cases.] In the present case the defendant made his motion to quash the service of the summons. In this his appearance was undoubtedly special, as he limited it solely to a request for this specific relief. But he also demurred to the jurisdiction of the court over his person and *over the subject-matter of the action.* In this case plainly a demurrer to the complaint for lack of jurisdiction over his person could not lie. If in any conceivable case it could lie, such a demurrer also would be treated as a special appearance. But here he went further and demurred to the jurisdiction of the court over the subject-matter of the action, a request for relief which the court could not grant him, saving upon the theory that he was regularly before the court. It was relief, moreover, independent and apart from his plea to the jurisdiction of the person, and, if successful, would have worked a dismissal of the action upon an entirely distinct legal ground. That in so demurring he *waived the question of the jurisdiction of* *his person, and submitted himself to the jurisdiction of the court,* is abundantly settled." (Citing cases.) (Italics ours.)

Section 1014 of the Code of Civil Procedure provides: "A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him."

[2] The question now to be decided is whether the superior court had jurisdiction of the action independent of the waiver.

The record does not disclose that there is any municipal court functioning in San Mateo county, and we will assume that there is none. The amount involved was more than that of the justice's court jurisdiction (limited to less than $300). No motion for change of venue was interposed.

Section 396 of the Code of Civil Procedure provides: "If the county in which the action is commenced is not the proper county for the trial thereof, the action may, notwithstanding, be tried therein, unless the defendant, at the time he answers or demurs, files an affidavit of merits, and demands, in writing, that the trial be had in the proper county." This was not done.

Section 397 of the Code of Civil Procedure provides: "The court may, on motion, change the place of trial in the following cases: 1. When the county designated in the complaint is not the proper county."

That it is the proper county is evidenced by section 395 of the Code of Civil Procedure, which provides: "In all other cases [exceptions not germane], the action must be tried in the county in which the defendants, or some of them, reside at the commencement of the action."

The defendant resided in Contra Costa county; the plaintiff in San Mateo county.

As to municipal courts in San Francisco the statute provides: "Each municipal court shall have exclusive original jurisdiction of all civil cases and actions, arising within the city or city and county in which such municipal court is established, of the following classes: 1. All cases at law in which the demand, exclusive of interest, or the value of the property in controversy, amounts to two thousand dollars or less." Stats. 1929, p. 838, § 2.

Under the admitted facts the case at bar did not arise in the city and county of San Francisco, and the municipal court therein would not have exclusive original jurisdiction. If the note had been made and delivered in San Francisco a different case might arise.

The only other question then to be considered is whether the note being made payable by its terms in San Francisco, confers jurisdiction on the municipal court of the latter place, or ousted the superior court of San Mateo county of jurisdiction.

We find that section 832 of the Code of Civil Procedure, subdivision 7, relating to justice's courts, says:

"Actions in justices' courts must be commenced, and, subject to the right to change the place of trial, as in this chapter provided, must be tried: * * *

"7. When a person has contracted to perform an obligation at a particular place, and resides in another county, township, or city—in the township or city in which such obligation is to be performed, or in which he resides; and the township or city in which the obligation is incurred is deemed to be the township or city in which it is to be performed, unless there is a special contract in writing to the contrary."

This provision cannot be of any solace to the defendant, for it relates solely to actions in justices' courts, and is an exception and special provision relating thereto. We find no such provision as to contractual performance, and none have been called to our attention, relating to superior courts.

This then brings us to the consideration of the said question of jurisdiction. If the place of payment is to be considered as a contractual right to have the case tried only in the municipal court of San Francisco, it may be a void contract under the following cases: General Acceptance Corp. v. Robinson, 207 Cal. 285, 277 P. 1039; General Motors Accept. Corp. v. Codiga, 62 Cal. App. 117, 216 P. 383, and cases cited.

If we should hold otherwise, it might open the door to parties making their written obligations payable in any certain named court or county, notwithstanding they arose elsewhere, which might result in unnecessarily increasing the burden of such courts or counties. However, we refrain from especially passing on this point.

This disposition of the case makes it unnecessary to consider any other points raised, except as to the statute of limitations. It appears on the face of the record that this action was commenced within the four-year period provided by section 337, Code of Civil procedure, and that the action was commenced in time. As there is no municipal court in San Mateo county, the superior court of that county would have jurisdiction, and we so hold.

The judgment appealed from is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

122 Cal.App. 265

SANNES v. McEWAN.

Civ. 7223.

District Court of Appeal, Second District, Division 1, California.

March 31, 1932.

1. Appeal and error 🔑931(1).

Fact findings made by trial court must receive construction upholding rather than defeating judgment.

2. Trial 🔑404(1).

In action for damages for vendor's fraudulent representations in sale of property, court's failure to make extension of amount allowed for improvements made *held* not omission justifying reversal of judgment, where other findings made such amount certain.

3. Witnesses 🔑275(1).

Permitting introduction in evidence of contract attached to plaintiff's deposition during plaintiff's counsel's examination of defendant *held* not error (Code Civ. Proc. § 2055).

4. Depositions 🔑90.

Admission of plaintiff's deposition *held* not objectionable on ground there was no showing made that witness continued absent (Code Civ. Proc. § 2021, subd. 1).

5. Depositions 🔑53.

Qualifications of commissioner were fixed as of law at date commission was executed (Code Civ. Proc. § 2006).

6. Depositions 🔑111(1).

Defendant waived any objection to notary's taking deposition by appearing and submitting cross-interrogatories (Code Civ. Proc. § 2006).

7. Depositions 🔑53.

Without a showing that notary was interested party, regularity of deposition could not be questioned (Code Civ. Proc. § 2006).

8. Depositions 🔑73.

Where certificate of notary taking deposition in effect contained all material recitals required by statute, no error could be predicated thereon (Code Civ. Proc. § 2006).

9. Depositions 🔑76.

Admission of deposition *held* not erroneous on ground there was not attached to deposition certificate of court of record authenticating seal and signature of notary.

10. Judgment 🔑210.

Statutory provision requiring court to give decision within 30 days is merely directory (Code Civ. Proc. § 632).

11. Fraud 🔑52.

Where purchaser's action was one for damages arising from vendor's fraudulent representations as to title, and vendor had no title, it was immaterial that purchaser had been possessed of premises and had received rent.

12. Fraud 🔑64(1).

In purchaser's action for damages arising from vendor's fraudulent representations that he had title, amount of damages was question of fact for trial court trying case.

Appeal from Superior Court, Los Angeles County; William D. Dehy, Judge.

Action by Olaf Sannes against James McEwan. From a judgment for plaintiff, defendant appeals.

Affirmed.

James W. Creede, of Los Angeles, for appellant.

J. E. Beum, of San Pedro, for respondent.

TAPPAAN, Justice pro tem.

Judgment was entered below for the plaintiff, and defendant appealed. The cause of action alleged by plaintiff is one for damages for fraudulent representations made by defendant that he had the title to certain real property which he sold under contract to plaintiff. Plaintiff seeks to recover the purchase price, sums paid for taxes, and for moneys expended upon improvements attached to the land. Defendant's answer, as to the material issues, is a general denial.

[1, 2] Appellant's first assignment of error is that the court failed to make a finding of fact upon the issue as to the value of the improvements made by plaintiff on the property. Plaintiff alleges in his complaint that he has placed upon the land involved improvements of the reasonable value of $1,300. The answer of defendant avers "defendants have no knowledge or belief, sufficient to enable them to reply to said allegations or either of them, and basing their answer on that ground, deny the said allegations and each of them, both generally and specifically." The court by its findings finds that plaintiff, in reliance upon defendant's fraudulent representation as to title, placed upon the premises a three-room bungalow which became a permanent fixture, expended the sum of $1,211.15 by way of principal and interest, and the sum of $70.01 for assessments and taxes levied against the premises. The court then finds the plaintiff has been damaged in the sum of $1,931.16, "after deducting all lawful credit and setoffs." From an examination of the findings as a whole, it is plain that the court only considered three elements of damages; improvements, principal and interest, and taxes. In the last two named elements,

the court fixed the amount in exact amount, but in the case of the improvements it failed to extend the amount in money, though it included it in the total amount found to be due. Under the circumstances here outlined, it cannot be said that the court did not find upon this issue, the amount being readily ascertained from an examination of the findings as a whole. Certum est quod certum reddi potest.

At the trial respondent introduced testimony as to the reasonable cost of the improvement, and appellant controverted this by testimony as to the present value of the improvement. The improvement was made some years before the trial. There was no attempt by appellant to prove the cost of the improvement or what relation the present value was to the cost of the improvement. "The appellant is not prejudiced unless the court shall fail to make such findings in his behalf as will countervail its other findings; and, as error in the court below is not to be presumed, but must be shown by him, it is incumbent on him to produce before this court the evidence that was presented to that court, in order that we may determine whether any error was committed in failing to make such findings." Winslow v. Gohransen, 88 Cal. 450, 452, 26 P. 504, 505. Under the record as presented here, any finding that the court might have made would have been adverse to the appellant, and would not be error sufficient to authorize the reversal of the judgment. Winslow v. Gohransen, supra. "Not only are all intendments in favor of the regularity of the action of the trial court, but 'it is a well-settled rule that the findings of fact made by the trial court are to receive such a construction as will uphold rather than defeat its judgment thereon.' Paine v. San Bernardino, etc., Co., 143 Cal. 656, 77 P. 659." Pacific States Corp. v. Arnold, 23 Cal. App. 672, 674, 139 P. 239. "The entire findings and conclusions of law are to be construed to uphold the judgment, when from the facts found, other facts may be inferred which will support the judgment." Terry v. Southwestern Building Co., 43 Cal. App. 366, 370, 185 P. 212, 214. The failure of the trial court to make the extension of the amount where, as here, the other findings make that amount certain, is not such an omission as to justify a reversal of the judgment.

[3] Appellant specifies certain error alleged to have occurred in reference to a certain deposition of the plaintiff, Olaf Sannes. It appears that attached to this deposition as an exhibit was one of the contracts involved in the sale of the premises in question by defendant to plaintiff. The defendant was examined by plaintiff's counsel under the provisions of section 2055 of the Code of Civil Procedure as to this contract. The trial court over defendant's objection permitted the contract to be received in evidence. The objection made was on the ground that the contract, being attached to the deposition, could only be admitted with the whole deposition. The testimony of the witness taken in the deposition was not involved in this phase of the matter. We know of no rule of law that would prohibit an instrument used as an exhibit in relation to the testimony of one witness which would bar it from being used in the examination of another witness, provided, of course, that the questions directed to the witness were otherwise competent and proper. No particular sanctity or immunity attaches to an instrument by reason of its attachment to a deposition. The same documents are made use of, and properly, in more than one action or proceeding. There was no error in permitting the examination of the witness or in the receiving of the contract in evidence under the circumstances.

[4] Appellant objects to the deposition on the ground that there was no showing made at the trial that the witness continued absent. The witness was the plaintiff, and his deposition could have been read in evidence by either party. Code Civ. Proc. § 2021, subd. 1; section 2022; Unruh v. Nelson (Cal. Sup.) 297 P. 888.

[5-7] Appellant next objects that the certificate of the notary who took the deposition fails to show that he was a "disinterested party," as provided by section 2006 of the Code of Civil Procedure. At the time the commission was issued by the court, the section referred to made no such provision; the amendment incorporating that provision becoming effective some months thereafter. The qualifications of the commissioner were fixed as of the law at the date the commission was issued. In any event it would seem that appellant has waived any objection he might have had by appearing and submitting cross-interrogatories. He neither made nor offered to make any affirmative showing that the notary was an interested party. In other jurisdictions under somewhat similar statutes it has been held that, without such showing, the regularity of the deposition cannot be questioned. Giles v. Paxson (C. C.) 36 F. 882; Younce v. Broad River Lumber Co., 155 N. C. 239, 71 S. E. 329, Ann. Cas. 1912C, 107.

[8, 9] The other objections to the certificate are of a highly technical nature, and, inasmuch as the certificate of the notary in effect contains all the material recitals required by the statute to be made, no error can be predicated thereon. Mills v. Dunlap, 3 Cal. 94; Short v. Frink, 151 Cal. 83, 90 P. 200; Hirshfeld v. Dana, 193 Cal. 142, 223 P. 451. Appellant complains that there was not attached to the deposition, as returned a certificate of a court of record authenti-

cating the seal and signature of the notary. Appellant fails to cite any authority for this objection, and a careful search has failed to reveal any law to sustain appellant's position. In some cases the acts of notaries must have such authentication, but in these instances it will be found to have been required by some special statute, as in the case of section 1189 of the Civil Code. Holland v. Hotchkiss, 162 Cal. 366, 376, 123 P. 258, L. R. A. 1915C, 492. The trial court did not commit error in the admission of the deposition.

[10] There is no merit in appellant's objection that the court failed to give its decision within the thirty days specified in section 632 of the Code of Civil Procedure. This provision is merely directory, and appellant does not contend that he has suffered detriment by reason of the delay. Hutchinson v. Marshall, 49 Cal. App. 307, 193 P. 164.

[11] Appellant calls the court's attention to the fact that respondent has been possessed of the premises in question during the time the payments were being made to him, and had received some moneys by way of rent as well. This was immaterial under the circumstances of this case. The appellant was found to have no title to the premises, and the action was not one for rescission, but one for damages arising from appellant's fraudulent representations as to the title. Blake v. Arp, 180 Cal. 144, 179 P. 683.

[12] There is sufficient evidence in the record to support the findings of the court and the judgment. The court was justified in finding more than nominal damages. Appellant, though not possessed of the title, received respondent's money and permitted him to improve the premises, all in reliance upon appellant's representations. There is nothing in the record tending to show that appellant will ever be in a position to complete his contract with respondent. The amount of the damages is a question of fact to be found by the trial court, and its findings on that question are supported by the record.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

122 Cal.App. 242

WITHROW v. NATIONAL SURETY CO. et al.

Civ. 4532.

District Court of Appeal, Third District, California.

March 30, 1932.

1. Fraudulent conveyances 🔑206(2).

"Creditor" within law relating to fraudulent conveyances is one in whose favor an obligation exists by reason of which he is or may become entitled to payment of money (Civ. Code, § 3430).

[Ed. Note.—For other definitions of "Creditor," see Words and Phrases.]

2. Fraudulent conveyances 🔑206(2).

One having claim arising from tort is "creditor" as respects fraudulent conveyances before commencement of action as well as after.

3. Fraudulent conveyances 🔑111.

One threatened with suit for personal injuries who quitclaimed realty to sister without consideration to enable him to effect "fair" settlement with injured party *held* not entitled to assert that grantee held property in trust for grantor so as to defeat rights of creditor levying execution while title to property was in grantee, although lien of judgment did not attach until after reconveyance.

4. Fraudulent conveyances 🔑172(1).

Conveyance in fraud of creditors vests title in grantee except as against grantor's creditors.

> In such case, while the grantee holds title, the property is subject to the claims of his creditors to the same extent as any other property to which he has title, and neither the fraudulent grantor nor grantee can set up the fraudulent character of the conveyance as against the creditors of the grantee.

5. Attachment 🔑184.

Attachment lien is merged in that of judgment and confers priority in judgment lien.

Appeal from Superior Court, Los Angeles County; William Hazlett, Judge.

Action by Charles W. Withrow against the National Surety Company and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

L. E. Dadmun, of Los Angeles, for appellant.

Whitson & Sims, Everett W. Mattoon, and S. V. O. Prichard, all of Los Angeles, for respondents.

Mr. Justice pro tem. COMSTOCK delivered the opinion of the court.

Action to quiet title to real estate and to enjoin defendants from selling the same under execution.

The evidence is without conflict; practically all of the facts having been stipulated to at the trial. The material facts are as follows: Plaintiff was the owner of a lot of land in Los Angeles, improved with a small frame house and garage, upon which he resided. In

April, 1926, a collision occurred between the automobile of plaintiff and one Constance Beggs. Suit for damages for personal injuries was threatened against plaintiff. He denied liability, but, nevertheless, upon advice of friends, conveyed his said real estate to his sister, Anna F. Hockensmith, without consideration other than the verbal agreement between him and his sister that she should hold title to the lot temporarily on account of said threatened lawsuit and pending a settlement thereof. The conveyance was by quitclaim deed absolute in form, without condition or reservation of title or interest in plaintiff contained therein. While the title stood in the name of Anna F. Hockensmith, she and her husband were sued by National Surety Company, and an attachment was levied in said action upon the said real property. Subsequently to the levy of said attachment, and while the same was in force, Anna F. Hockensmith reconveyed the property to the plaintiff by quitclaim deed. Prior to such reconveyance, plaintiff had made a complete settlement of the Beggs claim for the sum of $225, and obtained a release. After the deed back to plaintiff, judgment was recovered by National Surety Company in its action against the Hockensmiths, and execution thereon was issued, under which the defendant sheriff proceeded to sell the property. Plaintiff seeks the interposition of equity to prevent such sale and to quiet his title.

The trial court gave judgment that plaintiff be denied a decree quieting title in his favor; that defendant National Surety Company recover its costs against plaintiff; that National Surety Company be expressly authorized and permitted to sell the property under said execution; and that any injunction theretofore issued in the action restraining said sale be dissolved. Plaintiff moved for a new trial and to vacate the judgment and for a different judgment upon the findings. These motions were denied. This appeal is taken from the judgment and from the order denying said motions.

Plaintiff seeks to set in motion the machinery of a court of equity to relieve him from a condition brought about by his voluntary act. He who seeks the aid of a court of conscience must present himself in a blameless attitude or be denied relief. It is a fundamental principle of equity jurisprudence that whenever a party who, as actor, seeks to set judicial machinery in motion and obtain some remedy, has violated conscience or good faith, or other equitable principle, in his prior conduct, then the doors of the court shall be shut against him in limine. 1 Pomeroy's Eq. Jur. § 397. This doctrine does not rest upon any comparison of equities between parties, but squarely upon the foundation that, in order to qualify himself to be heard at all in a court of equity, one must speak consistently with the very principles which have occasioned its existence. Even though it would be manifestly unfair for a person to whom a conveyance conceived in fraud was executed without consideration to keep the property as against the fraudulent grantor, still equity is so jealous of its principles that it turns away at its very threshold those who have been party to a wrong. Allstead v. Laumeister, 16 Cal. App. 59, 116 P. 296. It is obvious that, if these principles apply to the state of facts presented by the record here, appellant cannot have relief.

Appellant contends that there was no intent to defraud creditors shown or which could properly be inferred from his acts in conveying his land under the circumstances. His position is that he put his property out of his name and thus gave himself the appearance of being penniless for the purpose of enabling him to make a just settlement with the person claiming damages from him, that it was done because his friends advised him he would be "held up" if the injured person knew he had any real property, and that the transfer was consistent with a prudential regard for his own interest as well as the utmost good faith towards Constance Beggs. We are of the opinion that this position cannot be maintained. There is nothing in the record which shows that the Beggs claim was in any way unconscionable or extortionate or that any effort was being made to "hold up" the appellant. It seems to us a one-sided view of justice which assumes that a just settlement cannot be made by one who owns property. The law gives to one who has been injured in his person or property as a proximate result of the negligence of another, and without negligence upon his own part, contributing to his injuries, the right to recover such damages as will fairly and fully compensate him for all pecuniary loss suffered thereby. Such compensation presupposes the ability upon the part of the negligent party to make pecuniary amends for the wrong done and the damage inflicted. If there is no financial ability to rectify the wrong, then justice has been cheated. On the other hand, for one free from negligence the law affords adequate defenses. We perceive no measure of justice or good conscience in an act which puts one in a position to negotiate for settlement of a claim based upon rights guaranteed under the law by falsely saying to the claimant: "Though you assert my liability and I deny it, still it will do you no good to sue me, for if, perchance, you recover a judgment against me I have no property and shall be unable to satisfy it." Nor can we recognize that such a course would be consistent with a prudential regard for one's own interest and the utmost good faith towards the claimant. Rather it should be described as a selfish and unfair regard for one's own interest and an unconscientious disregard of the lawful rights of others, conceived in fraud and based upon falsity.

[1, 2] The principles discussed herein have been applied to deny one relief in equity against his own conveyance in fraud of creditors. Allstead v. Laumeister, supra; note, 7 A. L. R. 150. Constance Beggs was a creditor of plaintiff. A creditor within the meaning of our law relating to fraudulent conveyances is one in whose favor an obligation exists by reason of which he is or may become entitled to the payment of money. Civ. Code, § 3430. One having a claim arising from tort is a creditor, as well before the commencement of an action as after. Chalmers v. Sheehy, 132 Cal. 459, 64 P. 709, 84 Am. St. Rep. 62; Cioli v. Kenourgios, 59 Cal. App. 690, 211 P. 838. In Holliday v. Holliday, 10 Iowa, 200, the contention was made that a conveyance was executed to a party other than the true owner because he feared he would be prosecuted upon a demand which he deemed unjust. Relief in equity was denied the complainant because equity will neither enforce a reconveyance nor enforce a secret trust in favor of a fraudulent grantor.

[3] Since we take the view that plaintiff's conveyance was conceived in fraud, it is plain that no enforceable trust arose. In Alaniz v. Casenave, 91 Cal. 41, 47, 27 P. 521, 523, it was said that "courts will not allow a trust to be proven by a party to the fraud, if the trust was created for a fraudulent purpose."

[4] A conveyance in fraud of creditors vests title to the property transferred in the grantee, except as against the creditors of the grantor. While the grantee holds such title, the property is subject to the claims of his creditors to the same extent as any other property to which he has title. Neither the fraudulent grantor nor grantee can set up the fraudulent character of the conveyance as against the creditors of the grantee. This proposition is plainly stated in 27 C. J. 665, where many cases are cited which amply support the text.

Appellant relies strongly upon the case of Chamberlain v. Chamberlain, 7 Cal. App. 634, 95 P. 659, in support of his claim that his act was consistent with a prudential regard for his own interest and with the utmost good faith towards Constance Beggs. But a cursory examination of that case discloses that the grantee had defrauded the grantor into making the conveyance by intentionally frightening him into the idea that, if he did not do so, creditors of an indebted corporation in which he held stock would pursue their remedy upon his stockholder's liability against his property. In support of the judgment of the court below, it was presumed that the plaintiff's act was free from fraud. This view was taken especially because of the importunities of the grantee and because no creditor appeared to have been actually defrauded. Further, it was held that, even conceding that the conveyance was influenced somewhat by the grantor's desire to preserve his property from sequestration by the creditors of the corporation, still equity would not permit the grantee to lay a trap for him and thereafter retain the fruits of his perfidy upon the ground that the grantor yielded too readily to temptation to save himself at a possible expense of creditors, and that the greater offense of the tempter overshadowed and rendered innocuous the weakness of the one of whom advantage was taken. The doctrine thus expounded was but an application of an exception to the general rule that equity will not grant relief to one who has made a deed to defraud creditors, such as was made in Donnelly v. Rees, 141 Cal. 56, 74 P. 433. In the case at bar, there was no fraud on the part of the grantee which induced plaintiff to make the deed. The scheme was his, founded upon the mere advice of friends, not upon fraud or undue influence by another, sufficient to overcome his volition. We think the general rule, and not the exception, applies here.

[5] That the lien of the judgment did not attach until after the property was reconveyed to plaintiff is of no avail to him. The lien of an attachment is merged in that of a judgment, and confers a priority in the lien of the judgment. Brun v. Evans, 197 Cal. 439, 241 P. 86; 3 Cal. Jur. 487.

The points which we have discussed are decisive of the case, and render detailed attention to other propositions mentioned in the briefs unnecessary.

The judgment is affirmed.

We concur: PRESTON, P. J.; R. L. THOMPSON, J.

122 Cal.App. 408

PEOPLE v. KEYLON.

Cr. 139.

District Court of Appeal, Fourth District, California.

April 7, 1932.

1. Perjury ⚷34(4).

Evidence corroborating prosecuting witness' testimony *held* sufficient to sustain conviction for perjury (Code Civ. Proc. § 1968).

2. Criminal law ⚷393(1).

Defendant cannot have testimony he voluntarily gave at burglary prosecution forming basis of perjury prosecution, excluded on ground accused need not give evidence against himself.

3. Criminal law ⚷703.

Prosecutor's cross-examination of defendant in perjury prosecution, who admitted falsity of extrajudicial statement, whether he lied about such statement when it became material, *held* not prejudicial misconduct.

4. Criminal law ⚷885.

Recommendation of leniency in verdict of guilty of perjury *held* surplusage.

5. Infants ⚷68.

Denying motion to sentence defendant convicted of perjury, as juvenile made after pronouncement of judgment, *held* not abuse of discretion, where defendant was arraigned in October and sentenced following December.

6. Criminal law ⚷1023(3).

Trial court's order denying probation made before judgment is not appealable.

7. Criminal law ⚷982.

Granting or refusing application for probation by defendant convicted of perjury was within trial court's discretion.

8. Criminal law ⚷982.

Trial court should have permitted defendant convicted of perjury to file formal application for probation and proceeded to final determination of same.

9. Criminal law ⚷1177.

Trial court's refusal to act on application for probation by defendant convicted of perjury *held* not prejudicial because defendant has right to apply for probation after affirmance of conviction on appeal.

Appeal from Superior Court, Fresno County; H. S. Schaffer, Judge.

Robert Keylon was convicted of perjury, and he appeals.

Affirmed, with directions.

J. C. C. Russell, of Hanford, for appellant.

U. S. Webb, Atty. Gen., John D. Richer Deputy Atty. Gen., and Glenn M. De Vore, Dist. Atty., and Chester R. Andrews, Deputy Dist. Atty., both of Fresno, for the People.

MARKS, J.

In an information filed by the district attorney of Fresno county appellant was charged with the crime of perjury. He was convicted before a jury and sentenced to confinement in the penitentiary. The court denied his motion for new trial. He is here on appeal from the judgment and from the order denying the motion.

The prosecution for perjury grew out of the testimony of appellant given as a witness in a preliminary examination of two defendants charged with burglary. The circumstances leading up to the burglary charge may be briefly summarized as follows: A. A. Singleton was the owner of two truck tires which he had stored in the living quarters of William Lamm, one of his employees. Chester Boyd and Richard Kerr were the lessees of a small two-room house on Olive street in the city of Fresno at which a drinking party was held on the afternoon and night of August 15, 1931. Some time during this night the tires were removed from the Lamm residence. They were subsequently found in the possession of a secondhand dealer who had purchased them from Boyd and Kerr. Boyd and Kerr were charged with burglary of Lamm's house and stealing the tires.

It was the theory of the two defendants at their preliminary examination that they were not guilty of burglary, because, as they contended, one of them entered the Lamm house at Lamm's invitation and removed the tires with his consent and sold them with his permission. In support of this defense, the appellant here who was a friend of both Boyd and Kerr, voluntarily testified as a witness in their behalf that he with others arrived at the Olive street house at about 9 o'clock on the evening of August 15, 1931, and remained there until the afternoon of the following day, with the exception of a trip to Lamm's residence, which he made in his automobile, accompanied by Boyd; that, upon reaching the Lamm residence, he remained in the automobile while Boyd went to the door of the Lamm house, where he was met by Lamm and taken into the house; that in a few moments Lamm and Boyd returned rolling the two truck tires to the automobile and loaded them; that subsequently on the morning of August 16, 1931, appellant saw Lamm at the Olive street house where Lamm spent at least two hours in the early morning of that day.

It is apparent from the record that appellant voluntarily offered himself as a witness for the defendants on their preliminary examination, that he was duly sworn before testifying, and that this testimony was relevant, competent, and material to the defense offered by his two friends.

[1] Appellant maintains that his conviction in the instant case was secured upon the testimony of Lamm alone, uncorroborated by other evidence, as required by the provisions of section 1968 of the Code of Civil Procedure. We cannot agree with this contention. Lamm testified that he had not seen either Boyd or appellant at his home on the evening of August 15, 1931; that he did not assist Boyd in taking the tires from his house and in loading them into appellant's automobile; that he gave no one permission to either take the tires or sell them; that he was not at the Olive street residence of Boyd and Kerr on the morning of the 16th of August, 1931, and did not see the stolen tires there. Two other witnesses testified that either Boyd or Kerr asked appellant for the use of his automobile on the evening of August 15, 1931, which was given; that Boyd and Kerr left together in this automobile unaccompanied by appellant; that appellant did not leave the Olive street house between the time of his arrival there at about 9 o'clock on the evening of August 15th, until the afternoon of August 16, 1931; that the tires were in the Olive street house on the morning of August 16th. One witness testified to seeing tires unloaded from an automobile and rolled towards the rear of the Olive street house on the evening of August 15th. This furnishes sufficient corroboration of Lamm's testimony to support the verdict of the jury and the judgment of the court. People v. McGee, 103 Cal. App. 149, 284 P. 229.

[2] Appellant complains of the overruling by the trial court of his objection to the reporter reading in evidence his testimony taken and reported at the preliminary examination of Boyd and Kerr. He maintains that, because a defendant is not required to give evidence against himself, this testimony should not have been admitted against him. There is no merit in this contention. The rule that a defendant cannot be required to give evidence against himself cannot be so distorted and extended as to exclude evidence given by him freely and voluntarily and under oath in another proceeding where such evidence furnishes the basis of a charge of perjury against him. This rule was never intended to furnish a shield behind which a defendant could hide and thus protect himself from the results of his willful perjury.

[3] In cross-examining appellant concerning an extrajudicial statement made by him which he admitted was false, the following question was asked him by an assistant district attorney and was assigned as misconduct: "Then when it made a difference you lied about it?" While the language of the question is somewhat intemperate, it does not furnish a ground for a reversal, as it is self-evident from the record that appellant either falsified in his testimony at the preliminary examination of Boyd and Kerr or was untruthful in his extrajudicial statement. The same may be said of several other similar questions asked of appellant.

Appellant complains of other acts of purported misconduct of the district attorney. An examination of the record satisfies us that these assignments of error do not furnish any grounds for a reversal of the judgment within the rules announced in the cases of People v. Hodges (Cal. App.) 2 P.(2d) 174; People v. Ruef, 14 Cal. App. 576, 114 P. 48, 54; People v. Ye Foo, 4 Cal. App. 730, 89 P. 450; People v. Dykes, 107 Cal. App. 107, 290 P. 102, and the rules announced and cases cited in 8 Cal. Jur. 619.

Appellant complains of many rulings of the trial court on his objections to questions asked by the deputy district attorney. These are numerous, and no good purpose could be served by a review of them here. We have carefully examined the entire record and considered all of them. They do not present sufficiently prejudicial errors to warrant a reversal of the judgment in view of the very evident guilt of the appellant and the justice of the verdict and judgment. It might be noted, however, that the trial court permitted both sides to wander far from the real issues involved in the trial of the case. Where evidence is clearly irrelevant, incompetent, and immaterial, and some of it hearsay, no good purpose can be served in admitting it, even though its admission results in no real prejudice to the cause of the accused. Trial courts should follow well-established rules of evidence.

[4] To its verdict finding the appellant guilty as charged, the jury added the following: "We the jury recommend leniency." Such a recommendation is mere surplusage, and may be disregarded as no proper part of the verdict. People v. Lopez, 210 Cal. 55, 290 P. 582; People v. Eickholt (Cal. App.) 7 P. (2d) 356; 8 Cal. Jur. 407.

[5] After the pronouncement of the judgment, counsel for appellant moved the court to set aside the judgment and sentence appellant to Ione as a juvenile, suggesting for the first time that he was seventeen years of age. This motion was denied. Appellant was first in the court below for arraignment on October 16, 1931. The trial occupied several days, and he was sentenced on December 1, 1931. His age at that time, according to his testimony, was about seventeen years and seven months. This was disputed by the district attorney, who offered to prove him older. He had been in serious trouble twice before. We conclude the facts before us do not show a breach of discretion on the part of the trial court in denying this motion which would

require the interference of this court, as there is no showing that the case was not properly in the superior court.

Before the pronouncement of judgment, counsel for appellant addressed the court in part as follows: "At this time I am going to ask the court for probation on this case. * * * At this time I ask for probation, ask that he be released on probation." The trial court replied: "That is within the discretion of the court whether it is referred to the probation officer or not. * * * I think I will deny the reference. The boy has been up on two other charges, and perjury is a sort of crime, and it is fitting the community is given an example of punishing perjury, so I think I will deny the reference to the probation officer." The trial court made no order either granting or denying the request for probation, if the statement of counsel could be considered a formal application for probation. If it be not so considered, the filing of such a formal application was undoubtedly excused by the foregoing and other remarks of the court during the discussion of the matter.

[6] An order denying probation, "made before judgment is not appealable because it may be reviewed on the appeal from the judgment. People v. Freithofer, 103 Cal. App. 165, 284 P. 484; People v. Lovelace, 97 Cal. App. 228, 275 P. 489. Under this amendment of 1927, it is now held that it is a right of a defendant to apply to the court for leave to file an application for probation. The granting or refusing to allow the defendant to make such an application, together with the granting or refusing of probation, is a matter within the sound discretion of the court. However, if in refusing to permit the defendant to make an application for probation, the court abuses this discretion, such refusal is subject to correction by writ of mandate, if the application for probation is made after judgment." People v. Payne, 106 Cal. App. 609, 289 P. 909, 910.

In Lloyd v. Superior Court, 208 Cal. 622, 283 P. 931, 935, the Supreme Court granted a peremptory writ of mandate requiring the respondent court "to entertain, hear and determine the application of petitioner for probation," after the trial court had concluded that it had no authority to entertain the same. In deciding the question, the Supreme Court said: "From the foregoing considerations we are of the opinion that it was the intention of the Legislature, by its last amendment of section 1203 of the Penal Code, adopted in 1927 (St. 1927, p. 1493), expressly removing the limitation of time imposed by the express terms of its earlier amendment, to invest trial courts with the power under said amended section to hear and determine applications for probation at any time prior to the execution of sentence, and that without reference to whether the defendant had in the meantime undertaken to prosecute a vain and unsuccessful appeal. It may be said in conclusion, and without detailed discussion, that we are of the opinion, based upon the previous action of this court in similar proceedings, that the application for a writ of mandate is a proper form of remedy, regardless of the fact that an appeal might lie from the order of the trial court either granting or refusing probation, since we are of the view that an appeal in cases of this character would not furnish to either the people or the defendant a plain, speedy, and adequate remedy."

[7-9] It is evident that, if the trial court is under such duty to "hear and determine applications for probation" that its action can be controlled by mandate, the duty to receive and entertain such applications must be included within the duty to hear and determine them. It follows that the court below should have permitted appellant to file a formal application for probation and should have proceeded to a final determination of the same. It does not follow that the trial judge will be under any duty to grant such application or to do anything more than to fairly hear and consider it and dispose of it by such order as in his discretion he may consider proper. As appellant has the right to apply for probation after the affirmance of the judgment on appeal (Lloyd v. Superior Court, supra), where no former application has been passed upon, no prejudicial error resulted from the failure or refusal of the trial court to act on the application formerly made. The error may be corrected by permitting appellant to renew his application for probation after affirmance of the judgment, if he be advised that it be for his best interest so to do. The trial court should then hear it and make an appropriate order determining the matter.

The judgment and the order appealed from are affirmed, with directions to the trial court to take appropriate action in the matter of the application for probation, if one be made, in conformance with the views herein expressed.

We concur: BARNARD, P. J.; Jennings, J.

122 Cal.App. 50

PEOPLE v. KING.

Cr. 61.

District Court of Appeal, Fourth District, California.
March 21, 1932.

1. Criminal law 🔑1144(13).

On contention that evidence is insufficient to support verdict of guilty, reviewing court assumes evidence is true.

2. Larceny 🔑55.

Evidence justified conviction for stealing automobile (Pen. Code, § 971).

3. Larceny 🔑64(7).

Possession of stolen property is not sufficient to prove theft thereof by possessor, but recent possession, together with guilty behavior on defendant's part, is sufficient.

4. Criminal law 🔑369(1).

Ordinarily, evidence of similar offenses, separate and isolated from crime charged, is not admissible.

5. Criminal law 🔑370, 371(1), 372(1).

Evidence of similar offenses is admissible when it tends to establish intent or guilty knowledge, motive, or common scheme embracing commission of two or more crimes so related that proof of one tends to establish other.

6. Criminal law 🔑370, 371(2), 372(5).

In prosecution for stealing automobiles, evidence relating to similar offenses *held* competent to prove guilty knowledge, common plan, and general conspiracy to commit series of automobile thefts (Pen. Code, § 182).

7. Criminal law 🔑1170½(5).

Error, if any, in denying accused right to cross-examine witness upon location of secret numbers on stolen automobiles after witness testified on subject on direct examination *held* not prejudicial, where stolen car was otherwise sufficiently identified (Const. art. 6, § 4½; Pen. Code, § 1258; Code Civ. Proc. § 1881, subd. 5).

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Clarence King was convicted of grand theft, and he appeals.

Affirmed.

Stephen Bedford, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Dep. Atty. Gen., for the People.

THOMSON, Justice pro tem.

By an information filed in the superior court, defendant and appellant Clarence King and one Edward L. Dobbs were charged jointly with the commission by them of the crime of grand theft, they being charged with stealing an automobile belonging to Katharine E. Smith; and by another information filed in said court defendant and appellant alone was charged with the commission by him of the crime of grand theft, he being charged with stealing an automobile belonging to Clark Blecka. The two cases were consolidated for trial. The jury returned a verdict of not guilty of the charge of stealing the Blecka car, and guilty of the charge of stealing the Smith car. This appeal is taken by defendant King from the judgment of conviction, and from the order of the trial court denying his motion for a new trial.

Appellant makes two general assignments of error: First, that the evidence is insufficient to support the verdict; second, that the trial court erred in denying to appellant the right to cross-examine a witness upon the location of secret numbers on an automobile after said witness testified on that subject on direct examination.

[1] With reference to appellant's first contention, we are convinced that there was ample evidence adduced at the trial to support the verdict. The evidence, which for the purposes of this appeal we must assume is true, shows that on the evening of April 9, 1931, Mrs. Smith left her Ford coupé automobile on a public parking lot in the city of San Bernardino while she attended a theater. At the close of the show she returned to the parking lot, but the car was not there. Mrs. Smith had not given any one permission to take the car, and whoever took the car took it without her knowledge or consent. The evidence further shows that on or about April 9, 1931, one Al Globenfelt, one of the proprietors of an automobile supply and automobile wrecking business in Fresno, sold to said Dobbs (operating under the name of George Brown) the salvaged chassis and motor of a Ford car, which had belonged to a Mrs. Miles, but had been in a fire, and was sold to Globenfelt by an insurance company. Two or three days thereafter Dobbs appeared at Globenfelt's place of business and offered to sell him a Ford coupé. Dobbs told Globenfelt that the coupé would be there in a few minutes, and a few minutes after that appellant drove a Ford coupé to Globenfelt's place of business. Dobbs thereupon introduced appellant to Globenfelt under the name of Miller. Globenfelt purchased the car; the negotiations for its sale and the agreement as to the purchase price being had and concluded in the presence of appellant, although the evidence did not show whether or not he was present when the purchase price was actually paid to Dobbs. This car bore the license number and motor number of the Miles

car, and Dobbs transferred the pink certificate of ownership of the Miles car to Globenfelt. This car was later identified as the Smith car by Mrs. Smith, who identified the car as hers by "a mar on the upholstery," and by her son, who identified the car as his mother's car by two small holes which he had drilled on the bracket between the headlights for the purpose of attaching a siren. It was also identified by a witness named Potts, whose testimony will be discussed later in this opinion. Dobbs, the other defendant charged in the information relating to the Smith car, testified at the trial that he stole the Smith car, and he entered a plea of guilty to that charge. At the time of the arrest of the appellant, he was in possession of another stolen car in the city of Bakersfield. At that time he gave his name as Albert Forbes. When asked about that car he said to the peace officer who arrested him: "If you think I stole that car it is your business to prove it. I am admitting nothing."

[2] Without considering the testimony of the witness Potts, we think the facts above outlined are sufficient to justify the verdict. Such evidence is sufficient to at least constitute appellant an accomplice of Dobbs in the theft of the Smith car. "* * * All persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, shall hereafter be prosecuted, tried, and punished as principals. * * *" Pen. Code, Cal., § 971.

[3] It is true that possession of stolen property alone is not sufficient to prove the theft thereof by the party in whose possession it was found, but the recent possession, together with guilty behavior on the part of a defendant, is sufficient. In the instant case, appellant was in possession of the stolen Smith car, in a disguised condition, within three days after it was stolen. He was accompanied by the man who admittedly did steal this car; he acted under an assumed name; he was present and acquiesced in the sale of this stolen car to Globenfelt; and the jury could very well have inferred from the evidence that he acquiesced in the acceptance of, and shared in a division of, the purchase price; and, when arrested, appellant again gave an assumed name. Such evidence is sufficient to find appellant guilty of the theft of the Smith car. People v. Robertson (Cal. App.) 3 P.(2d) 946; People v. Lang, 142 Cal. 482, at page 484, 76 P. 232; People v. Fain, 100 Cal. App. 439, 280 P. 162.

[4-6] In addition to the evidence mentioned above, the record shows an abundance of evidence tending to show that Dobbs and appellant were operating under a common scheme or plan to steal automobiles, disguise them, and dispose of them in an altered condition. Evidence was introduced to prove that Dobbs and appellant together disposed of an automobile belonging to one Clark Blecka. There was evidence to show that this automobile was stolen; that it was afterwards altered by substituting a motor which had been in a burned salvaged car, by attaching the license plates of the burned car to the Blecka car; and that the Blecka car, as thus altered, was then sold to Globenfelt and the pink certificate of ownership of the burned car assigned and delivered to Globenfelt with the Blecka car. A witness testified that Dobbs and appellant participated together in the sale of the Blecka car. Here we have the identical plan or scheme used with the Smith car, at a time prior to the theft of the Smith car. In this connection it is interesting to note the following portion of the testimony of Al Globenfelt, while testifying about stolen cars which had been sold to his firm by Dobbs and appellant:

"Q. You say there were some others there also brought in of the same kind? A. Yes, sir, quite a few.

"Q. Some others by these defendants? A. Yes, sir, about 50 of them.

"Q. You mean 50 that were stolen? A. Stolen cars, yes, sir."

Evidence of the other crimes was competent to show that appellant had guilty knowledge of the source of the Smith car, and also to show a general plan or scheme engaged in by Dobbs and appellant. Ordinarily evidence of the commission by a defendant of other similar offenses, which are separate and isolated from the crime charged, is not admissible; but there are certain well-recognized exceptions to this rule, among which is the exception that such evidence is admissible when it tends to establish intent or guilty knowledge, motive, or a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other. 8 Cal. Jur., pp. 61 and 69; People v. McGill, 82 Cal. App. 98, 102, 255 P. 261. The evidence in this case relating to the commission of other crimes, including the possession of a stolen automobile at the time of the arrest of appellant, was competent to prove the following facts: First, that appellant had guilty knowledge of the source of the Smith car (People v. Zimmerman, 11 Cal. App. 115, 118, 104 P. 590); second, that the act of appellant in driving the Smith car to the Globenfelt place of business was merely a part of a common plan, system, or scheme jointly participated in by Dobbs and appellant to steal automobiles, disguise them, and dispose of them in their altered condition (People v. Berry, 191 Cal. 109, 215 P. 74; People v. Cordish, 110 Cal. App. 486, 498, 294 P. 456; People v. Stutsman, 66 Cal. App. 134, 225 P.

477; People v. Sindici, 54 Cal. App. 193, 194, 201 P. 975; People v. Zimmerman, supra); and third, that prior to the commission of the offense charged, Dobbs and appellant had entered into a general conspiracy to commit a series of automobile thefts, and that the offenses on which appellant was tried were but a part of this general underlying conspiracy. Pen. Code of Cal., § 182; People v. Wilson, 76 Cal. App. 688, 694, 245 P. 781. We are of the opinion that, even if it were doubtful that the evidence, other than that of similar offenses, is sufficient to warrant the conviction, still, when considered with the evidence of other offenses, there can be no doubt that the evidence is sufficient to sustain the conviction of appellant.

Appelant contends, however, that, because he was acquitted on the charge of stealing the Blecka car, all of the evidence offered in support of that charge must have been disregarded by the jury in arriving at its verdict in the case now on appeal; and that the remaining evidence was insufficient to support a conviction. We have already disposed of this contention, so far as it relates to the sufficiency of the evidence in the absence of evidence of other thefts, and we do not agree with appellant's conclusion that the jurors must have disregarded the evidence relating to the Blecka car because they acquitted appellant on the charge of stealing the Blecka car. The evidence in regard to the Blecka car was properly admitted at the trial, and we cannot determine what part of it was satisfactory and convincing to the jury and what part of it was not. The jurors might have had a reasonable doubt as to one particular element necessary to prove appellant guilty of the theft of the Blecka car and consequently acquitted him as to that charge, and they might have believed all the rest of the evidence touching upon the theft of the Blecka car and appellant's connection with it. This evidence was before the jury, and, regardless of the jury's reason for not finding appellant guilty of stealing the Blecka car, this evidence also related to the charge of stealing the Smith car, in that it tended to prove that Dobbs and appellant were operating as partners or coconspirators in a common design and system. If the appellant had been tried on the charge involving the theft of the Smith car, without consolidating the case involving the theft of the Blecka car, evidence of the theft of the Blecka car would have been admissible to show such a common plan or scheme. People v. Phillips (Cal. App.) 8 P.(2d) 228; People v. Smith (Cal. App.) 4 P.(2d) 268; People v. Berry, 191 Cal. 109, 122, 215 P. 74; People v. Stovall, 94 Cal. App. 635, 637, 271 P. 576; People v. McGill, supra.

[7] G. F. Potts, a witness called by the people, testified that he was at the time involved in the case, a special agent of the National Auto Theft Bureau at Fresno, that he was also a Fresno police officer, and that he inspected the Smith car and the Blecka car to identify them. He identified each of these cars by means of what he called a "secret number," which the evidence indicates is the motor number of the car, stamped on a hidden place on the body of the car, which location is known only to the manufacturer and the National Auto Theft Bureau, and these numbers are used for the sole purpose of identifying stolen cars. These numbers are communicated in confidence to said bureau and to peace officers. On cross-examination, counsel for appellant asked this witness: "Where is that number at?" This was objected to. The court thereupon stated to counsel for appellant: "You are privileged to cross-examine on any and all matters pertaining to those secret numbers, except as to their location," and the trial court denied a motion to strike out the testimony of the witness as to the secret numbers. The record shows that the rulings on the objection and on the motion were made on the ground that the information relative to the secret location of these numbers constituted such a communication to a public officer as is specified under the provisions of section 1881, subdivision 5, of the Code of Civil Procedure of California, which reads as follows: "A public officer can not be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure." There is no doubt that the information regarding these "secret numbers" is such a communication and is privileged under the statute, and, if the witness had not testified on direct examination respecting the fact that these numbers are stamped on secret locations on the cars, and that he compared such stamped numbers with the motor numbers of the Smith car and the Blecka car, no doubt he could have claimed this privilege. But, by reason of the fact that the witness voluntarily testified in response to questions by the district attorney about these matters, a very different question is presented. Without an opportunity for such cross-examination, appellant had no way of checking up on such testimony to determine if the stamped numbers were on the cars, or if the witness correctly testified to his comparison of these numbers with the motor numbers, respectively. In the view we take of this case it is not necessary to determine this question, for the reason that we believe that the identification of the Smith car by Mrs. Smith and her son, when considered with all the other facts and circumstances of the case, was a sufficient identification without the identification made by the witness Potts. If the rulings of the trial court on said objection and said motion were erro-

neous, they were not prejudicial to the substantial rights of defendant. Const. of California, art. 6, § 4½; Pen. Code of California, § 1258.

The judgment and order appealed from are, and each of them is, affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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122 Cal.App. 93

SEID PAK SING et al. v. BARKER et al. (SABATH, Intervener).

Civ. 4436.

District Court of Appeal, Third District, California.

March 23, 1932.

Rehearing Denied April 22, 1932. Hearing Denied by Supreme Court May 19, 1932.

1. Parties 🔑38.

One is not intervener in narrowest sense merely because he styles his pleading a complaint in intervention.

2. Pleading 🔑4.

Designation of pleading by pleader does not determine its character.

3. Mortgages 🔑591(1).

Party defendant, in action by holders of junior mortgage to redeem premises from lien of prior trust deed, cannot foreclose further inquiry or destroy plaintiffs' cause of action by transferring thing in dispute.

4. Limitation of actions 🔑124.

Where intervener took up issues tendered as against owners of premises and holders of liens as their successor in interest, intervener's complaint dated back to institution of action, and all claims not barred then continued as such throughout determination of case.

> The action was one to establish right of plaintiffs as owners and holders of junior mortgage to redeem premises from lien of prior trust deed and fix basis of redemption, and was commenced on January 26, 1919. On May 10, 1926, intervener filed complaint in intervention alleging that he had succeeded to fee ownership of premises involved and had become owner and holder of claimed prior incumbrances, and that he owned trust deed and promissory note secured thereby, which came into his ownership on January 26, 1920.

5. Limitation of actions 🔑124.

Where holder of prior liens was made party defendant to action to test his demand and discharge it by payment so that junior incumbrancer might obtain equities of redemption and defendant submitted his claims for determination and settlement, it could not be held claim was barred for delay in presentation on ground it had not been urged.

6. Tender 🔑22.

Legal effect of plea of tender is irrebuttable admission of indebtedness to extent of tender regardless of final outcome of action.

7. Tender 🔑12(1).

Offer to pay what offerer may conclude is proper amount does not constitute "tender."

[Ed. Note.—For other definitions of "Tender (verb)," see Words and Phrases.]

8. Mortgages 🔑150.

Original mortgagor cannot, in subsequent incumbrance, limit effect of prior liens and arbitrarily determine order thereof and bind persons acting with notice.

9. Estoppel 🔑58.

Estoppel arises only where to deny it would prejudice person asserting it.

10. Estoppel 🔑54.

Intervener becoming owner of prior incumbrances with notice of terms of mortgage providing it should prevail over other incumbrances *held* not estopped to urge priority.

11. Mortgages 🔑559(4).

In action to recover amount of deficiency judgment, creditor is entitled to exhaust whatever security judgment debtor may have.

12. Mortgages 🔑559(4).

Where it was eventually duty of intervener, who acquired premises and prior liens, to pay indebtedness under mortgage, court, having all parties before it, should have ordered deficiency judgment against intervener.

> It was intervener's duty to pay the indebtedness because intervener assumed burden of mortgage as part of purchase consideration, whereby lands purchased were held by intervener as primary fund for payment of demand of holders of mortgage.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action by Seid Pak Sing and others against Harry B. Barker and others, in which A. J. Sabath intervened. From the judgment, plaintiffs appeal.

Judgment modified, and, as modified, affirmed.

Louttit, Stewart & Louttit, of Stockton, and Sterling Carr and Carr & Guiler, all of San Francisco, for appellants.

Lafayette J. Smallpage, A. P. Hayne, and Nutter, Hancock & Rutherford, all of Stockton, for respondents.

Mr. Presiding Justice PRESTON delivered the opinion of the court.

In lieu of any preliminary statement of the case, reference is made to the former hearing in the earlier appeals. Seid Pak Sing v. Barker, 197 Cal. 321, 240 P. 765. The report fully covers the facts, and our discussion will include only such features as are incidental to the contentions here presented.

The original complaint was filed on January 26, 1919, which date, therefore, was that of the commencement of the action. The original defendants were Barker, Miller, Grossman, Chicago Bonding & Surety Company, a corporation, with a number of fictitious defendants.

The action has been characterized as one to establish the right of plaintiffs as the owners and holders of a junior mortgage upon certain premises to redeem said premises from the lien of a prior deed of trust upon the same and fix the basis of such redemption. This is rather a broad characterization and, as it will appear hereinafter, is intended as such. After the decision on the former appeal, the case went back for retrial, at the conclusion of which judgment and decree was entered determining the existence of a lien in favor of plaintiff against the premises, but subjecting the lien to prior liens in favor of the intervener. This appeal is prosecuted by the plaintiffs from that portion of the judgment allowing precedence to these claims of intervener and deferring the lien of plaintiffs thereto.

As stated, the action was commenced on January 26, 1919. In the complaint it was alleged that the premises involved had been impressed with a number of liens arising out of certain mortgages, a deed of trust and the claims of plaintiff. The complaint, in detail, sets forth the history of the various transactions relating to the property. In due course answers were filed by the various defendants, each answering separately. By these different answers each defendant set up the priority of his or its claims, so that issue was joined in the main on the questions of the validity of claimed liens, and, if established, then on the order of priority.

In January, 1920, plaintiffs filed a supplemental complaint, not changing the original cause of action, but amplifying the same and including items accrued since the date of the commencement of the action. The same property is involved with the additional allegation that one Lederer had succeeded to certain rights of former defendants and Lederer was made a party defendant. Thereafter Lederer filed his answer joining issue on the allegations of the complaint, but praying no affirmative relief. On May 10, 1926, being of a date subsequent to the determination of the appeal, the action was dismissed as against defendant Lederer. On the same date an order was made permitting A. J. Sabath to file his complaint in intervention, and on said date was filed the said complaint in intervention.

The intervener first alleges, and this fact is admitted by all parties, that he has succeeded to the fee ownership of the premises involved and had also become the owner and holder of the claimed prior incumbrances. This ownership dated from June 12, 1921. He then alleges his ownership of the deed of trust and the promissory note secured thereby. The complaint in intervention proceeds to take up each allegation of the complaint. The general prayer is that intervener be granted such general relief as he may be entitled to under the pleadings and issues presented. Amendments were made to this complaint in intervention, but the main features thereof remain unchanged. Incidentally, the amendments indicate that the ownership of the original deed of trust and the debt secured thereby came into the ownership of the intervener on January 26, 1920.

The first point urged by the appellant that the filing of the complaint in intervention changed the character of the original action, and intervener Sabath became in effect the plaintiff, and the plaintiffs herein became in effect the defendants, exactly as though the intervener had originally commenced this action to determine his rights under the trust deed and for other affirmative relief which he claimed was due him as the owner of the land. This, it is claimed, placed plaintiff in a position where he could urge all possible defenses, including the statute of limitations to the claims advanced by the intervener. And we note how that plaintiff did specifically, on all occasions, both by demurrer and answer, and likewise at the trial, urge the bar of the statute of limitations. Here it might further be conceded that the claims were barred if the main contention of plaintiff in this connection should prevail. It becomes necessary, therefore, to further consider the issues.

The case has run along for some twelve or thirteen years and has been marked by frequent amendments to the pleadings on both sides. The transcript is in two large volumes, and the whole thereof, with the exception of the findings and judgment, constitutes the pleadings, original and amended. It will be unnecessary to analytically detail each pleading. Sufficient for our discussion may be presented by a general outline.

The plaintiffs were lessees of the premises involved, under a written lease from the then owner. The lessor had given to the lessees a mortgage covering certain portions of the property by way of security for the performance of specified obligations by the lessor assumed. Plaintiffs alleged the breach of these obligations and sought to foreclose the mortgage for an amount alleged to be due thereunder. In their original complaint the plaintiffs set up the facts as to the existence of a prior deed of trust and likewise the existence of certain mortgages held and owned by the defendants. Also was set up a deed to the premises whereby the same were conveyed to defendant Chicago Bonding Surety Company, which deed was alleged to be in effect a mortgage.

The complaint brought before the court for decision the question of priorities of said incumbrances, the effect, if any, of subsequent transfers thereof, which transfers and assignments were appropriately alleged, and in its nature required the determination of the respective rights of all parties.

The subject-matter of the action was the common fund out of which all of these claims, if proved, were to be paid. The original lessor and mortgagor under the lease was not made a party, and it is apparent throughout that the purpose of the action was to determine what part of the premises, if any, might respond to plaintiffs' demand, and that, if the said demand was junior in right to other found liens, the amount of the latter be determined in order that plaintiffs might discharge or satisfy senior liens and advance their own.

At the time of the commencement of the actions none of the claims now urged by intervener had been outlawed.

In 1926, when intervener appeared, the action was dismissed as to Lederer; speaking accurately, there could be no substitution to replace one not a party to the action. But Sabath, intervener, as the successor of Lederer, was, in effect, nothing more than a substituted defendant, though we do not find it necessary to in anywise rest the decision on that point.

[1-4] The complaint in intervention, while so denominated, was, in many of its essential features, an answer to the allegations of the complaint. The title and securities held by intervener through subsequent transfer were made the subject of the action as against his predecessors in interest. That intervention set up nothing that could not have been urged by the remaining defendants, and, upon closer scrutiny, it will develop that practically all of the new matter advanced by intervener was the changed ownership. True, he amplified the defenses already urged and asked affirmatively for the relief which the court would have been obliged to give upon proof of the facts alleged. There may be certain features of this complaint in intervention that contain new matter, but inasmuch as these issues are not before us, we may disregard them.

It is always unsafe to tie irrevocably to a name and in a confusion of terms it well might occur that an inapt characterization of a right might result. The mere classification of a right is not essential. First, we recognize the claimed right and, after such recognition, it is entitled to enforcement, whether the name given it accords exactly with the general understanding thereof. And so here, throughout, we are cited to many cases attempting to define and limit the rights of an intervener under given conditions. But the record discloses that the present intervener merely took up the issues tendered as against the owners of the premises and the holders of the liens thereon, as a successor in interest. We have much authority to the effect that one entering into an action is not an intervener, in the narrowest sense, merely because he styles his pleading a complaint in intervention. Temple v. Alexander, 53 Cal. 3. In Pickwick Stages v. Board of Trustees, 189 Cal. 417, 208 P. 961, it is held to be thoroughly established that the designation given by a party to his pleading does not determine its character. A party defendant in an action such as this cannot foreclose further inquiry or destroy plaintiffs' cause of action by a mere transfer of the thing in dispute. The thing itself remains before the court, as did the lands here involved, burdened with the asserted claim of plaintiffs, and the transferee would have the right and the duty, perhaps, of defending his ownership, on the same issues whereby it was attacked. We conclude that intervener's complaint dated back to the institution of the action, and that any and all claims then alive and not barred continued as such throughout the determination of the case.

[5] Next appellant contends that the note secured by the deed of trust is barred by the statute of limitations. The note was for $35,000 and dated at Stockton, Cal., June 21, 1917, and was payable two years after date. When defendant Barker became the owner and holder of this note in December, 1918, he gave notice of the sale of the property under the deed of trust, the due date of the note having been accelerated through defaults in payment of interest. The sale was noticed for January 29, 1919. The complaint filed on January 26, 1919, sought, as a part of the general relief, an injunction restraining such sale, and after a hearing, such injunction, pending the action, was issued of February 13, 1919. The order further forbade any other sale "under or on account of any lien upon or on account of any lien upon or against said real property or any other evidence of indebtedness or claim of lien." Appellant contends that this injunction simply restrained a sale and did not interfere with the commencement of any action to enforce the right to judgment.

We have followed the argument of counsel for appellant in every detail and, while it may prove the claim he makes, nevertheless, he arbitrarily fixes the starting point and then proves his own theory, the net result being merely to indicate the correctness of counsel's views on matters in nowise determinative of the questions before us.

It is now recognized that statutes limiting the time within which actions must be commenced are favored by the courts as tending to promote social ends desired. A defense of limitation is a defense to the merits, and, if established, is a complete bar. However favored, we must keep in mind the purpose behind such legislation and the good intended to be accomplished. Statutes of limitation are often called statutes of repose; they protect against stale demands and insure against claims being urged where by reason of lapse of time it would be impossible to present a true defense. Likewise do they militate against perjury and fraud. For these reasons, chiefly, are these statutes favored. And for the further reason that the threat implied obliges people to present their demands while still fresh and within the memory of witnesses still alive. And where, as here, a holder of a mortgage or deed of trust is made a party to an action, the exclusive object of which is to test his demand and discharge it by payment, in order that a junior incumbrancer might obtain the equities of a redemption and in response to such action the defendant does specifically submit his claims for determination and settlement, it would seem an unjust, harsh, and illogical conclusion to hold that his claim was barred for delay in presentation on the ground that it had not been urged. It would make equity a jest to declare that its powers, exercised under the guise of equality and reason, were in reality used only as means of destroying what it purported to protect. We hold that the statute has not barred any of the claims not barred at the time of pleading them in the present action.

It therefore becomes unnecessary to inquire into the question as to whether or not a junior mortgagee may resist a senior incumbrance without offering to do equity.

[6, 7] Appellants then contend that the intervener was not entitled to recover interest on the promissory note secured by the trust deed because plaintiffs had tendered payment of the amount to the trustee and the latter had refused to accept the same. This claim was urged in the court below, and the finding of the trial court impliedly is against appellant. We have none of the evidence before us, and on that ground alone would be disposed to decline any further notice of the matter. The record discloses that there was at all times an insistent claim by appellant that the amount claimed as due by defendants was falsely padded and beyond all reason. Appellant made a written request of defendants to ascertain the amount due and offered to pay "whatever sums were properly secured by said trust deed." Such an offer does not meet the requirements of a tender. The legal effect of a plea of tender is an irrebuttable admission of indebtedness to the extent of the tender regardless of the final outcome of the action. 26 R. C. L. 650. In the instant case the attitude of appellants from the outset was that defendants were claiming much more than was legally their due. By the complaint plaintiffs sought to ascertain the exact amounts due and therein offered to pay what the court might decree. We are cited to no authority, and we have found none, holding or intimating that an offer to pay what the offerer may conclude is the proper amount, constitutes a tender in the sense the law requires.

[8-10] Appellants, both in the court below and here, have raised the question of estoppel operating against intervener in the urging of his priority. The mortgage given to the appellants under the terms of the lease provided that the same should have priority to and prevail over any other lien or incumbrance except a deed of trust in a sum not exceeding $40,000. Appellants then contend that when intervener became the owner of the incumbrances, other than the trust deed, he had notice of the terms of the mortgage and thereby arose the estoppel here urged. The theory seems to be that the original mortgagor in and by a subsequent incumbrance can limit and qualify the effect of prior liens and arbitrarily determine the order thereof, and that such a determination binds all who act with notice. A mere statement of the proposition is its own undoing. Further, an estoppel is created only in instances where to deny it would operate to the prejudice of him asserting it. The enforcement of liens of this nature and in this case being against the property, we cannot see where plaintiffs could be prejudiced merely through the fact of a change in person asserting the lien. The prior liens having attached no guaranty or representation of the original mortgagor could alone suffice to retard or prorate the securities.

[11, 12] The final argument is that, irrespective of the determined rights, the plaintiffs are entitled to a deficiency judgment against the intervener. The claimed chain of liability tying intervener Sabath into the deficiency runs as follows:

The Chicago Bonding & Surety Company, by virtue of its acquisition of the title to the lands involved, became liable for the fulfillment of its grantor's contract under the lease. Subsequently, upon transfer to intervener, as a part of the consideration, Sabath indemnified his grantor against all claims outstanding against the lands, including the claim of plaintiffs.

It is to be observed here that the Chicago Bonding & Surety Company was consolidated with American Bonding & Casualty Company prior to the acquisition of title by intervener, and the immediate grantor of intervener was the American Company. When the consolidation was effected, an agreement was made whereby the American Bonding & Casualty

Company assumed the debts, charges, liabilities, and obligations of every name, nature, and description, due from or owing by the Chicago Bonding & Surety Company. This consolidation was effected while the present action was pending and as a part of the said consolidation the American Company took over all of the assets of the Chicago Company. In the instant case there is a deficiency judgment in favor of plaintiffs and against the Chicago Bonding Company for the amount of plaintiffs' found claim which shall remain unsatisfied after sale of the property. There seems no question but that this liability is enforceable as against the American Company. However, the latter is not a party to this action, by substitution or otherwise. When the American Company transferred the property and the trust deed to intervener Sabath, the instrument and agreement of transfer, in setting forth the consideration thereof and as a condition thereof, used this language:

"It being agreed, however, that the said Sabath does for himself, his heirs, successors and assigns indemnify the said company from and against any and all claims, expenses, damages, costs and attorneys' fees remaining unpaid or that may accrue against the Chicago Bonding and Insurance Co. by reason of or in connection with said Mildred Island property above mentioned."

It will be remembered that at the time of this last-named transaction the instant suit was pending, and the claims of plaintiffs were then well known to all parties to this last agreement.

There is no denial of the fact that the actual defendant in the case was the Chicago Company, and that all other parties defendant were in privity with said company, whether designated as assignees, transferees, or agents. Sabath, the intervener, was an officer in the Chicago Bonding Company and intimately connected with the transactions of that company from the outset. He took over the property as an individual and permitted the obligation to continue as against the original defendants for a period of some five years before asserting his claims as owner of both the lands and the original trust deed.

The court below has decreed a deficiency judgment against the Chicago Bonding Company. This is a debt of the American Company under the consolidation agreement. In time, under the agreement between American Company and Sabath, the obligation to pay the debt as between the last two, rests on Sabath, the intervener. The findings before us, unassailed as they are, almost demonstrate that in the last analysis the Chicago Bonding Company, American Company and Sabath are in immediate privity throughout and acting "one for all and all for one." If, upon a sale of the premises, after liquidating the liens of intervener, there remains a deficiency, the same is a judgment against the Chicago Company. In an action to recover the amount of the judgment the creditor is entitled to exhaust whatever security the judgment debtor may have against the same.

The administration of justice would seem to be at a faltering stage if there were no power in equity to at once fasten liability where the record indicates it must eventually rest. One boast of equity is that it can and does intervene to quiet litigation and prevent needless dispute.

Obviously, upon the judgment herein becoming final, no further determination of the facts involved will be permitted.

The obligation of the Chicago Company cannot longer be classed as a mere liability; it has now been judicially declared. The intervener took title subject to the duty and liability of liquidating and discharging all claims against the owner, and to him it can make no difference whether he pays one person or another. Here, in the heat of the controversy, intervener buys the property involved, with full knowledge, and as an express part of the consideration takes over the burden of indemnifying the original obligee against any cost or liability.

The trial court held, at the insistence of defendants and the intervener, that the liens claimed by them had not merged in the ownership, and therefore we consider them as separate.

The factual condition found is that the intervener assumed the burden of plaintiffs' mortgage as a part of the purchase consideration whereby the lands purchased are held by intervener as a primary fund for the payment of plaintiffs' demand.

We conclude that it being eventually intervener's duty and obligation to pay the indebtedness, the court, having all parties before it, should have ordered a deficiency judgment against the intervener. White v. Schader, 185 Cal. 611, 198 P. 19, 21 A. L. R. 499; Williams v. Coleman, 70 Cal. App. 400–405, 233 P. 397; Josephian v. Lion, 66 Cal. App. 650–660, 227 P. 204.

Throughout the foregoing the Chicago Bonding & Surety Company (a corporation) has been referred to as Chicago Company and Chicago Bonding Company; in each case the reference includes and is intended to designate the Chicago Bonding & Surety Company. Likewise, American Bonding & Casualty Company has been referred to in abbreviated form. Wherever reference is made to the company designated by the use of the word American, the designation is intended to include American Bonding & Casualty Company.

The judgment is modified to provide that a deficiency judgment in favor of plaintiffs arising from the amount remaining due plaintiffs, after the sale of the premises under the mortgage, be ordered against intervener Sabath.

As so modified, the judgment is affirmed, appellants to recover costs of appeal.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

MURRAY v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.*

Civ. 8429.

District Court of Appeal, First District, Division 2, California.

April 7, 1932.

Rehearing Denied May 7, 1932. Hearing Granted by Supreme Court June 2, 1932.

1. Master and servant ⚷361.

Aviator injured while delivering plane for purchaser to increase his flying experience *held* not purchaser's "employee," as regards compensation.

Relationship of employer and employee did not exist, since the owner of the plane had no control over the time the flight was to begin or end, over the route to be taken, the speed to be used, or the times or places the aviator might stop along the route, and the aviator had the full power to determine every detail of his conduct, and received as compensation for his service merely an increase in his flying hours, and expenses for himself and the plane.

[Ed. Note.—For other definitions of "Employé," see Words and Phrases.]

2. Master and servant ⚷361.

Aviator, injured while flying plane he unauthorizedly accepted as substitute for plane he contracted to deliver for purchaser, *held* not purchaser's "employee," as regards compensation.

Plane had been duly licensed by Department of Commerce, had been sold to purchaser by the manufacturer, purchaser held a bill of sale, and, if any relation of employer and employee existed, it existed solely for the purpose of delivering to the owner the plane which he had purchased, and it did not cover the time the aviator occupied in flying another plane over which purchaser had no possible right of control.

Certiorari to Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act by Carl R. Long, claimant, opposed by Hamilton Murray, alleged employer. To review an award of the Industrial Accident Commission of the State of California, employer brings certiorari.

Award annulled.

Hamilton Murray, in pro. per.

A. I. Townsend, of San Francisco, and McIntyre Faries, of Los Angeles, for respondents.

NOURSE, P. J.

Petitioner seeks to review an award of respondent commission awarding Carl Long compensation payable by petitioner.

There is no substantial dispute in the evidence. Petitioner is a land appraiser, with airplane flying as a hobby. Long was a licensed air pilot who was seeking to increase his flying service in order to secure a commercial license. In February, 1931, petitioner arranged for the purchase of a Curtiss-Wright "Junior" airplane from the Curtiss-Wright Airplane Company in Robertson, Mo. Long was recommended to petitioner as a capable man to drive the airplane to California for delivery. Petitioner paid the purchase price, and on June 3, 1931, was given a bill of sale for a particular plane described as department of commerce license number "N.C.—10983." On the same day license was duly issued permitting said plane to be taken out. Petitioner then authorized Long to call at the Curtiss-Wright plant and accept delivery of this machine. On June 4th Long was informed by the superintendent of the plant that the plane ordered was not ready for delivery and was offered another plane numbered "N.C. 10984." Without communicating with petitioner, Long accepted the substituted plane and flew to California, where he was injured before delivery of the plane to petitioner. The compensation of Long for his service was the increase in his flying hours; he was paid no wages by petitioner, but was allowed expenses for himself and the plane. Upon these facts, the respondent commission found that Long was an employee at a weekly wage of $35, and awarded him compensation for permanent disability payable $21.61 weekly.

[1] The award must be annulled. The relation of employer and employee did not exist to give respondent jurisdiction to make any award against this petitioner. Petitioner contracted with Long to make delivery of the plane to him at Petaluma, in California. He had no control over the time the flight was to begin or end, no control over the route to be taken, the speed to be used, or the times or places Long might stop along the route. The trip took seven days, during which time the parties had no communication with each other. Long chose his

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 14 P.2d 301.

own route, and had full power to determine every detail of his conduct throughout. This total absence of control negatives the relation of master and servant. New York Indemnity Co. v. Ind. Acc. Com. (Cal. Sup.) 1 P.(2d) 12; Hillen v. Ind. Acc. Com., 199 Cal. 577, 581, 582, 250 P. 570; Becker v. Ind. Acc. Com. (Cal. Sup.) 298 P. 979.

[2] But the absence of this relation is demonstrated by another fact. Petitioner contracted with Long for the delivery of a particular plane numbered 10983. That plane had been duly licensed by the department of commerce, had been sold to petitioner by the manufacturer, and petitioner held a bill of sale. Long accepted a substituted plane without the knowledge or consent of petitioner, and was injured while flying the latter plane. If any relation of employer and employee had existed between petitioner and Long, it existed solely for the purpose of delivering to the petitioner the plane which he had purchased from the Curtiss-Wright concern. It did not cover the time Long occupied in flying another plane over which petitioner had no possible right of control. We are not here concerned with the question whether this substitution constituted a valid sale of the second plane to petitioner. We are concerned alone with this fact—that, as the second plane had not been licensed to petitioner, he had no control over it, and hence had no control over the pilot.

The award is annulled.

We concur: STURTEVANT, J.; SPENCE, J.

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122 Cal.App. 83

PEOPLE v. CONKLIN.

Cr. 2115.

District Court of Appeal, Second District, Division 2, California.

March 23, 1932.

1. Sodomy 🔑6.

Evidence *held* to sufficiently corroborate testimony of boy that accused committed sexual perversion on his person (Pen. Code, § 288a).

2. Sodomy 🔑6.

Evidence supported verdict that participation in act of sexual perversion by boy of nearly 12 was by "assent" rather than "consent," and hence no corroboration of his testimony was necessary (Pen. Code, §§ 26, subd. 1, 288a, 1111).

There is a decided difference in law between mere submission and actual "consent." "Consent" in law means a voluntary agreement by person in the possession and exercise of sufficient mentality to make an intelligent choice to do something proposed by another. "Consent" differs very materially from "assent." The former implies some positive action, and always involves submission. The latter means passivity or submission which does not include consent.

[Ed. Note.—For other definitions of "Assent" and "Consent," see Words and Phrases.]

3. Criminal law 🔑1172(1).

Withdrawal of instruction deemed erroneous, positive direction to disregard, and giving of correct instruction *held* not prejudicial error.

4. Criminal law 🔑1172(1).

Inadvertent leaving in of inapplicable statement in general instruction that witness may be impeached by proof of conviction of felony *held* harmless.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Wendell M. Conklin was convicted of violation of section 288a of the Penal Code, and he appeals.

Affirmed.

Frederic H. Vercoe, Public Defender, and G. A. Benedict, Deputy Public Defender, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., James S. Howie, Dep. Atty. Gen., and Buron Fitts, Dist. Atty., and Frank Stafford, Dep. Dist. Atty., both of Los Angeles, for the People.

WORKS, P. J.

Defendant was convicted under a charge that he had violated the provisions of section 288a of the Penal Code, which denounces the crimes sometimes known as fellatio and cunilingus, the section being couched, however, in English. Defendant appeals from the judgment and from an order of the trial court denying his motion for a new trial.

The alleged victim of appellant was a boy nearly twelve years of age, and it is contended that he was an accomplice of appellant in the commission of the acts concerning which he testified as a witness for the prosecution. It is also insisted that the testimony of the boy is without corroboration in the record, whereas a corroboration of the testimony of an accomplice is necessary under the law in order to convict one charged with crime.

We shall first inquire whether the boy's story was corroborated. On a certain evening the boy's parents, Mr. and Mrs. F., were visited by appellant and his wife, the boy having arrived home soon after the visitors came. The four elders had been drinking intoxicating liquors before the boy's arrival and continued to do so afterwards. The first liquor used was whisky and the drinkers then resorted to beer. After a supply of the latter became invisible, some one suggested that more of it would be acceptable, and Mrs. F. then said that more was to be found in a locked chicken house at the back of their lot and dispatched the boy for it. Appellant followed him, possibly for the purpose of aiding in the transportation of the beer to the house, possibly with a more sinister object. The liquor was taken from the chicken house and deposited on the ground while the structure was being relocked. The boy testified that then, at the request and under the direction of appellant, the alleged offense was committed, giving the details. He says that the act lasted "not very long; my mother came out then."

We now turn to the testimony of the mother, Mrs. F. She said that while she was in the house talking to appellant's wife, her husband having gone to bed as he had to arise at three in the morning, "all of a sudden it came to me that the boy had been gone an awfully long time." Her testimony then proceeds:

"Q. How long had he been gone up until that time? A. About 20 minutes, I imagine, or longer. So I just rushed out the front door and ran around the house and down the driveway; and when I got to the front of the garage * * * I could see Mr. Conklin's white sweater; and he was in a stooping position, and the boy was either getting up or getting down, I couldn't say which. * * *

"Q. Did you go over to them, then? A. And I said, 'What is going on here? What are you doing?' And Mr. Conklin seemed to be in a very excited mood. He said, 'What do you mean? What do you mean? Nothing; nothing.' And I said, 'Well, you come in the house and we will see what this is all about,' and he hauled off and hit me, and broke the bone here of my nose; and I guess I clutched him and got him by the hair; and we went into the house and I called my husband to get up—what had happened—and Mrs. Conklin said, 'What is the matter, Marie?' And I said—well, I said, 'Mr. Conklin'—

"Q. Was Mr. Conklin present at that time? A. Yes. I said: 'He has had the boy out there in the back yard, and he had him down on the ground.' And she said, 'Oh, Marie, I can't believe anything like that; I can't believe anything like that.' And I said, 'Well, I saw it with my own eyes; I saw him have him down, and he wouldn't give me any explanation.' * * * Well, then I said—I kept calling my husband, and he wanted him to wait until he got his clothes on; and I said, 'I want to get the police here.' She said—Mrs. Conklin said, 'Oh, no; do not get the police,' and my husband said to him: 'Well, then, be a man and wait until I get my clothes on and we will straighten this out.' But Mr. Conklin was trying to get away all this time and I was trying to hang on to him. * * * Well, I had hold of him; and I had hold of his hair part of the time, and part of the time hold of his clothes; and Mrs. Conklin had hold of me; and he was trying to pull her. He said, 'Let us get out of here; let us scram'; that is the exact words. * * * In the meantime, he had gotten away from me—that hold that I had had on him—and he got out in the front yard, and my husband was after him. Well, he hit my husband, and my husband knocked him down; and they scrambled back and forth; and Mrs. Conklin was trying to get out, and I had hold of her. So they finally got away."

At another place the witness said that she did not know the condition of the boy's clothing when she got out to where appellant and the boy were, as she did not examine him. On cross-examination she testified:

"Q. Mrs. F. * * *, you said something that—after you got into the house you made some remark, that he had the boy down on the ground. Now, you never did accuse this defendant directly of having done anything to your boy, did you? A. No; I asked him what was going on out there * * *

"Q. * * * And you never did tell the defendant directly during that conversation, that entire evening, that he had done anything to the boy, did you? A. Well, I don't know if I said anything to him directly. I said it; I was telling my husband about it, and I was telling his wife; there was such a rumpus and a scuffle around it is hard to tell whether it was talking directly to one person or not. * * * I said it in his presence, yes, because we were all in the front room.

"Q. Well, you said at the preliminary hearing that you didn't know whether it was in his presence or not, didn't you? A. Yes, I did, but everything happened so quickly then; I thought of a lot of things afterwards.

"Q. Did you ever ask the boy, in the presence of the defendant, what had happened out in the back yard? A. Well, I couldn't say if it was in his presence or not. * * *

"Q. Did the boy say anything to you while you were in the back of the lot? A. No, he did not, but he started crying and I knew there was something wrong if he started crying. * * *

"Q. Mrs. F. * * *, you didn't see the defendant do anything to your boy, as regards his private parts, did you? A. No, I did not.

"Q. And you did not know, even when you got back into the house, if it ever happened, that it had happened, did you? A. Not until I questioned the boy, but I had—

"Q. Well, you don't know whether that was while the defendant was there or afterwards? A. Well, I think it was while they were scuffling. I could not say for sure as to about that time. * * *

"Q. Mrs. F., * * * you say you did not examine the clothing of your little son at all? A. No.

"Q. And you didn't know that there were, if there were, any of the buttons on his pants unbuttoned, did you? A. No.

"Q. You didn't look at it? A. No.

"Q. Did you examine it? A. No.

"Q. Even after you went into the house? A. No."

One of the arresting officers testified that about three o'clock in the morning of the night in question he and a fellow officer approached the apartment occupied by the appellant; that they stood outside and heard a conversation going on inside the apartment; that thereupon he knocked on the door and announced that he was a police officer, whereupon the conversation ceased; that he told the occupants several times that he was an officer and wanted to talk to them, but the door was not opened; that he then called the landlady but she was unable to unlock the door for the reason that the key had been turned from the inside; that finally he succeeded in working the key out and unlocking the door and found appellant and his wife "apparently asleep"; that he then told appellant to get up and put on his clothes, as he had a serious accusation against him. The appellant then inquired what it was all about, according to the testimony of the witness, and was informed that it was for a violation of section 288a of the Penal Code, to which statement appellant responded by saying, "I know about that," or "I know what that is." The officer further testified that he "kept asking" appellant "to get up, and he refused." Finally they tried "to pull him out," whereupon appellant jumped up and ran into the bathroom. The officers followed and finally after the landlady talked to appellant he submitted to arrest.

The question whether the testimony of the mother and of the arresting officers furnished any corroboration of the story of the boy we think is settled by People v. Morton, 139 Cal. 719, 73 P. 609, 611, People v. Robbins, 171 Cal. 466, 154 P. 317, 319, and People v. Kempley, 205 Cal. 441, 271 P. 478, 484, although additional cases might be cited on the subject. In People v. Morton the Supreme Court said (the italics being employed by that tribunal): "'The corroboration of an accomplice required by law, in order to warrant a conviction upon his testimony, must tend pertinently to connect the accused with the offense. Corroboration as to matter having no tendency in this direction, however thorough and complete, will not suffice.' Welden v. State, 10 Tex. App. 400. In that case the court further said: 'We suggest this mode as a proper test: Eliminate from the case the evidence of the accomplice, and then examine the evidence of the other witness or witnesses with the view to ascertain if there be inculpatory evidence—evidence tending to connect the defendant with the offense. If there is, the accomplice is corroborated; if there is no *inculpatory* evidence there is no corroboration, though the accomplice may be corroborated in regard to any number of facts sworn to by him.' In Simms v. State, 8 Tex. App. 230, the rule is thus stated: 'The evidence must tend directly and immediately to connect the defendant with the commission of the offense.' In New York, under the same Code provision (Code Crim. Proc. § 399), it was said: 'The corroboration, however strong in all other respects, must point to the connection of the defendant with the *commission of the crime* to be of any avail.' People v. Ryland, 28 Hun, 568, 570." It is remarked in the opinion in People v. Robbins: "The rule in this behalf is well and tersely stated in 12 Cyc., at page 456, where it is said: 'It is necessary that the evidence corroborating an accomplice shall connect or tend to connect the defendant with the commission of the crime. Corroborative evidence is insufficient where it merely casts a grave suspicion upon the accused. It must not only show the commission of the offense and the circumstances thereof, but must also implicate the accused in it. * * * But where the circumstances, when proved, taken separately or collectively, are consistent with the innocence of the accused, there is no corroboration, and a verdict of conviction thereon will be set aside.'" The case of People v. Kempley contains an exhaustive treatment of the subject of corroboration of accomplices, a part of which only will here be quoted (the italics are those of the court): "The law of this state on the question of corroboration is now well settled. The statutory rule is found in section 1111 of the Penal Code, which provides: 'A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offence; and the corroboration is not sufficient if it merely shows the commission of the offence or the circumstances thereof.' This Code rule has been the same since its adoption as a part of the Criminal Practice Act in 1851. In the early case of People v. Ames, 39 Cal. 403, it was said that the purpose of the statute 'was to prohibit a conviction, unless there was *some* evidence, entirely exclusive of that of the accomplice, which, of itself, and without the aid of the accomplice, tended to raise at least a suspicion of the guilt of the accused.' In the later case of People v. Thompson, 50 Cal. 480, this court was at pains to point out that the language of People v. Ames, supra, should not be taken as a correct statement of the rule, and that it was not intended to lay down a rule 'that if the corroborating evidence sufficed to raise merely a *suspicion* of the defendant's guilt, and nothing more, that it would be a sufficient corroboration within the meaning of section 1111.' People v. Thompson, supra, page 482. In People v. McLean, 84 Cal. 480, 24 P. 32, it was said: 'But although more is required by way of corroboration than to raise a mere suspicion (see People v. Thompson, 50 Cal. 480), yet the corroborating evidence is sufficient if it, of itself, tends to connect the defendant with the commission of the offense, although it is slight, and entitled, when standing by itself, to but little consideration.'" The court said on a later page: "Upon a consideration of the entire record we are compelled to state that when the testimony of the accomplice is eliminated from the case, as it must be for the purpose of determining the question of corroboration (People v. Robbins, supra; 8 Cal. Jur. 178, and cases cited), the other evidence in the case has no substantial connection with any crime, is as consistent with innocence as with guilt, and that it is questionable whether it raises even a suspicion of guilt."

[1] Measuring the question by the rule enunciated by the foregoing authorities, it is plain to us that the corroborating evidence was sufficient. Nor are we unmindful in making this statement that the case here involved is essentially different from those in which the commission of the offense by *someone* is amply demonstrated by testimony other than that given by the accomplice. And we here add parenthetically that if this distinction be noted in the various cases much of the apparent confusion will disappear. But here it cannot be said, eliminating the testimony of the accomplice, that the testimony is as consistent with the innocence of the defendant as with his guilt. It may be that the position of the two when first discovered by the mother can be explained away. But why did the boy start immediately to cry unless something was wrong? Why did the defendant become so excited as the testimony of the mother reveals him to have been? Why, when he was confronted with the accusation made by Mrs. F. to appellant's wife in his presence and while she had hold of his hair, did he not protest his innocence? Why did he feign sleep when the officers first gained admission to his room, as well as seek refuge in the bathroom? Why, when he was called upon for an explanation in the back yard, if he was innocently in the position described, did he not explain instead of exclaiming, "What do you mean; what do you mean? Nothing; nothing"? At no time did he state a reason for the compromising position, but rather he not only hit the father but also struck and broke the bone of the mother's nose. We deem the corroborating evidence to be ample.

[2] It now becomes necessary to inquire whether the boy was an accomplice. In 1915 (St. 1915, p. 760) the Legislature, departing materially from the then existing rule of judicial decision (see People v. Coffey, 161 Cal. 433, 119 P. 901, 39 L. R. A. (N. S.) 704), amended section 1111 of the Penal Code by adding the following sentence thereto: "An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant in the cause in which the testimony of the accomplice is given." The boy in the present case whose person was violated, as it is claimed by the prosecution, could not have been prosecuted for any offense whatever because of the submission of his person to the alleged criminal assault of appellant, unless he participated in the act with criminal intent. The rule is thus stated in the case of People v. Dong Pok Yip, 164 Cal. 143, 146, 127 P. 1031, 1032: "We are of the opinion, however, that the evidence upon the whole case falls short of showing that the boy actually and knowingly consented to be the victim of the alleged assault. It may be admitted that the evidence shows that the boy was ignorantly indifferent and passive in the hands of the defendant, even to the point of submission; but there is a decided difference in law between mere submission and actual consent. Consent, in law, means a voluntary agreement by a person in the possession and exercise of sufficient mentality to make an intelligent choice to do something proposed by another. 'Consent' differs very materially from 'assent.' The former implies some positive action and always involves submission. The latter means passivity or submission which does not include consent. Geddes v. Bowden, 19 S. C. 1, 7; Aull v. Columbia, N. & L. R. Co., 42 S. C. 431, 20 S. E. 302; Bouvier's Law Dict. In cases of the character under discussion, the age and mentality of the subject of an indecent assault is important, and should always be considered in determining the presence or absence of consent. The mere submission of a child of tender years or retarded mental development to an attempted outrage of its person should not, in and of itself, be construed to be such consent as would, in point of law, justify or excuse the assault. 2 Bishop's New Crim Law, § 35, subd. 2. It is neither unreasonable nor unnatural to assume that such a child, in the hands of a

strong man, might be easily overawed into submitting without actually consenting. Hill v. State, 37 Tex. Cr. R. 279, 66 Am. St. Rep. 803, 38 S. W. 987, 39 S. W. 666." To the same general effect reference may also be had to People v. Camp, 26 Cal. App. 385, 147 P. 95, where attention is called to section 26 of the Penal Code, wherein it is said that all persons are capable of committing crimes with certain exceptions, among whom subdivision 1 specifies: "Children under the age of fourteen, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness. * * *" An instruction was given in the instant case defining the law as set forth in People v. Dong Pok Yip, supra, and while it is true that the boy said he knew it was wrong, nevertheless bearing in mind that he was not yet twelve years old and of course had not arrived at the age of puberty, together with his remaining testimony, we are satisfied that there was sufficient testimony under the rule to justify the jury in concluding that his was an "assent" and not a "consent."

The Attorney General asks us to determine that the boy was not an accomplice under the authority of People v. Johnson (Cal. App.) 2 2 P.(2d) 216, but the conclusion to which we have come renders any discussion thereof unnecessary.

[3] Appellant also complains because the court, deeming an instruction erroneous, withdrew it from the jury and gave in its stead one concerning which no complaint is made. He urges that the harm could not thus be undone, and further that the withdrawal was not unqualified. We cannot agree that the withdrawal was not absolute. The trial judge definitely and positively told the jury to disregard it entirely, and to pay attention to the one given in its place. While the practice is not to be commended, it is apparent that the impression made upon the jury was to fix in their mind the true rule rather than the reverse. We can find no prejudicial error in the point.

[4] In the general instruction to the jury concerning the credibility of witnesses the court, very patently by inadvertence, left in the following: "A witness may also be impeached by proof that he has been convicted of a felony." The appellant assigns the same as error. Undoubtedly the words should not have been used, there being no testimony that any witness had ever been convicted; but we must conclude that this is one of those cases where an inapplicable instruction could do no harm. The jury as reasonable men and women could not possibly have found a place to apply it. Furthermore, it was not and could not have been directed toward the appellant.

Complaint is also made of an instruction which it is argued constituted a formula instruction, and therefore was faulty because it failed to state all of the conditions necessary to a verdict. It did not, however, purport to be a complete statement of the law of the case. The thing of which appellant complains, to wit, that it included no reference to the kind of evidence necessary to corroborate an accomplice, reveals the weakness of his argument. The jury had been fully instructed upon this subject as well as upon the question of who are accomplices, and, as men and women of common intelligence, could not have misunderstood or misapplied the instruction.

Other errors are assigned, all of which have been fully considered. A further discussion of them would serve no useful purpose.

Judgment and order affirmed.

We concur: CRAIG, J.; IRA F. THOMPSON, J.

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122 Cal.App. 159

DEPARTMENT OF PUBLIC WORKS OF CALIFORNIA et al. v. CITY OF SAN DIEGO et al.

Civ. 778.

District Court of Appeal, Fourth District, California.

March 25, 1932.

Rehearing Denied April 21, 1932. Hearing Denied by Supreme Court May 23, 1932.

1. Mandamus ⚷182.

Order which court could make *held* limited by terms of alternative writ of mandate.

2. Mandamus ⚷3(8).

Waters and water courses ⚷167(1).

Dam Act *held* not to authorize department affirmatively to compel owner to remodel, repair, or rebuild dam or to continue its operation; hence mandamus to compel owner and lessee to strengthen buttresses did not lie, especially where other statutory remedies were adequate (St. 1929, p. 1505).

Broad powers given department of public works by St. 1929, p. 1505, popularly known as "Dam Act of 1929," are limited by plain provisions of act to prevention of construction and operation of unsafe dams, and do not extend to point where owner of dam may be compelled to continue its operation or directly compelled to perform specific work which might be necessary to any such continuance.

Original proceeding for a writ of mandate by the Department of Public Works of the State of California and others against the City of San Diego and others.

Demurrers sustained, and peremptory writ denied, without prejudice to any other proper proceeding.

U. S. Webb, Atty. Gen., and C. C. Carleton, Spencer Burroughs, and Henry Holsinger, all of Sacramento, for petitioners.

C. L. Byers, City Atty., and H. B. Daniel, Asst. City Atty., both of San Diego, and Hunsaker & Cosgrove, of Los Angeles, for respondent city.

Wright & McKee, of San Diego, and O'Melveny, Tuller & Myers and Louis W. Myers, all of Los Angeles, for respondent company.

BARNARD, P. J.

This is an original proceeding seeking a writ of mandate to compel the owner and the lessee of a certain dam to do certain work thereon. The action is brought by the department of public works of the state of California and the state engineer, under a claim of authority vested in them by what is popularly known as the "Dam Act of 1929" (St. 1929, p. 1505).

The petition alleges that the respondent company is the owner, and the respondent city is the lessee, of what is known as the "Lake Hodges Dam," situated about twenty-five miles northerly from San Diego; that this dam is a concrete multiple arch dam of the Eastwood type, having a height of 115 feet and a storage capacity of 37,500 acre-feet of water; that when completed in 1918 the dam was approved by the then state engineer, but that since that time the science of designing and constructing dams of this type has made a very rapid and extensive advancement, in the light of which increased knowledge a lack in the design and construction of the buttresses of this dam is now apparent; that on October 1, 1925, the respondent company leased the dam to the respondent city with an option to purchase the same; that during 1928 and 1929 a number of investigations were made by agents of the state engineer and others as to the condition of this dam, resulting in reports to the effect that the design and construction of the dam, and particularly of the buttresses, are not in accord with established engineering principles; that various cracks exist which are gradually increasing in width, and that the dam is located in a region where earthquake shocks are reasonably to be anticipated; that on November 16, 1929, the respondent city, pursuant to the provisions of the Dam Act, filed an application for permission to enlarge the spillway of said dam, which application was approved, and that work completed in 1930; that on January 24, 1930, pursuant to the provisions of the Dam Act, the respondent city filed its application for the approval of this dam; that an inspection of the dam was made in June, 1931, by engineers and geologists representing the state engineer, and, based upon their findings and reports and other previous reports and inspections, the state engineer found that the dam was unsafe; that on September 10, 1930, the respondent city was notified in writing that the dam would not be approved until the buttresses were strengthened, and the filing of plans and specifications for the strengthening of said buttresses was requested; that, the respondent city having failed and omitted to file such plans and specifications on August 15, 1931, the said engineer issued an order directing said city to strengthen the buttresses of said dam and to commence the work on or before October 15, 1931, and to complete the same on or before December 31, 1931, and that a similar order was served upon the respondent company; that both respondents have failed, neglected, and refused to comply with said orders; that between May, 1931, and January 8, 1932, a number of other investigations of said dam were made by various engineers and geologists representing the state engineer; that these various investigators reported to the effect that the buttresses of this dam are improperly designed and constructed, and that there has been an annual variation in width and also an accumulative width of cracks in said dam; and that eathquake shocks which might be expected in that region might cause some of the buttresses to collapse and the structure to fail. It is then alleged that said Lake Hodges Dam was on August 15, 1931, and at all times since has been, and now is, unsafe and a menace to life and property; that there is now impounded behind said dam about 22,000 acre-feet of water; that said dam might suddenly collapse and release a flood of water which would endanger the lives of many people living in and passing through the area below it; that in the past there have been ten earthquakes in that region of sufficient intensity to injure this dam, although none of these has occurred since the dam was constructed; that the present season is one of very heavy precipitation and run-off, that the time of the heaviest run-off in this shed is in the months of January and February, and it is anticipated that said reservoir will then be filled to capacity; that, although the spillways of said dam are adequate to accommodate large floods, a flood may reasonably be expected in such a season as this, of such proportions as to cause an overtopping of the entire dam, setting up severe vibrations in the buttresses and threatening the entire structure; that its defects in design and construction render this dam of doubtful construction and safety under usual and ordinary conditions, and that such safety would become more doubtful in times of flood; and that it would take eighteen days to drain the reservoir at its present level and with the outlets now provided, and twenty-six days to drain it if the reservoir was full. It is then alleged that it would be a hazardous undertaking to breach this dam during the present season of precipitation, and that it would be impractical and an economic waste to enlarge the outlets sufficiently to prevent the accumulation of water in the reservoir, and that "the only economic and practical means of speedily obtaining protection to life and property and which will render said dam safe with the least possible delay and preserve its usefulness is the immediate commencement and energetic prosecution of the work necessary to thoroughly strengthen the buttresses by bracing and inter-bracing." The prayer is that a writ issue directing each of the respondents to "forthwith strengthen the buttresses of said Lake Hodges dam and to do so pursuant to the authority by law vested in the petitioners and to do all things necessary or incidental to the doing of said work."

Pursuant to the above petition, an alternative writ of mandate was issued by the Supreme Court and made returnable before this court, commanding the respondents to strengthen the buttresses of said dam or to show cause why they should not be required so to do. Demurrers and answers were filed by the respondents, the demurrers being first argued, and the case is now before us upon the points raised by these demurrers.

[1] The act here under consideration has been held to be a proper exercise of the police power of the state. Bent Bros., Inc. v. Campbell, 101 Cal. App. 456, 281 P. 717, 719; Sawyer v. Board of Supervisors, 108 Cal. App. 446, 291 P. 892; Los Angeles County Flood Control Dist. v. Wright (Cal. Sup.) 2 P.(2d) 168. While the general validity of this act and the right of these agencies of the state to enforce reasonable regulations in the manner provided may be considered as established, we are here called upon to consider the right of the department to affirmatively compel the repairing or rebuilding of a dam. Any order we could make is of course limited by the terms of the alternative writ which was issued. Gay v. Torrance, 145 Cal. 144, 78 P. 540.

[2] The first question presented is whether this act authorizes the petitioners to compel the doing of certain work upon this dam, not indirectly by withholding their approval or their permission for its further use, and not with the alternative of refraining from maintaining and using a dam which may be in an unsafe condition, but affirmatively and in any event. In effect, the case before us goes the extent of presenting the question of whether the owner of a dam may be compelled to rebuild the same, since the petition clearly shows that the work sought to be compelled is deemed necessary fully as much because of defects in the original design and construction of the dam, due to the lesser amount of knowledge prevailing at that time, as by reason of any subsequent deterioration in the structure. The first question then is whether the terms of this act are to be so interpreted as to give to the petitioners the right to directly compel the doing of particular work, or as merely to give them the power to prevent either the construction or the maintenance of an inadequate or unsafe dam, through the methods provided in the act. In Bent Bros., Inc. v. Campbell, supra, the court said: "As we read the act there is nothing which authorizes the state engineer to directly require the construction of a dam according to any particular plans or specifications, nor does the act authorize the state engineer to make any material alterations in any contract which has been entered into between an owner and contractor for the construction of a dam. But while the act does not, in terms, directly authorize the state engineer to do what we have mentioned, it does indirectly give him power to enforce his recommendations and suggestions by enabling him to begin actions to enjoin and restrain the construction or maintenance of any dam not constructed or repaired according to approved plans and specifications, and through the medium of the court affect the safety of persons and property living below the point or place of the construction of the dam, and the creating of a reservoir which might become a menace to the property and lives of persons in the course which the impounded waters would take in the event the proposed structure proved inadequate to withstand the pressure of the impounded waters."

In Sawyer v. Board of Supervisors, 108 Cal. App. 446, 291 P. 892, 896, the court said: "In the case of Bent Bros. v. Campbell, supra, this court held that the act in question gives the state engineer power to enforce his recommendations and suggestions by enabling him to begin actions to enjoin and restrain the construction or maintenance of any dam not constructed or repaired according to approved plans and specifications. * * *"

The court thus points out that there is nothing in the act which authorizes the state engineer to directly require a particular kind of construction in the erection of a dam, although indirectly the same result may be accomplished. We think the same thing is true with respect to the maintenance of a dam already constructed. While the approval of the department is necessary for the continued operation and maintenance of an existing dam, and while a large control is thus possible in the indirect way of withholding such approval, with a penalty for otherwise continuing operation, and while the department is given power to enforce the provisions of the act through a court proceeding or even by summarily relieving the stress upon a dam to the extent of completely emptying it if necessary, on the other hand, we see nothing in the act purporting to authorize the department to compel the owner of a dam to maintain the same, or to compel that certain work be done with that end in view, without regard to whether or not the owner of such a dam desires to continue to maintain and to operate the same.

Section 4 of the act requires the owner of an existing dam to apply for a certificate of approval, which was done in this case. It also requires the department to examine the dam within three years, which was here done, and provides that the department shall either issue a certificate of approval or an order directing the work necessary to be done and fixing a time therefor, the latter of which was done in this case. While the section thus provides for the issuance of a certificate of approval if the work is done to the satisfaction of the engineer, this particular section of the act does not provide what shall be the effect of the failure to do the work ordered. Section 12 of the act authorizes the state engineer, in an emergency, to take any remedial action that is necessary to protect lives and property, even to the extent of partially or entirely emptying the dam. Section 17 makes a failure to comply with the provisions of the act a misdemeanor and provides a penalty therefor. Section 18 provides that, in case of a violation of the act, the department may commence an action or proceeding in the superior court "for the purpose of having such violations or threatened violations stopped and prevented." In our opinion, the purpose and effect of this act is to confer upon the department the right to prevent the continued maintenance and operation of a dam in an unsafe condition, but not to authorize the department to compel either the rebuilding or the continued operation of such a dam. Nowhere in the act is there any provision that the owner of a dam may be compelled to do a specific thing or to do any work in a particular way, except as a condition for obtaining the approval of the department in the event it is desired to continue to operate the dam. As we read the statute, the owner of such a dam may be restrained from maintaining it in such a condition that it may be dangerous, he may be punished for violating the terms of the act, and he may be subject to having his reservoir summarily emptied to a sufficient extent to make it safe, in case of an emergency, or, in other words, he may be prevented from operating and maintaining a dam in an unsafe condition. But, on the other hand, he may neither be directly compelled to remodel, repair, or rebuild the dam, nor may he be compelled to continue to maintain or operate the same nor directly compelled to put it into a condition where it could safely be continued in operation. We think the act is preventive rather than compulsory in nature. Without doubt, so far as this act is concerned, the respondents would have the right to cease to use and maintain this dam. Possibly they might then be compelled by mandate to remove the dam, at least sufficiently to prevent its becoming a menace to the public. But a very different sort of order is here asked for.

It would appear that any such interpretation of the act here involved as would permit the department to affirmatively compel the doing of particular work regardless of whether or not the owner of a dam desired to continue to operate and maintain the same, would, at least so far as the respondent company is concerned, be in violation of article 1, § 14, of the Constitution of California and of the Fourteenth Amendment to the Constitution of the United States, as taking private property for public uses without compensation. Pacific Tel. & Tel. Co. v. Eshleman, 166 Cal. 640, 137 P. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822; Chicago, Burlington & Quincy Ry. Co. v. People of State of Illinois, 200 U. S. 561. 26 S. Ct. 341, 50 L. Ed. 596, 4 Ann. Cas. 1175; West Chicago Railroad v. Illinois ex rel. Chicago, 201 U. S. 506, 26 S. Ct. 518, 50 L. Ed. 845; City of Philadelphia v. Provident Life & Trust Co., 132 Pa. 224, 18 A. 1114. In these and many other cases, while the right of the state in the exercise of its police power to compel the doing of certain things as a condition to the continued use of property for specific purposes has been upheld, we know of no case where the owner of property has been deprived of a choice between complying with the requirements made and ceasing to so use his property. In Bent Bros., Inc. v. Campbell, supra, the court said: "While not so denominated, the act is purely a police regulation and must stand or fall as so considered." While the police power may limit and restrict the uses to which an owner may put his property, it may not compel him to use such property for a particular purpose if he prefers to abandon such a use thereof. Counsel for the respondent company furnish the apt illustration that a farmer with a dam costing $10,000 and only valuable to him to that extent, could not, although such a dam be unsafe and dangerous to the lives of others, be compelled to rebuild or repair the dam in such a manner as to cost $50,000, an amount far in excess of its value to him, even though that amount might be required to make the dam safe, although he might well be compelled, as an alternative proposition, to forego the use of the dam.

We think the particular writ of mandate here sought is not available to the petitioners for the further reason that the dam act itself provides an adequate statutory remedy, and, as has been pointed out, this act is purely a police regulation, and its only purpose is to prevent the maintaining of dams in such an unsafe condition as will endanger the lives and property of the public. In case of a violation of its provisions, two remedies are provided in the statute. Section 18 of the act provides for an action in court, a portion thereof reading as follows: "The department shall bring such action or proceeding by petition in such superior court, alleging the violation or threatened violation complained of, and praying for appropriate relief by way of mandamus or injunction. It shall then be the duty of such court to specify a time, not exceeding twenty days after the service of the copy of the petition within which the owner or person complained of must answer the petition, and in the meantime said owner or person may be restrained. In case of default in answer or after answer the court shall immediately inquire into the facts and circumstances of the case. Such parties shall be joined as the court may deem necessary or proper in order to make its judgment, order or writ effective. The final judgment in such action or proceeding shall either dismiss the action or proceeding or direct that the writ of mandamus or injunction issue or be made permanent as prayed for in the petition, or in such modified or other form as will afford appropriate relief."

In Bent Bros., Inc. v. Campbell, supra, the court said: "Section 18 of the act authorizing the state engineer to institute actions by way of mandamus or injunction puts teeth enough therein to make all the reasonable mandates of the state engineer effective."

Although this section provides also for a writ of mandamus, it must follow that this would apply only under certain circumstances and for a proper purpose. It might apply, for instance, where it was impossible to prevent a continuance of the danger except by compelling the removal of the dam. But, so far as here appears, these petitioners, not only have an adequate remedy through an injunction, but a much more speedy and convenient one, since an injunction could be secured on the very day an action was filed, upon a proper showing of facts. A second remedy given by the statute, in section 12 thereof, is the right, in case the condition of the dam is so dangerous as not to permit of time for the issuance and enforcement of an appropriate order, to take any remedial means necessary to protect life and property, even to the extent of lowering the water in the reservoir or of completely emptying the same. The petition herein alleges that these remedies are inadequate for the reason that, with the present outlet facilities of this dam, it would take eighteen days to drain the reservoir at its present level, and that, during the years 1916 and 1927, floods occurred which caused an inflow into the reservoir greater than the capacity of the outlets. It neither appears that it would be necessary to completely drain the reservoir to make this dam safe, nor how much lowering of the water would be required to make it safe, nor how long this would take, nor how long it would take to do the work, the doing of which is here sought to be compelled. So far as appears, the strengthening sought to be compelled in this proceeding may take longer than the other remedies which are open to petitioners, and as much danger of a flood creating an emergency may exist in the one case as in the other. Already this proceeding has taken sixty days and may consume much more time. Under ordinary conditions, the statutory remedies given the petitioner are entirely sufficient and in case of a sudden emergency, such as it is alleged occurred in 1916 and 1927, it is difficult to see why the very summary powers given to the department in such an emergency would not be more speedy and more effective, in so far as preventing loss of life and property through any weakness in this dam, than any writ that could be issued in such a proceeding as this. It seems apparent that this writ is sought not as a means of meeting an emergency or as the only means of preventing the operation of a dam in an unsafe condition, but for the general purpose of compelling specific work to be done, with an eye to continuing the economic value of the dam. While this latter object is a commendable one, we think it comes neither within the police power of the state nor the terms of this act.

A number of other questions are raised, including one as to the jurisdiction of this court, in view of the fact that the act provides that a proceeding shall be brought in the superior court; whether the granting of this writ as against the respondent company would impair the obligation of a contract, since the lease referred to provides that the respondent city shall pay for any repairs or alterations to the dam; and whether such an order could be enforced against the respondent city since the petition does not allege that the city has funds available which could be lawfully appropriated to this purpose. It is unnecessary to discuss these questions in view of our conclusion that the petitioners are not entitled to the writ prayed for, under the provisions of the act itself.

The ends sought to be attained by the provisions of this act are both necessary, under well-known conditions, and legal, as an exercise of the police powers of the state. Broad powers are given to the department, and rightly so, to prevent the operation and maintenance of dams in such a condition as will endanger the lives and property of the public. We think these powers are limited by the plain provisions of the act to the prevention of the construction and operation of unsafe dams, and that they do not extend to the point where the owner of a dam may be compelled to continue its operation or directly compelled to perform specific work which might be necessary to any such continuance.

The demurrers are sustained, and the peremptory writ is denied, without prejudice to any other proper proceeding.

We concur: MARKS, J.; LAMBERT, Justice pro tem.

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122 Cal.App. 5

SCHMIDT v. CITY OF VALLEJO.

Civ. 4520.

District Court of Appeal, Third District, California.

March 19, 1932.

Rehearing Denied April 18, 1932. Hearing Denied by Supreme Court May 16, 1932.

1. **Municipal corporations ⇨857.**

To recover against municipality under statute, plaintiff must prove he was injured as result of dangerous or defective condition of property (St. 1923, p. 675, § 2).

St. 1923, p. 675, § 2, renders municipalities liable for injuries resulting from defective conditions of their property which are not remedied within a reasonable time after notice of such conditions.

2. **Municipal corporations ⇨852.**

Slide raised 13 feet from ground and provided for children to play upon is not "dangerous instrumentality" within statute rendering municipalities liable for injuries resulting from defective conditions of their property (St. 1923, p. 675, § 2).

[Ed. Note.—For other definitions of "Dangerous Instrumentality," see Words and Phrases.]

3. **Municipal corporations ⇨852.**

Municipality *held* not liable for injuries received by boy who, while in position of safety, fell from top of slide maintained in public playground, though city knew slide was defective elsewhere (St. 1923, p. 675, § 2).

Appeal from Superior Court, Solano County; Percy S. King, Judge.

Action by Richard Schmidt, a minor, by Hazel Schmidt, his guardian ad litem, against the City of Vallejo, a municipal corporation. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

L. L. Steele, of Oakland, and James F. Brennan, of San Francisco, for appellant.

Russell F. O'Hara, of Vallejo, for respondent.

Mr. Presiding Justice PRESTON.

This is an action for damages brought by plaintiff, a minor of the age of nine years, through his guardian ad litem, against the defendant municipality, under section 2 of the Statutes of 1923, page 675, for certain personal injuries received by plaintiff as the result of a fall from an alleged dangerous and defective slide maintained in the public playgrounds of the defendant, city of Vallejo.

The case having been called for trial, a jury was impaneled and evidence adduced. At the conclusion of plaintiff's case defendant moved for a nonsuit, which motion was granted and judgment of nonsuit entered.

Plaintiff prosecutes this appeal from said judgment.

The statute mentioned is found in the Statutes of 1923, page 675, and section 2 thereof reads as follows: "Counties, municipalities and school districts shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets, highways, buildings, grounds, works and property in all cases where the governing or managing board of such county, municipality, school district, or other board, officer or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition of any such street, highway, building, grounds, works or property and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition or failed and neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition."

Specific attention may be called to the opening portion of the law, as follows: "Counties * * * shall be liable for *injuries* to persons and property *resulting from* the dangerous or defective condition of public streets * * * property in all cases," etc.

Cases arising under the statute quoted have been before the courts many times and it is needless to review the authorities. A mere citation to such authorities will suffice: Hook v. City of Sacramento (Cal. App.) 5 P.(2d) 643; Huff v. Compton Grammar School, 92 Cal. App. 44, 267 P. 918; Dawson v. Tulare High School, 98 Cal. App. 138, 276 P. 424; Gorman v. County of Sacramento, 92 Cal. App. 656, 268 P. 1083. We adhere to the conclusions reached, both by this court and in other courts in this jurisdiction.

[1] From the decisions and from the wording of the statute we are of the opinion that in order to recover damages a plaintiff must prove at the outset that he has been *injured as a result of the dangerous or defective con-*

dition of public streets, buildings, grounds, works, or property.

In the instant case appellant prefaces his argument in the following terms:

"Under the statute it is only necessary for plaintiff to prove four things, which are:

"1. The dangerous and defective condition of the property;

"2. Knowledge of some officer or agent of the defendant of the dangerous or defective condition;

"3. Neglect to repair within a reasonable time after notice or knowledge;

"4. Authority of the officer or agent to repair."

If we should accept appellant's views in this regard, we would have no alternative but to reverse the judgment.

There was sufficient evidence to have rendered erroneous a nonsuit on each of the elements so claimed to be the entire foundation of the present cause of action. But it can be at once seen that appellant has entirely ignored the one most important element in his cause of action, namely, the injury. The injury in the present action is alleged to have resulted from the dangerous and defective condition of a certain playground structure commonly designated as a slide. Such a contrivance is in general public use throughout the playgrounds of the state, and any detailed mechanical blueprint thereof would be unnecessary. It may be generally described, however, with particular reference to the slide here in question.

Two upright posts or poles are set in the ground and are of a height approximately 13 feet. From the top a ladder runs to the ground on one side and a semicurving slide runs to the ground from the other side. This slide has a smooth surface and starts at a pitch of forty-five degrees, curving up as the bottom is approached, so that the last few feet of the slide almost parallel the ground.

To use the slide, one goes up the ladder to the top point where the slide and ladder apex. Here there is a guard railing extending above the structure about 2 feet, forming an arch effect. The railing runs as a support for a person about to be seated upon the slide and enables the person to acquire a balance insuring a straight and even course down. This rail or guard drops down over the slide to a distance of 3 feet or thereabouts and at the end the rail is turned to fasten to the slide at that point. By way of further description this guard or rail is so arranged that one seated on the slide, preparatory to going down, may, while still seated, secure a hold upon the rail. About a foot and one-half from the top of the slide there is an upright brace running from the slide to this rail, the general and designed purpose of which is to brace and strengthen the rail and render the same less mobile.

At the point where the slide and ladder join is a metal apron covering and concealing the jointure and presenting an unbroken surface at the apex.

It is conceded that the slide was located in a public playground maintained by the defendant city and under the care and supervision of its officers. And at this point it may be conceded that there is in the record before us ample evidence to the effect that in some particulars this slide was in a defective and perhaps dangerous condition. For instance, the apron over the apex ridge was loose and could be flapped about; the side boards on the slide were rough; the frame was so secured that it was possible for two or three boys to cause the slide to vibrate and sway. Also, at the outlet or end from the slide there is a concrete landing. There is also evidence to indicate that the slide had been the scene of other accidents and that complaint had been made to the proper officers of the city and no action taken.

[2, 3] On the day in question here, plaintiff, a boy of nine years of age, went to the playground in the company of other young people, all older than himself. Plaintiff alone undertook the slide. He walked up the ladder, crossed the apron and seated himself at the top of the slide. He did not, however, at once commence the descent. He remained seated there with his legs outstretched and resting his feet against the braces supporting the rail. While so seated, one of his companions inquired the time of day and plaintiff reached down into his clothing for his watch. In some manner one of his feet got caught between the brace and the outer wall of the slide. He thereupon, in an effort to free himself, straightened up his body and pulled himself backward and upward. The release of the foot caused a sudden impetus to be given the body and the boy fell backwards over the top and down to the ground, causing him to be seriously injured.

Upon the motion for a nonsuit the trial judge's conclusion was expressed as follows: "His fall was caused because he was a little fellow and not strong enough to get just into the right position, or because he was careless or for some reason he fell; *but it was not caused by a defect in the construction of the slide.*" We may stop here, in passing, to note appellant's contention that the reasons given by the court below were reasons other than assigned in the motion for a nonsuit. There is no merit in this contention. The primary ground of defendant's motion was that if there was any defect in the slide there was no evidence that the injury resulted therefrom. Therefore, the court's holding was in direct response to the motion.

The boy was in a position of unquestioned safety. Certain minor defects which may have been in the slide in no way entered into the accident. There is some evidence to the point that the structure was so erected that the rail and support provided a place where a boy might place his feet and that the feet so placed might get fastened, as did the feet of plaintiff. This argument is purely speculative. There is no evidence of any knowledge on the part of any of the defendant officers or employees that this part of the slide was so used. There is no evidence that the rail and its support were provided for such a purpose, or for any other purpose than to aid in the proper and safe use of the apparatus. The structure was of standard pattern and in general use; an approved appliance for outdoor recreation and diversion.

There is no instrumentality, however safely constructed, but that it may be converted in its use into an instrumentality of danger. It is a generally well-known commonplace that children in early years display an aptitude in jumping from places of varying height, and it seems readily apparent that if one child in play should mount the ladder of this slide and deliberately jump from a high round or step thereof, the resulting injury, if any, would hardly be chargeable to the fact that there was some slight defect elsewhere in the slide.

There was testimony to the effect that more modern slides have changed the style of construction, in so far as this guard rail is concerned. The change has resulted in the rail being shortened or looped into a circular affair of much less proportion. The evidence concerning this change shows that it was made not to protect against a demonstrated danger, but for the purpose of preventing two or three boys loitering at the top or to prevent one larger boy from hogging the appliance.

Mindful, as we must be, of all of the rules regulating and defining the trial court's right and duty on motions for nonsuit, we can find no evidence in the record that would support a judgment for plaintiff had the case gone to the jury.

It is true that any structure raised thirteen feet from the ground and provided for children to play upon has certain elements of hazard. But the general experience of educators and playground directors has shown these slides to be rarely the source of accident of serious nature. They cannot be classed as dangerous instrumentalities.

All that the plaintiff required for his safety was a proper use of the slide. Unfortunately, and perhaps as a boy will often do, he wanted to slide in his own way. The fact that the brace could be used as a footrest, while preparing for the slide, did not make the construction defective or dangerous. The function of the brace was solely to support the rail, which furnished a support and guide for the younger people in getting seated.

There is not a syllable of evidence to the effect that in this respect the slide was either defective or dangerous as a matter of construction. In fact, it is obvious that the slide would be greatly more dangerous with no support.

Appellant stresses the point that there is evidence to the point that in some other cities slides have been constructed in a bed of sawdust or shavings, so that a fall from any part of the structure would be less likely to result in serious injury.

This is but an additional factor of safety and raises no inference that slides without this safeguard are dangerous or defective.

If we hold, as the record compels, that the slide itself is not a dangerous appliance, it must follow that any failure to guard against all possible danger does not create the liability claimed.

Under the law governing, it is not for a court or jury to speculate as to possibilities of insuring absolute safety. The law fastens upon a municipality the duty of maintaining its property in a condition neither dangerous nor defective. When it does so maintain its property, liability is not to be fastened upon it merely because it may appear that certain property, in no wise dangerous either in its construction or intended use, could possibly be made safer by other means.

The judgment is affirmed.

We concur: Mr. Justice R. L. THOMPSON; Mr. Justice PLUMMER, J.

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122 Cal.App. 505

PEOPLE v. SOUTH.

SOUTH v. SUPERIOR COURT OF NAPA COUNTY et al.

Civ. 4626.

District Court of Appeal, Third District, California.
April 12, 1932.

1. Criminal law ⚷576(2).

Accused could not have prosecution dismissed for violation of guaranty of speedy trial, where delay was due to accused being federal prisoner under control of federal authorities, who refused to deliver him over to state court (Const. art. 1, § 13; Pen. Code, § 1382).

2. Criminal law ⚷636(1).

Accused is entitled to be personally present at all proceedings of trial.

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3. Courts ⚷495.

As between federal and state courts, court first acquiring jurisdiction and custody of prisoner may retain it exclusively.

Writ of mandate to Superior Court, Napa County; Percy S. King, Judge.

John South was charged with murder, and he applies for peremptory writ of mandamus to compel the Superior Court of Napa County to dismiss the information.

Writ denied.

E. L. Webber, of Napa, for petitioner.

Wallace Rutherford, of Napa, for respondents.

PER CURIAM.

The petitioner seeks a peremptory writ of mandamus to compel the superior court of Napa county to dismiss an information charging him with murder. The application is based upon alleged failure to prosecute the cause with diligence.

The petitioner was arrested December 29, 1929, at Yountville, under a federal process, for violating the prohibition act. In the mêlée he shot the federal officer, Robert D. Freeman, in the shoulder. Under a mittimus, he was temporarily placed in the custody of the sheriff of Napa county, as a federal prisoner. January 6, 1930, he was indicted by the federal grand jury of the Northern District of California, upon four counts, to wit: Resisting an officer, illegal possession of intoxicating liquor, the unlawful use of a deadly weapon, and the infliction of great bodily injury upon the arresting officer. He was retained as a federal prisoner in the Napa county jail until February 25, 1930, when he was transferred to the Sacramento county jail for trial in the United States District Court. In the meantime, Freeman died on February 8th from the effect of the gunshot wound. The sheriff of Napa county filed a complaint in the justice's court charging him with murder. On February 18th, his preliminary examination was held and he was bound over for trial in the superior court on a charge of murder. March 1st the district attorney filed an information against him in the superior court of Napa county charging him with the crime of murder. His arraignment was set for March 3rd. On motion of the district attorney, because of the prisoner's absence, the arraignment was continued to March 17th. On the last-mentioned date the defendant was not present in court, but he appeared by counsel and moved to dismiss the information under the provisions of section 1382 of the Penal Code for failure to prosecute the action with diligence. This application was resisted by the district attorney, who filed his affidavit in support of his opposition thereto. The affidavit averred the foregoing facts and alleged the defendant was retained at all times since the commencement of the charge of murder against him, in the exclusive custody of the federal officers as their prisoner; that the district attorney had demanded of the federal officers custody of the person of the petitioner for the purpose of trying him on the charge of murder, but that "said United States governmental officials declined * * * to place the said John South under the jurisdiction of the above entitled Superior Court." The motion to dismiss the information was thereupon denied and the cause temporarily dropped from the calendar.

On May 14, 1930, the defendant South was tried and convicted in the United States District Court of one or more of the counts contained in the indictment, and sentenced to the federal prison at McNeil Island for the term of ten years. He is still confined in that institution as a federal prisoner.

Subsequently, on January 16, 1932, the defendant again moved the superior court of Napa county to dismiss the information charging him with murder on the ground of failure to prosecute the action with diligence. The district attorney again resisted the motion and filed another affidavit in support of his opposition thereto. Once more he averred the foregoing facts, alleging that during the entire time the murder charge was pending against the accused he was retained in the exclusive custody of the federal officers as their prisoner; that he demanded the custody of the person of trying him on the charge of murder, but that the United States governmental officers refused to grant the request; that he was unable to secure the custody of the defendant, but that it was his intention to prosecute the charge of murder against him as soon as he was able to obtain jurisdiction of his person. The motion to dismiss the information was again denied. This petition for a writ of mandamus was then instituted. All of the proceedings in the murder charge against the petitioner which transpired in Napa county are introduced as evidence on this hearing.

[1] The Constitution (article 1, § 13) and section 1382 of the Penal Code guarantee to a defendant a speedy trial of the offense with which he is charged. The question as to whether this privilege has been denied depends upon the circumstances of the particular case. In re Alpine, 203 Cal. 731, 265 P. 947, 58 A. L. R. 1500. Section 1382 of the Penal Code provides that "The court, *unless good cause to the contrary is shown*, must order the prosecution to be dismissed. * * * 2. If a defendant, whose trial has not been postponed upon his application, is not

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

brought to trial within sixty days after the finding of the indictment, or filing of the information." It has been held that, in the absence of a showing reasonably excusing the delay, a defendant is absolutely entitled to a dismissal of the action, if he has not been brought to trial within sixty days from the time of filing the information against him. Upon the contrary, the information should not be dismissed if the trial of the cause is delayed *for good reason*. The conduct of an accused person in concealing himself from the officers to prevent his arrest or obstruct the process of the court may furnish good cause for refusing to dismiss an information for the failure to prosecute with diligence. In re Gere, 64 Cal. App. 418, 221 P. 689. Where the defendant is outside the state and beyond the jurisdiction of the court, this fact furnishes good reason for a delay in the prosecution of a criminal charge. Under such circumstances the delay is not a violation of the statutory limitation prescribed by section 1382 of the Penal Code. So, also, while an accused person is in the exclusive charge of federal officers as a prisoner, and the state court is unable to procure jurisdiction of his person for the purposes of trial, this furnishes good cause for delay in the prosecution of his case. Under such circumstances an information may not be dismissed for lack of diligence. People v. Sichofsky, 58 Cal. App. 257, 208 P. 340, 341; Ponzi v. Fessenden, 258 U. S. 254, 42 S. Ct. 309, 310, 66 L. Ed. 607, 22 A. L. R. 879. In the Sichofsky Case, above cited, it is said: "It probably is true * * * that, after the sentence by the federal court, and until the end of his term and discharge, no state court could assume control over his body without the consent of the United States. * * * The United States District Court was the sole agency possessing authority to give consent, on behalf of the United States, to the assumption by the state court of control of the body of appellant."

Since the petitioner South was a federal prisoner under the exclusive control of the governmental authorities during all the time the state criminal proceedings were pending against him, and the federal authorities refused to consent to confer jurisdiction of his person upon the state court for the purpose of trial, there was good cause for delay in the trial of the case. Under such circumstances the constitutional and statutory guarantee of a speedy trial is not violated.

[2, 3] The case of Ponzi v. Fessenden, supra, is decisive of this petition for a writ of mandamus. In a characteristically clear and able opinion of the late Chief Justice Taft, it is held that when the federal government legally assumes the custody of one who is accused of a crime, the state authorities may not interfere with its superior right to retain the prisoner during the progress of his trial and for the period of his sentence, except by consent of the United States court having jurisdiction of the cause, or of the Attorney General. One who is charged with a crime is entitled to be personally present at all the proceedings of his trial. Neither a state nor federal court may try one who is charged with a crime without jurisdiction of the person and custody of the prisoner. 16 C. J. 174, § 225. As between the federal and state courts, the one which first acquires jurisdiction and custody of the prisoner may retain it to the exclusion of the other court until the judgment is satisfied. Marsino v. Hogsett (D. C.) 37 F.(2d) 409–413. By consent of the sovereignty holding jurisdiction of the prisoner, he may be subjected to trial in the courts of the other government by conferring custody of his person for that purpose. It is said in the Ponzi Case, "He [the prisoner] may not complain if one sovereignty waives its strict right to exclusive custody of him for vindication of its laws in order that the other may also subject him to conviction of crime against it. In re Andrews (D. C.) 236 F. 300; United States v. Marrin (D. C.) 227 F. 314. Such a waiver is a matter that addresses itself solely to the discretion of the sovereignty making it and of its representatives with power to grant it. * * * The fact that he may have committed two crimes gives him no immunity from prosecution of either." Rigor v. State, 101 Md. 465, 61 A. 631, 4 Ann. Cas. 719.

Respecting the right of a federal or state court which first secures the custody of a prisoner to retain jurisdiction of his person until the judgment of that court has been satisfied, the Ponzi Case says: "The court which first takes the subject-matter of the litigation into its control, whether this be person or property, must be permitted to exhaust its remedy, to attain which it assumed control, before the other court shall attempt to take it for its purpose." This superior right to retain the custody of a prisoner without interference is justified in this language: "It is a principle of right and of law, and therefore, of necessity. It leaves nothing to discretion or mere convenience. These courts [federal and state] do not belong to the same system, so far as their jurisdiction is concurrent. * * * When one [sovereignty] takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty."

Finally applying the principles heretofore announced to the facts of the Ponzi Case, the court says: "The federal District Court first took custody of Ponzi. He pleaded guilty, was sentenced to imprisonment and was detained under United States authority to suffer the punishment imposed. Until the end of his term and his discharge, no state court could assume control of his body without the consent of the United States."

Under the comity which exists between federal and state courts, upon proper application to the United States District Court or to the Attorney General who has custody of federal prisoners, jurisdiction of the person of one who is charged with another crime may be conferred upon the state court for the purpose of trial. This privilege will not ordinarily be requested so as to interfere with the regular proceedings of the federal court. The granting of the request is, of course, discretionary. In the present case it appears this district attorney of Napa county requested of the federal authorities the custody of the prisoner South for the purpose of trying him in the state court for murder, and that this request was refused "by the United States governmental officials." We assume there was valid reason for refusing this application at the time it was made. This court is not concerned with the reason for the refusal. The federal authorities had a right to refuse the request with or without cause. It necessarily follows from the foregoing authority that so long as the United States refuses to confer jurisdiction of the person of John South upon the Napa county superior court, it may not be said the cause is not prosecuted with due diligence or that the defendant is deprived of his constitutional or statutory right to a speedy trial. This remains true, even if the trial of the defendant on the charge of murder is thus suspended until his federal sentence at McNeil Island is completed.

The writ of mandamus is denied.

MONTEREY PARK COMMERCIAL & SAV. BANK v. BANK OF WEST HOLLYWOOD et al.*

Civ. 8260.

District Court of Appeal, First District,
Division 2, California.
March 25, 1932.

Rehearing Granted April 23, 1932.

1. Deeds 🔑56(2).

Whether grantor delivered deed to grantee through escrow holder depended on grantor's intention.

2. Judgment 🔑253(1).

Judgment for damages exceeding amount demanded in complaint is erroneous.

3. Mortgages 🔑217.

If mortgagee lost part of land securing debt, damages against party causing loss would be its market value, less market value of remaining land.

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by the Monterey Park Commercial & Savings Bank against the Bank of West Hollywood and others, to cancel deed and compel reconveyances. From a judgment against all defendants except Alice A. Dodd, they appeal.

Reversed.

David E. Fulwider, of Hollywood (Harold A. Fendler, of Los Angeles, of counsel), for appellants.

Goudge, Robinson & Hughes and David A. Sondel, all of Los Angeles, for respondent.

JAMISON, Justice pro tem.

This was an action to cancel a certain deed from plaintiff to defendant Leslie Miller for a certain tract of land containing ten acres in Yucaipa valley, and also to cancel a deed conveying the same land from said Leslie Miller to defendants George W. Miller and Elizabeth Miller, or, in the event that title to said land cannot be decreed to plaintiff, that it recover from defendants the sum of $7,200, that being the reasonable value of said lands.

Judgment was rendered for plaintiff canceling the said deeds and requiring said Millers to reconvey said land to plaintiff within thirty days after its rendition, and, in the event of their failure to do this, that plaintiff have judgment against them and the defendant Bank of West Hollywood for the sum of $8,000. All of the said defendants filed motions for new trials, and, said motions having been denied, they have appealed.

No judgment was taken against defendant Alice A. Dodd.

On October, 1896, defendant Alice Dodd and her husband conveyed to respondent by their deed a 5-acre tract of land known as block 82, hereafter also referred to as tract No. 1, and also a tract of land known as block 70, hereafter also referred to as tract No. 2.

Thereafter on January 4, 1927, the said Alice Dodd, acting through her husband, J. D. Dodd, entered into an escrow with appellant Leslie Miller by which she agreed, in exchange for certain property to be deeded to her by said Miller, to convey to him the 10-acre tract designated as tract No. 2.

On January 14, 1927, appellant Leslie Miller and said Alice Dodd entered into another escrow known as escrow No. 258, in which

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*For subsequent opinion see 13 P.2d 976.

she agreed to convey to said appellant the said five acres embraced in tract No. 1, in exchange for certain property to be conveyed to her by said Miller. Both of these escrows were deposited with appellant Bank of West Hollywood, as escrow holder.

On March 25, 1927, respondent wrote a letter to said Bank of West Hollywood, inclosing therewith a deed, wherein respondent was named as grantor and the said Leslie Miller as grantee, conveying to the said Miller the said five acres described as block 82, in which referring to escrow 258A, the following instructions were given to appellant: "You are at liberty to use this deed in accordance with instructions from Mr. J. D. Dodd which I understand he has given you in connection with the above mentioned escrow and escrow No. 1058 at the Wilshire National Bank, when you are able to remit to this Bank the sum of $4,000.00, together with two Trust Deeds, one in the amount of $2,000.00 on property located near the town of Artesia, Los Angeles County, the other for $1200.00 on property located on Bentley Avenue, North Pico Blvd., in the City of Sawtelle."

On April 11, 1927, appellant Bank of West Hollywood wrote respondent as follows, referring to escrow 258A: "We are returning herewith deed from yourselves to Leslie Miller, covering Block 82, according to Map of Subdivision 3 of a part of Yucaipa Valley, County of San Bernardino, State of California, Except portions thereof, as this property is being placed in another escrow, and withdrawn from our escrow," and returned therewith respondent's deed to Miller for said block 82. On April 12, 1927, respondent sent this deed to the Wilshire National Bank with instructions similar to those given the Bank of West Hollywood.

On April 14, 1927, appellant Bank of West Hollywood wrote respondent inclosing a deed from respondent to Leslie Miller for the ten acres described as block 70 and, referring to escrow No. 251A, said: "As the report on condition of title covering property shown in enclosed deed shows title in your Bank we would ask that you have same executed and returned to us. Trusting you will give this matter your attention as we are ready to close the escrow."

On April 25, 1927, the said deed having been signed and acknowledged by the officers of respondent bank it returned said deed to the Bank of West Hollywood with the following letter, referring to escrow 251A: "Enclosed herewith Corporation Grant Deed executed by the Monterey Commercial and Savings Bank in favor of Leslie Miller, a single man. Trusting you will find same correct and satisfactory we are."

One of the officers who signed and acknowledged the last-named deed in behalf of respondent bank was O. R. Clanton, the vice president thereof. He testified that when he signed the said deed he supposed it contained the same description that was contained in the deed sent to the West Hollywood Bank on March 25, 1927, nor had he at any time received any information, from any source, that a deed containing any other description than that contained in the deed of March 25, 1927, had been requested or required of respondent bank.

W. L. Parslow, who was the secretary of respondent bank and as such signed and acknowledged said last-named deed, testified substantially to the same facts as those testified to by witness Clanton.

Upon the receipt by it of said last-named deed, the Bank of West Hollywood caused said deed to be recorded, and delivered it to said Leslie Miller when said escrow No. 251A was closed.

The escrow in the Wilshire Bank was never closed, but was abandoned and the said deed of appellant to Leslie Miller was never delivered to him, but was returned through the mail to respondent.

Respondent never received any consideration for its deed conveying to Leslie Miller the said block 70, consisting of the 10-acre tract.

On February 9, 1927, appellant Bank of West Hollywood wrote to the said Alice A. Dodd, stating that it had talked with her husband advising him that it would be necessary to have a deed from respondent to close escrow 251A, and also a copy of its articles of incorporation for filing in San Bernardino county, and on March 4, 1927, a copy of said articles was sent appellant bank by respondent for use in connection with said escrow No. 251A.

On or about August 1, 1927, the said Leslie Miller conveyed said block 70 to his parents, George W. Miller and Elizabeth F. Miller. This deed was recorded on August 11, 1927. Respondent claims that it had no knowledge regarding the delivery of its deed for block 70 to Leslie Miller until in January, 1928, and that on the 28th of that month it wrote the Bank of West Hollywood to return said deed or transmit to it the said $7,200 in cash and mortgages. Appellants contend that the findings are not supported by the evidence.

One of the findings is that the Bank of West Hollywood intentionally misled respondent into believing that the deed to the ten acres in block 70 sent it on April 14, 1927, was in fact the deed for the 5-acre tract in block 82. We find no support in the evidence for this finding. Nor are the findings that the Bank of West Hollywood at all times knew or should have known that respondent at no time intended to deposit with the Bank of West Hollywood its deed for the said ten acres in block 70, nor to permit any conveyance of said ten acres to be made to said Miller, and that the Bank of West Hollywood concealed from respondent the fact that said deed covered the said ten acres in block 70 instead of the five acres in block 82 and concealed from respondent that Leslie Miller had executed a deed to the ten acres in block 70 to George W. Miller and Elizabeth F. Miller are not supported by the evidence. There are other findings of the court which the evidence fails to support, but we will limit our discussion of them to one more only.

The court found that the conveyance from Leslie Miller to George W. Miller and Elizabeth F. Miller was executed without any good or valuable consideration. Leslie Miller testified that he received a consideration for this conveyance from George W. Miller and Elizabeth Miller, but upon respondent's objection the court refused to let him state the nature of that consideration. As no evidence was offered by respondent to the effect that the consideration passing from the said Millers to Leslie Miller was not a valuable one, this finding was not supported by any evidence. The court erred in refusing to permit appellants to offer proof as to the character of the consideration passing from the said Millers to Leslie Miller. There is no evidence that the said George W. Miller or Elizabeth F. Miller had any knowledge or notice that the delivery of the deed to Leslie Miller and passing title to him to the said 10-acre tract was dependent upon any conditions.

[1, 2] Respondent contends that the deed from it to Leslie Miller for the 10-acre tract in block 70 was never delivered. While the court found that this deed was delivered by the Bank of West Hollywood to the said Miller, there is no finding whether or not respondent delivered said deed to Leslie Miller or caused it to be delivered to him. The Bank of West Hollywood claims that having informed respondent that escrow No. 251A was ready to be closed and that said deed was necessary for that purpose, and that respondent in its letter inclosing said deed, duly executed by it, attached no conditions to its delivery to Leslie Miller in completing the closing of said escrow, gave it authority for such delivery. Some color is given to this claim of the said bank from the fact that in its letter of February 9, 1927, to Alice A. Dodd, it stated to her that it would be necessary to have a deed from respondent for the said ten acres before escrow No. 251A could be closed, and there is a presumption that respondent had knowledge of the contents of this letter from the fact that in this same letter the Bank of West Hollywood requested a copy of the respondent's articles of incorporation, and on March 11, 1927, respondent sent a copy of said articles to be used in connection with escrow 251A. In Williams v. Kidd, 170 Cal. 631, 638, 151 P. 1, 3, Ann. Cas. 1916E, 703, the court said: "It is essential to the validity of a transfer of real property that there be a delivery of the conveyance with intent to transfer the title, and the true test under which delivery is to be determined is in ascertaining whether in parting with the possession of the conveyance the grantor intended thereby to divest himself of title. If he did, there was an effective delivery of the deed. If not, there was no delivery. The solution of this question is grounded entirely on the intention of the grantor, and this essential matter of intention is a question of fact to be determined by the trial court from a consideration of all the evidence in a given case." Hotaling v. Hotaling, 193 Cal. 368, 224 P. 455, 56 A. L. R. 734; Kimbro v. Kimbro, 199 Cal. 344, 249 P. 180. The amount of the damages demanded in the complaint is the sum of $7,200.

Respondent had judgment for $8,000. A judgment for damages in excess of the amount prayed for is erroneous. Burke v. Koch, 75 Cal. 356, 17 P. 228; 14 Cal. Jur. 988.

[3] If respondent's acceptance of a deed from Alice A. Dodd partook of the nature of an equitable mortgage to secure the $7,200 owing to it, and said deed was given and accepted for that purpose, then the measure of damages for the loss of the ten acres in the block 70 would be the market value of said ten acres, deducting therefrom the market value of the five acres in block 82 still held by respondent, and upon the retrial of this case the appellants should be allowed to offer proof of these facts.

We are of the opinion that, for the reasons heretofore set forth, the judgment should be reversed, and it is so ordered.

We concur: NOURSE, P. J.; SPENCE, J.

122 Cal.App. 416

SPELLACY v. DAUTERMAN et ux.

Civ. 8132.

District Court of Appeal, First District, Division 1, California.

April 8, 1932.

Rehearing Denied May 7, 1932. Hearing Denied by Supreme Court June 4, 1932.

1. Gifts 🔑49(5).

Evidence sustained finding donor giving donee passbook and order of payment of savings account for services rendered intended to make transfer of account.

2. Appeal and error 🔑171(3).

Objection that findings are not within issues cannot be considered on appeal where action was tried without objection to pleadings, and findings are justified by evidence.

3. Appeal and error 🔑1032(1).

Prejudice must be shown to warrant reversal for findings not being within pleadings, where no objections to pleadings were made, and evidence justified findings.

4. Banks and banking ⚷139.

Drawee's authority to pay check is revoked by drawer's death before payment or acceptance.

5. Gifts ⚷30(3).

Donor's order directing bank to pay her savings account to donee accompanied by delivery of passbook *held* complete gift making such order valid, though not presented to bank until after donor's death.

6. Gifts ⚷30(3).

Delivery of passbook of savings account with order for payment of whole account with intention of making gift of deposit constitutes complete gift, though not presented to bank until after donor's death.

7. Gifts ⚷30(3).

That passbook and order to pay savings account delivered to donee was made payable to donee's husband did not constitute husband donor's agent, making gift invalid because not presented before donor's death.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Alma Spellacy, as administratrix of the estate of Mary E. Havens, deceased, against W. L. Dauterman and wife. From a judgment for defendants, plaintiff appeals.

Affirmed.

Joseph F. O'Malley, of San Francisco, for appellant.

Ford & Johnson and Fletcher A. Cutler, all of San Francisco, for respondents.

PER CURIAM.

The above action was brought by the administratrix of the estate of Mary E. Havens, deceased, to recover the sum of $2,399.69. The complaint contained three counts, the first two alleging, in substance, that on January 16, 1928, the deceased had on deposit with the Hibernia Savings & Loan Society the said sum, and on that date signed and delivered an order on the bank to pay the same to defendant W. L. Dauterman, who acquired possession of the order and collected the above amount and paid the same to his wife, defendant Cathryn Dauterman; that there was no consideration for the order, and that the same was not accepted or paid by the bank until after the death of Mrs. Havens; further, that the latter, by reason of her bodily and mental condition, was incapable of knowing the effect of the transaction, and that defendants exercised undue influence over her in obtaining the order. The third count was for money had and received.

Defendants denied that Mrs. Havens was incompetent or incapable of understanding the nature of the transaction, or that undue influence was exercised to obtain the order. They alleged that preceding its execution defendant Cathryn Dauterman had rendered services to Mrs. Havens, and that in consideration thereof the order was executed to defendant W. L. Dauterman for the use and benefit of his wife.

No evidence in support of the allegations of incompetency or undue influence was adduced.

The court found that the order, together with her passbook containing her account with the bank, were delivered by Mrs. Havens to Cathryn Dauterman with the intention of making a present gift to her of the amount on deposit and represented by the passbook, namely $2,399.69, and the judgment for defendants was entered accordingly.

Plaintiff, who has appealed therefrom, contends that the above finding was not within the issues and is unsupported; further, that notwithstanding the finding it appeared that Mrs. Havens died before the order was accepted or paid by the bank, and that consequently the gift was revoked and the authority of W. L. Dauterman, to whom the order was made payable, was likewise terminated.

[1] Cathryn Dauterman testified to the rendition of services for which the deceased had agreed to compensate her, further stating on cross-examination that the order and passbook were handed to her in a sense "as a gift in consideration of the services I had rendered." Again, she testified that Mrs. Havens gave her the bank book and told her "to keep it," later telling her that she wanted her to have it. While it is true that the witness stated that the word "gift" was not used in any of the conversations with Mrs. Havens, and that the past services were the moving cause or consideration, nevertheless it may well have been that Mrs. Havens, in recognition of past acts of kindness which she had repeatedly acknowledged, and without regard to any obligation to pay therefor, intended to make a voluntary transfer of the deposit, and we cannot say that the court's conclusion that such was the case is wholly without support.

[2, 3] An objection that findings are not within the issues when the action was tried without objection to the sufficiency of the pleadings to raise such issues, and the findings are justified by the evidence, will not be considered on appeal. Horton v. Dominguez, 68 Cal. 642, 10 P. 186; Moore v. Campbell, 72 Cal. 251, 13 P. 689. Moreover, to warrant a

reversal in such cases appellant must show that the alleged error was prejudicial. Turner v. Stock, 79 Cal. App. 662, 251 P. 814.

In addition, it may be said that the facts would have supported the conclusion that the giving of the order and the transfer of the passbook were intended as a complete assignment of the whole deposit. Dunlap v. Commercial National Bank, 50 Cal. App. 476, 195 P. 688.

[4-6] As urged by appellant, it is the rule that a check of itself does not operate as an assignment of any part of the fund to the credit of the drawer with the bank (Civ. Code, § 3265e), and that the drawee's authority to pay it is revoked by the drawer's death before payment or acceptance (Sneider v. Bank of Italy, 184 Cal. 595, 194 P. 1021, 12 A. L. R. 993). In the case at bar, however, the deposit was a savings account, and the order read as follows: "San Mateo, California, June 16, 1928.—The Hibernia Savings and Loan Society, San Francisco, Calif. Gentlemen: You are hereby directed to pay to W. L. Dauterman the balance due me on deposit in the name of Mary E. Havens in account No. 327/397. The passbook accompanies this authorization.—Yours truly, Mary E. Havens." In such cases there appears to be a well-settled difference in the effect of the death of the drawer of a check and that of the donor of a savings account. As stated in 28 Cor. Jur., Gifts, § 65, page 665, "A deposit in a savings bank may be the subject of a gift, and where the owner of such deposit, with the intention of making a gift, delivers his deposit book containing entries of deposit in his name to the intended donee, with an order for the payment of the whole deposit, this constitutes a complete and valid gift thereof although the book and order are not presented to the bank until after the donor's death." The same rule was followed in Allen v. Smith, 38 Cal. App. 409, 176 P. 365; Dellepiane v. Hynes, 83 Cal. App. 604, 257 P. 180, and Donovan v. Hibernia Savings & Loan Society, 90 Cal. App. 489, 265 P. 995, and in Dunlap v. Commercial National Bank, supra, it was held that a check given for a valuable consideration and intended as a complete assignment of the whole of a commercial deposit will be given that effect.

The facts show that Mrs. Havens intended a present transfer of the savings account to Mrs. Dauterman.

[7] Nor is there any merit in the contention that W. L. Dauterman was decedent's agent in the transaction. According to the testimony the passbook was delivered to Cathryn Dauterman, who requested that as a matter of convenience the order which was to accompany it should be made payable to her husband; and it was clearly the intention that in collecting the fund he should act for his wife and not for Mrs. Havens. Re Stockham, decd., 193 Iowa, 823, 186 N. W. 650, 22 A. L. R. 765.

The conclusions of the trial court are fairly supported, and the record discloses nothing which would justify a reversal of the judgment.

The judgment is affirmed.

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122 Cal.App. 324

McGLOTHIN v. CITY AND COUNTY OF SAN FRANCISCO.

Civ. 7877.

District Court of Appeal, First District, Division 1, California.

April 2, 1932.

Rehearing Denied May 2, 1932. Hearing Denied by Supreme Court May 31, 1932.

1. **Automobiles 🔑244(11).**

Evidence that truck driver, in making left turn, failed to pass to right of center street marker, sustained finding of his negligence in intersection collision (St. 1923, p. 558, as amended by St. 1929, p. 541, § 54).

2. **Appeal and error 🔑995.**

Appellate court can only consider legal sufficiency of evidence (Code Civ. Proc. §§ 1847, 2061).

3. **Negligence 🔑134(11).**

Proof by preponderance of evidence that negligence of defendant proximately contributed to damage warrants plaintiff's recovery.

4. **Damages 🔑132(3).**

$8,000 to 28 year old woman typist for permanent injuries and shock resulting from depressed skull fracture and brain concussion and contusion, unfitting her for vocation of clerk or stenographer, *held* not excessive.

5. **Appeal and error 🔑1004(1).**

Verdict cannot be set aside as excessive unless so plainly excessive as to warrant conclusion that it resulted from passion and prejudice.

6. **Appeal and error 🔑932(1).**

On question whether verdict is excessive, reviewing court must treat every conflict in evidence favorably to prevailing party, giving him benefit of every inference.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Fern McGlothin against the City and County of San Francisco. Judgment for plaintiff, and defendant appeals.

Affirmed.

Superseding opinion in 5 P.(2d) 611.

John J. O'Toole, City Atty., and Henry Heidelberg, Deputy City Atty., both of San Francisco, for appellant.

Ford & Johnson and Fletcher A. Cutler, all of San Francisco, for respondent.

PER CURIAM.

An appeal from a judgment entered upon a verdict in favor of plaintiff and against defendant, city and county of San Francisco.

A judgment in the same action as against Guiseppe Larussa, who was joined as a defendant with the municipality, was heretofore affirmed. Sedwick v. Larussa (Cal. App.) 10 P.(2d) 118. The action was one for damages sustained by plaintiff while a passenger in a jitney bus operated by Larussa, which came in collision with a truck owned and operated by the municipality.

The latter claims that the implied finding that its employee was negligent is unsupported; that the evidence shows that the sole proximate cause of the injuries complained of was the negligence of Larussa, and, further, that the verdict is excessive, notwithstanding an order of the trial court reducing the amount awarded by the jury.

At about 8 o'clock a. m. on November 22, 1929, the jitney bus was proceeding north on the right-hand side of Valencia street in San Francisco. According to the testimony, when the bus reached the intersection of Valencia street with Nineteenth street, which runs east and west, it passed the southerly curb line of Nineteenth street at a speed between 30 and 35 miles an hour. At about the same time a 5-ton truck 21 feet long and 7 feet wide, owned and operated by the municipality, and which had been traveling south on Valencia street, entered the intersection, and a collision between the two vehicles occurred in the east half thereof. There was some testimony that the truck was also traveling at an excessive speed. It appears without dispute that the driver of the truck was turning to his left, and that in so doing he did not pass beyond the center of the intersection. Under the provisions of section 129 of the California Vehicle Act (as amended by St. 1929, p. 541, § 54), it would have been his duty to do so unless otherwise directed by "turning markers" at the intersection. The above section provided that boards of supervisors and legislative bodies of cities and towns might by ordinance prescribe a different method of turning at any intersection of highways, provided "markers" or other devices should be located upon the pavement and within the intersection, clearly indicating the course to be traversed by vehicles turning at such intersection. It is admitted that the supervisors of the municipality had adopted such an ordinance, and that on and along the curb lines crossing the intersection were certain markers or buttons, one being on the north curb line of Nineteenth street approximately in the center of Valencia street. The court instructed the jury that the said ordinance provided that "the operator of a vehicle intending to turn to the left at an intersection or an alley or driveway shall approach the point of turning in the line of traffic next to the center of the roadway. * * * The operator of a vehicle in turning left at an intersection shall pass to the right of the center of the intersection before turning except where markers have been placed upon the intersection boundary line to be crossed by vehicles, and the operator shall pass to the right of such markers."

[1, 2] It was the duty of the driver of the truck to drive at a careful and prudent speed not greater than was reasonable having due regard for the traffic (California Vehicle Act, § 113 [as amended by St. 1927, p. 1436, § 30]); and, assuming in view of the ordinance that he was not bound to pass south of the center of the intersection before turning to his left, it was nevertheless his duty to pass to the right of the button in the center of Valencia street on the north curb line of Nineteenth street. According to some of the witnesses he failed to do this, but turned to the north of this button into the northeast quarter of the intersection, where the collision occurred. Others testified in effect that the course of the truck was over the button, its left wheels only passing to the north or left thereof. The municipality claims that the testimony of these witnesses was inherently improbable; that they were contradicted by others, and that the implied finding by the jury that the driver of the truck was negligent in this respect is unsupported. We have read the testimony of the witnesses, and cannot say that they were unworthy of belief or that their testimony was inherently improbable. The question of their credibility, even where contradictions and inconsistencies appear, as well as the weight to be given their testimony, was for the jury (Code Civ. Proc., §§ 1847, 2061; 2 Cal. Jur., Appeal and Error, sec. 551, p. 938), and the appellate court may only consider its legal sufficiency as distinguished from its probative force (Smith v. Royer, 181 Cal. 165, 183 P. 660). Nor will it disturb a verdict, even though it would have found the other way had it occupied the place of the jury. Clopton v. Clopton, 162 Cal. 27, 121 P. 720. Moreover, the judge who presided, and who saw and heard the witnesses, passed upon the motion for a new trial, one of the grounds of the motion being the insufficiency of the evidence. Presumably the same arguments as to the weight to be given this testimony were there made, and decided adversely to the contention of the municipality. We cannot say that there was no substantial evidence supporting the conclusion that the driver of the truck was negligent, or that his negligence

was not a proximate cause of the damage suffered by plaintiff.

[3] To warrant a verdict against either defendant it was sufficient for plaintiff to prove by a preponderance of the evidence that the negligence of such defendant proximately contributed to the damage. 19 Cal. Jur., Negligence, § 20, p. 572; Merrill v. Los Angeles Gas. & Elec. Co., 158 Cal. 499, 111 P. 534, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134; Springer v. Pacific Fuel Exchange, 92 Cal. App. 732, 268 P. 951.

[4-6] The jury returned a verdict for $25,000, which later was reduced to $15,000. Plaintiff, who was 28 years of age, was employed as a typist at a salary of $100 per month. As a result of the accident she suffered a depressed fracture of the skull, and, as her physician testified, not only a brain concussion, but a brain contusion—as he described it, a brain tearing, his opinion being "that there were adhesions of both meninges of the brain in the fracture, which is permanent"; furthermore, that she is "disabled from the vocation of clerk or stenographer or working as a relief telephone operator in a large business"; also that she suffered a well-marked nervous shock, "the effect of which will be projected into months and years." Another physician, who performed an operation upon her skull, made necessary by her injuries, described their extent and the lacerations which she received. Plaintiff also described her injuries and their after-effects, from which she was still suffering at the time of the trial; and in this connection one of her physicians testified that she will show a lowered nervous reserve, and as a reasonable certainty a mental type of "dynamopathical apoplexy"—as he explained, "periods when she is not up to standard mentally."

The verdict of a jury awarding damages cannot be set aside as excessive unless it is so plainly so as to warrant the conclusion that it was the result of passion or prejudice. Perry v. Angelus Hospital Ass'n, 172 Cal. 311, 156 P. 449. The question in the first instance is for the trial court; and in considering an attack upon a verdict as excessive the reviewing court must treat every conflict in the evidence favorably to respondent, and give him the benefit of every inference which can reasonably be drawn in support of his claim. Zibbell v. Southern Pacific Co., 160 Cal. 237, 254, 116 P. 513. It is a reasonable conclusion from the evidence that plaintiff's injuries were not only serious and painful, but that they will be permanent, and we cannot say as a matter of law that the amount to which the judgment was reduced is excessive.

Finally it is urged that the trial court unduly restricted the cross-examination of one of plaintiff's witnesses, but we find no merit in this contention.

We are satisfied that the verdict on the question of the negligence of the municipality was fully supported; that the judgment as finally entered is not excessive, and that no error has been shown which would justify a reversal.

The judgment is affirmed.

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122 Cal.App. 782

Dorothy M. SEDWICK, Formerly Known as Dorothy M. McLaughlin, Plaintiff and Respondent, v. Joe LARUSSA, also Known as Guiseppe Larussa; John J. Kelly and the City and County of San Francisco (a Municipal Corporation), Defendants and Appellants.

Civ. 8366.

District Court of Appeal, First District, Division 1, California.
April 4, 1932.

Appeal by defendants from a judgment of the Superior Court, City and County of San Francisco, Franklin A. Griffin, Judge, in an action for damages for personal injuries sustained in an automobile accident. Affirmed.

John J. O'Toole, City Atty., and Henry Heidelberg, Deputy City Atty., both of San Francisco, for appellants.

Hugh K. McKevitt, Joseph DeMartini, and Ford & Johnson, all of San Francisco, for respondent.

PER CURIAM.

Appeal from a judgment entered in favor of plaintiff upon a verdict against the city and county of San Francisco.

The action was one for damages for personal injuries sustained by plaintiff while a passenger in a bus operated by Guiseppe Larussa, which on November 22, 1929, came into collision with a truck owned and operated by the municipality.

The complaint alleged that the injuries complained of were caused by the negligence of Larussa and an employee of the municipality. The injuries arose from the same accident described in the opinion filed in case numbered 7877 in this court and entitled Fern McGlothin v. City and County of San Francisco, 10 P.(2d) 116, on account of which the plaintiff in that action also recovered against the municipality, and which judgment was heretofore affirmed by this court.

It was stipulated by appellant and respondent that the appeal in the present case be submitted for decision on all the briefs, maps, etc., now on file in said cause numbered 7877, and that the decision to be rendered therein should be with like force and effect the decision in this cause.

The judgment appealed from in the present action is accordingly affirmed.

122 Cal.App. 379

WESTPHAL v. WESTPHAL.

Civ. 8190.

District Court of Appeal, First District, Division 1, California.
April 7, 1932.

Rehearing Denied May 7, 1932. Hearing Denied by Supreme Court June 4, 1932.

1. Divorce 🔑211.

In statute authorizing court to grant wife alimony necessary for support during pending divorce action, term "necessary" vests power to grant such alimony in court's discretion (Civ. Code, § 137).

Word "necessary" has not fixed meaning in law, but is flexible and relative, because it may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, or conducive to end sought. It is also defined as impossible to be otherwise or to be dispensed with, indispensable, essential, or as meaning reasonably convenient.

[Ed. Note.—For other definitions of "Necessary," see Words and Phrases.]

2. Divorce 🔑286.

When reviewed, every presumption is in favor of discretionary order granting wife alimony during pending divorce proceedings.

3. Divorce 🔑213, 225.

Support and suit money are denied wife during pending divorce only when she possesses sufficient means for support in accustomed mode of living and to defend action (Civ. Code, § 142).

4. Divorce 🔑213, 225.

Whether wife had sufficient means for support and to defend divorce action depends on circumstances and financial condition of parties (Civ. Code, § 142).

5. Divorce 🔑211.

Awarding $400 per month alimony during pending divorce action to wife having $500 annual income *held* not abuse of discretion, where husband had monthly income of $3,360 (Civ. Code, §§ 137, 142).

6. Divorce 🔑209.

Wife, in pending divorce action, cannot be granted back alimony from date action was commenced to time award was made without showing there was necessity for such award (Civ. Code, § 137).

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by Elinor Westphal against Adolph R. Westphal. From an order allowing to plaintiff alimony pendente lite in an action for divorce, defendant appeals.

Affirmed in part, and reversed in part.

W. H. Metson, Keyes & Erskine, and Erwin L. Chloupek, all of San Francisco, for appellant.

Walter H. Linforth, of San Francisco, for respondent.

PARKER, Justice pro tem.

This is an appeal by defendant from an order, made in an action for divorce, allowing plaintiff wife alimony pendente lite for the support of herself and the minor child of the marriage of plaintiff and defendant. The order made was not ex parte, but, after a full and complete hearing, after due notice given.

The main point of this appeal is the construction to be placed upon section 137 of the Civil Code. Preliminarily, we will sketch the more prominent phases of the record before us, though there seems to be no dispute as to the showing made. Plaintiff seeks a divorce on the ground of extreme cruelty. The complaint alleges sufficient facts, which, if found true, would fully warrant a divorce on the ground urged. At the hearing it was shown, and practically admitted here, that defendant is of substantial wealth, that his worth is in excess of $800,000, and that from his separate property he derives an income in excess of $2,000 per month. In addition to this, defendant receives as salary each month the sum of $860.

The plaintiff at the time of the hearing admitted the ownership, as her separate property, of certain oil stocks concededly marketable at a then value of $15,000, and producing income of $40 per month. The court below, after the hearing, ordered that defendant pay to plaintiff the sum of $400 per month for the support and maintenance of plaintiff and the minor child, which payment was to continue each month until further order of the court. No question is presented as to the reasonableness of the amount or defendant's ability to pay the same.

[1] The sole contention, primarily, is that the court had no power to make any order requiring defendant to pay any sum as alimony. This contention rests upon the ad-

mitted fact of plaintiff's individual ability to maintain and support herself out of the property owned by her. Section 137 of the Civil Code reads in part as follows: "When an action for divorce is pending, the court may, in its discretion, require the husband to pay as alimony any money necessary to enable the wife to support herself and her children." Appellant stresses the word "necessary," and founds his argument upon the strictest interpretation of that word. Citing the current edition of Webster, the word "necessary" is defined as "impossible to be otherwise, or to be dispensed with, without preventing the attainment of a desired result; indispensable; requisite; essential." Therefore, argues respondent, unless it is indispensable or essential that a husband support his wife pending an action for divorce, she must support herself. As a preface to this argument, appellant urges the familiar canon of statutory construction that words in common use are to be construed in their natural, plain, and ordinary signification. However, there is another rule which parallels this; namely, that words which have acquired a peculiar and appropriate meaning in law are to be construed according to such peculiar and appropriate meaning. Civ. Code, § 13.

In the law, the word "necessary" has not a fixed meaning, but is flexible and relative. It may mean something which in order to accomplish a given object cannot be dispensed with, or it may mean something reasonably useful and proper. Marshall County v. Rokke, 134 Minn. 346, 159 N. W. 791, Ann. Cas. 1918D, 932. The word "necessary" must be considered in the connection in which it is used, as it is a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought. Rexroth v. Holloway, 45 Ind. App. 36, 90 N. E. 87. In 3 Bouv. Law Dict. 2310, we find the word defined as meaning reasonably convenient, and the authorities therein cited emphasize the flexibility of the word. In section 137 of the Civil Code, it is obvious that the word was used in its broader sense, inasmuch as the action of the court rests in discretion. Obviously, under the strictest interpretation of the word "necessary," there would be a negative of any discretion. The language of the section compels a broad interpretation. It provides that the court in its discretion may require the payment of any money necessary to enable the wife to support herself. In other words, the court is to determine what it deems necessary under all of the conditions shown to exist. It may supplement the wife's separate income to bring the total to the amount deemed requisite; the object being the support of the wife whether wholly by the husband or partially.

[2] The section, properly construed, is intended to vest in the trial court a discretion, moved and directed by a regard for the maintenance of the statu quo pending the determination of the controversy, and also guided by the state's interest in the fullest inquiry being had on the true merits of the issues presented. The propriety, or lack thereof, in the trial court's action, centers around the question of the proper exercise of this discretion. Manifestly, the discretion is not vested in a reviewing court. Comparable to other orders or judgments of a trial court, when reviewed, every presumption is in favor of the validity of an order such as now before us. Not only the statutes, but the decisions of the courts, reflect the spirit of the time in which the same are promulgated. In an economic and social change, the views of lawmakers and courts keep apace. Sound discretion in one stage would reveal itself in certain acts, while, at another stage, the same acts would indicate a complete lack of reason and become unjustifiable.

Without delving into the economical, social, moral, or other problems involved in any discussion of the subject of marriage and divorce, we are of the opinion, in considering the decisions and authorities cited, greater stress must be given those most recent as being more completely indicative of the present attitude of the courts, and more responsive to the need and the design of the statute.

In Kowalsky v. Kowalsky, 145 Cal. 394, 78 P. 877, the court says: "It was within the discretion of the court to award the plaintiff temporary alimony and counsel fees, notwithstanding the fact that it appeared that the wife was the owner of some corporation stocks of the value of $700 or thereabout. The plaintiff alleged in her affidavit that the defendant owned property worth $100,000, and was in the receipt of an income of $650 per month. * * * The court might well conclude that, with such abilities on the part of the husband, it would not be fair to the wife to compel her to sell all that she had in order to raise money wherewith to live and prosecute her action."

In Farrar v. Farrar, 45 Cal. App. 584, 586, 188 P. 289, 290, it is said: "Nor is it any defense to the order appealed from that the wife has property in her own right. * * * Where the wife is the owner of nonincome-producing property, the law does not require her to have recourse to her own resources first, or to impair the capital of her separate estate."

In Whiting v. Whiting, 62 Cal. App. 157, 216 P. 92, 93, it appeared that the wife was the owner of real property of a net value of $4,300 and was in receipt of wages of $16.50 per week. The husband was the owner of property of the value of $200,000. The trial court ordered that the husband pay to the wife as alimony the sum of $150 per month, and also costs and counsel fees in the aggregate of $1,200. The point was raised that the trial court erred in making the allowance, upon the ground that plaintiff-wife had ample means of her own for her support and the costs. The court answered this contention as follows: "Was it, under such a state of facts, within the power of the court to make the order complained of? The denial of the wife's application would have resulted in one of two situations. The defendant's appeal would have gone uncontested, or the wife would have been compelled to exhaust the small amount of property owned by her in defending herself against the proceeding instituted by defendant. It would have been unfair in the extreme to pit the wife in her penury against the husband in his affluence, in a proceeding commenced by him."

In Busch v. Busch, 99 Cal. App. 198, 278 P. 456, the rule is again announced that, where the wife is the owner of nonincome-producing property, the law does not require her to have recourse to her own resources first, or to impair the capital of her separate estate.

In Meyer v. Meyer, 5 Cal. Unrep. Cas. 944, 52 P. 485, it was shown that the wife had an income of $135 per month and the husband's net income was $275 per month. It was held that an order directing the husband to pay $50 per month for the support of the wife and one child was not excessive. Not only did the court hold $50 not excessive, but reduced a larger sum down to that amount as being a reasonable allowance.

In Harding v. Harding, 144 Ill. 588, 32 N. E. 206, 208, 21 L. R. A. 310, an exhaustive review of the authorities is made, and the court concludes: "If the income of the wife be sufficient to suitably support her, there will ordinarily exist no reason for making an allowance for that purpose. But if the income of the wife be insufficient, and that of the husband be ample, equitable considerations and the weight of authority requires, as we think, that such a sum should be allowed from the husband's income as will, when added to her own, enable the wife to live comfortably pending the litigation in the station in life to which he has accustomed her." Quoting further from the same case: "It would seem equitable and just that the wife, who is prosecuting her suit in good faith, should be placed upon an equality with the husband; and if her income be insufficient to maintain her, and to carry on the litigation, his income should be required to contribute, before she should be required to exhaust her estate." Interesting and instructive notes on the subject are to be found in 15 A. L. R. 781, and 35 A. L. R. 1099.

[3, 4] Conceding that different jurisdictions have announced different rules, nevertheless they are all in seeming accord that support and suit money are to be denied the wife only when she possesses property or means sufficient to support her in her accustomed mode of living, and to defend the action. And as a corollary thereto, it is almost universally held that the test of sufficiency varies with the circumstances of each case, and the relative financial condition of the parties. Section 142 of the Civil Code provides: "When the wife has * * * a separate estate, * * * the court, in its discretion, may withhold any allowance to her out of the separate property of the husband." Obviously, a discretion to withhold implies a power to grant. Without further citation, it may be stated that text-writers, commentators, and courts seem in almost complete accord with the views hereinbefore noted, to the end that in the first instance a wholesome discretion is conferred upon the trial court subject to review only as to the question of a reasonable exercise of such discretion.

[5, 6] We may come now to the facts in the instant case. Plaintiff and defendant were husband and wife. The period of time elapsing between the marriage and the date of separation was five years, six months, and one day. A minor daughter of the age of three years was the only issue of the marriage, and is still living. The wealth of defendant, as hereinbefore stated, was approximately $900,000, with an income therefrom of $2,500 per month. In addition thereto, defendant received a salary of $860 per month; the salary being concededly community property. The family had been maintained in a fashion necessitating the expenditure of about $1,000 per month. There was evidence before the trial court that it would require $750 per month to maintain the plaintiff and child in the same style. At the hearing in the court below, the defendant, in response to a question by the court as to what defendant thought would be a reasonable allowance to pay to the wife, replied: "That is rather difficult—$250 or $300 a month. I would rather leave that to your discretion." It is admitted that the wife owns oil stocks, the result of money given her by her father as a wedding present and of a value at the time of hearing of approximately $15,000, with an annual income to be derived therefrom not to exceed $500. The trial court's award of $400 per month is not an abuse of discretion, but is in all respects reasonable and just.

However, there is one more question presented which goes not to the propriety of the court making any award nor to the amount thereof. Appellant argues that the trial court, upon the record before it, was limited to an award for future support and maintenance of the wife. The complaint was filed on June 25, 1929. The court thereupon issued its order to defendant to appear and show cause, if any he had, why an order should not be made requiring him to pay alimony and costs. This order was returnable July 5, 1929. The hearing upon the order did not take place until September 3, 1929. On said last-named date, the court made its order as hereinbefore noted; the particular portion of said order now being considered reading as follows: "That the defendant forthwith pay to the plaintiff the sum of One Thousand Dollars ($1000.00), being at the rate of $400.00 per month, for the support and maintenance of plaintiff and the minor child of the parties hereto from the 25th day of June, 1929, to the 12th day of September, 1929." Appellant urges that this was an award of what might be termed "back alimony," and comes within the rule announced in Busch v. Busch, supra; Tremper v. Tremper, 39 Cal. App. 62, 177 P. 868; Reed v. Reed, 40 Cal. App. 102, 180 P. 43. We think the claim of appellant should be upheld in this particular. There is no showing of any kind in the record from which we may even infer necessity for back allowance. The rule announced in the cited cases is liberal to an extreme, but it does require some positive showing either of necessity or of fact from which a necessity might be inferred. The only testimony before the court was that prior to the date of the order the wife and her child had been living with the former's parents, but that it was her desire to establish a residence for herself and child apart from the home of her parents. For aught the record discloses, the home of the wife's parents was equal in station and comfort to the home of the parties to the action before separation, and, whether it was or not, it afforded the wife shelter and sustenance of which she makes no complaint. The trial court on the showing made had no discretion to order payments to be made by defendant as and for past expenses for which no indebtedness or obligation had been incurred by the wife. The wife made no showing of depletion of her separate estate or use of her own income; in fact, no showing at all. The fact that the order to show cause had been issued on June 25, 1929, is of no consequence. The application for temporary support in itself determines no right, and, if it were true that from the date of the filing of the complaint the necessities of the wife required alimony payments, that fact should have been shown.

That portion of the order requiring appellant to pay $1,000 as and for support and maintenance of respondent and the minor child from June 25, 1929, to September 12, 1929, is reversed. In all other respects the order is affirmed. Neither party shall recover costs upon the appeal.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

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122 Cal.App. 388

WESTPHAL v. WESTPHAL et al.

Civ. 8198.

District Court of Appeal, First District,
Division 1, California.
April 7, 1932.

Rehearing Denied May 7, 1932. Hearing Denied by Supreme Court June 4, 1932.

1. Divorce 🔑223.

Order directing husband having monthly income exceeding $2,500 to pay $2,500 to wife for carrying on divorce action *held* not abuse of discretion, though wife had annual income of $500.

Order directed husband to pay to wife $500 to enable her to compensate her counsel on the husband's appeal from order directing payment of support money, and $1500 to enable wife to compensate counsel for services to be rendered in defending wife against cross-complaint of husband, and $500 to enable wife to defray costs and expenses of action.

2. Divorce 🔑225.

Wife having insufficient means to carry on divorce action need not exhaust corpus of her estate before being entitled to fees and support money from husband.

3. Divorce 🔑221.

That wife's counsel in divorce action received $1,000 for past services did not affect subsequent order allowing wife counsel fees, where fees allowed were not applied to past services.

4. Divorce 🔑221.

As regards allowance to defray wife's counsel fees in divorce action, each case must be considered on its own merits.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by Elinor Westphal against Adolph R. Westphal and another. From an order directing payment of counsel fees and costs in an action of divorce, defendants appeal.

Affirmed.

Keyes & Erskine, William H. Metson, and Erwin L. Chloupek, all of San Francisco, for appellants.

Walter H. Linforth, of San Francisco, for respondent.

PARKER, Justice pro tem.

The parties to this action are the same as in the case of Westphal v. Westphal (Cal. App.) 10 P.(2d) 119, this day decided. The present appeal is from an order directing defendant Adolph R. Westphal to pay plaintiff certain sums of money to defray counsel fees and costs of suit. The order appealed from was made after answer and cross-complaint by defendant. Prior to the making of the order in the present appeal, the court had made an order directing the payment of a monthly allowance, from which order defendant Adolph R. Westphal had appealed. The order here under review directs defendant Adolph R. Westphal, who will hereinafter be referred to as the husband, to pay to Elinor Westphal, hereinafter referred to as the wife, sums of money as follows: $500 to enable her to compensate her counsel upon the husband's appeal from the order directing the payment of support money; $1,500 to enable her to compensate her counsel for his services to be rendered in defending plaintiff against the cross-complaint of the husband; $500 to enable the wife to defray the costs and expenses of the action.

Sufficient of the general situation appears in the case between the same parties this day decided. We deem it unnecessary to detail the nature of the cross-complaint or the charges therein contained. Suffice it to say that the cross-complaint does necessitate a defense, and the pleadings throughout indicate a relentless vindictive battle in the offing, such only as may be expected in like cases.

[1, 2] The chief ground relied upon by appellant is that the wife is of sufficient means to conduct her own defense and bear the expense thereof from her own funds. We feel this point to have been fully disposed of in the appeal from the order allowing support. The plaintiff-wife, as there shown, has some oil stocks of a value of $15,000, from which she derives an income of $500 per annum. It is not the law that she be compelled to exhaust the corpus of her estate, and certainly the income is not of sufficient amount to provide her with adequate means of defense. The order allowing counsel fees in the action was expressly to defend against the cross-complaint. In Meyer v. Meyer, 5 Cal. Unrep. Cas. 944, 52 P. 485, 486, it was the claim that the wife was the owner of real estate to a value of $30,000, while the husband seems to have had nothing other than his earnings of some $300 per month. The income of the wife was $135 per month. The court says: "As to the allowance for counsel fees, if it be conceded that she is still in fact the owner of [the real estate], as appellant contends, the income * * * is not sufficient to enable her to pay counsel; and as she is the defendant in the action, and not a voluntary party, we think she should not be required to incumber her real estate in order to defend the action."

In Ruling Case Law, vol. 1, p. 895, the rule is stated that the law does not require a wife to have recourse to her own resources first, to the impairment of the capital of her own separate estate. 19 Corpus Juris, 236, states the rule that the capital of the wife's separate estate need not be resorted to by her in prosecuting or defending her action against the husband. Where the husband is a man rated at a wealth of possibly $1,000,000, or even one-half thereof, and with income from all sources in excess of $2,500 per month, and the situation disclosed is one of extreme hostility between the parties, we can see no abuse of discretion in the order made.

[3] As a matter of fact, appellant does not question the amount of the allowance made excepting in a perfunctory way. It was shown that the wife's counsel had received $1,000 for past services. This, in the present case, does not affect the order here being reviewed, inasmuch as no part of the money ordered advanced was for past services, and there is no contention that the money already paid is in payment of future services.

[4] Appellants argue along the lines of public policy, social economy, and good morals. While these arguments are interesting, they call for no reply. A change in the general scheme of the law can come only through the Legislature. Yet, for the very reasons urged by appellant in his general discussion, each case must be considered by itself, and so the lawmaker has perforce left the determination of many things to the sound discretion of the trial court. And it is certain that, if the individual cannot wisely choose his or her partner in matrimony, the courts cannot remedy the error there made. And, where the argument is advanced that the allowance of alimony encourages persons to enter into the marriage state simply in the hope of financial gain through the liberality of the courts, the reasons advanced redound, not against the system, but as testimonials to the credulity of those unable at the outset to distinguish the gold from the dross.

Judgment affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

122 Cal.App. 432

KUSTER v. PARLIER et al.

Civ. 757.

District Court of Appeal, Fourth District, California.

April 8, 1932.

1. Equity ⚷39(1).

Equity once invoked will complete the matter.

2. Mortgages ⚷401(1).

Mortgage provision *held* construable as acceleration clause supporting action for full amount of four notes on default in principal of two and interest on all, and justified deficiency judgment for indebtedness remaining after proceeds were applied thereto (Code Civ. Proc. § 726).

> Mortgage was given to secure four notes payable at different times, and provided that, on default in payment of principal or interest, mortgagee could sell premises and retain principal and interest from proceeds. Code Civ. Proc. § 726, provides that there can be but one action for the recovery of such a debt as was represented by notes involved secured by the mortgage, and that the court may, by its judgment, direct the sale of the incumbered property and the application of the proceeds thereof to the amount due to the plaintiff, and, if the proceeds are insufficient and a balance still remains due, a deficiency judgment shall be entered for the balance.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by Fritz Kuster against G. W. Parlier and another. From portions of a judgment in favor of plaintiff, defendants appeal. Affirmed.

Harris & Hayhurst and Rue C. Gibson, all of Fresno, for appellants.

W. T. Belieu, of Willows, for respondent.

BARNARD, P. J.

This is an action for the foreclosure of a mortgage given to secure four promissory notes made payable at different times. The action was filed after the maturity date named in two of the notes but prior to that named in the other two, and at a time when the mortgagors were in default as to the principal of the first two, and as to the interest on all of the notes. This appeal is taken from that portion of the decree which adjudged that the entire indebtedness secured by the mortgage was due, and from a further portion providing that a deficiency judgment should be docketed against the mortgagors for such portion of the indebtedness as remained after the proceeds of the sale were applied thereto. It is conceded that none of the notes contained any clause whereby the maturity date might be accelerated, and the only question here raised is as to whether certain language used in the mortgage should be construed as having such an effect. This portion of the mortgage reads as follows:

> "And these presents shall be void if such payment be made according to the tenor and effect thereof; but in case default be made in the payment of the said principal or interest, as therein provided, then the said party of the second part—executors, administrators and assigns are empowered to sell said premises with all and every of the appurtenances, or any part thereof, in the manner prescribed by law, and out of the money arising from such sale to retain said principal and interest together with the costs and charges of making said sale, and Fifty no-100 Dollars for attorney's fees, which said costs and charges and attorney's fees shall be a charge upon said premises and may be deducted from the proceeds of the sale above authorized; and the overplus, if any there may be, shall be paid by the party making such sale on demand to the parties of the first part, their heirs or assigns."

It is respectively contended by the parties that these provisions do or do not amount to what is commonly referred to as an acceleration clause. The appellants admit that the mortgage thus authorized the sale of the land, upon a partial default, and the payment of the entire indebtedness from the proceeds of such sale, if sufficient, but contend that no deficiency judgment could be legally entered, and that payment of the two notes which had not yet matured, according to their own terms, could not be enforced prior to the dates named in those notes, except as such payment might be secured through a sale of the land in question.

This action is governed by the provisions of chapter 1, title 10, pt. 2 (sections 726–729), of the Code of Civil Procedure. Section 728 of this Code makes special provision for a case where the debt secured falls due at different times, and this provision would apply in the absence of any contract between the parties. In the case before us, as shown by the above quotation from the mortgage, a special contract was made by the parties, and therefore this section has no application here. The only other section applying to this proceeding, so far as is here material, is section 726, the procedure of which was followed by the trial court. The only question presented is whether all of the procedure provided by this section then applied and was justified by the terms of the contract between the parties. This section first provides that the court may, by its judgment, direct the sale of the incumbered property and the application of the proceeds thereof to the amount due to the plaintiff. It follows that this judgment directing such sale and such application must also fix the amount which is then to be paid to the plaintiff. In the case before us, the parties had agreed that the entire amount of the indebtedness might be retained in the event of such a sale. Under this agreement and under the provisions of this part of section 726, the court was authorized to enter a judgment for the full amount of all the notes and to order that amount paid to the plaintiff out of the proceeds of the sale, if such proceeds were sufficient for that purpose. This decree of the court fixing the amount to be paid to the plaintiff has the effect of a judgment, and the amount to the payment of which the security is ordered applied is both fixed by the decree and becomes, in effect, a judgment. In ordering the land sold in order to pay something to the plaintiff, the court must of necessity fix the amount that is to be paid, and, when so fixed, this is, we think, the amount due to the plaintiff within the meaning of this section. By agreeing that the land mortgaged may be sold and the proceeds applied to the full amount of all of the notes, the mortgagors agree that judgment for that amount may be thus entered as a basis for the sale of the land. This agreement, together with the statute, authorized the entry of such a judgment, which then became the amount due to the plaintiff, as referred to in the statute.

In another paragraph of this statute it is further provided that, when the amount due, as thus fixed by the decree, is not realized from the proceeds of the sale, a deficiency judgment shall be entered for the balance. This applies in every case in which the amount named in the decree as being the amount that is to be paid from the proceeds of the sale is not realized from the property. This was the situation here. In agreeing that the land might be sold for the purpose of then paying the entire debt, the mortgagors agreed that it should be sold according to law; in other words, according to this statute. The provisions of this statute are a part of the contract between the parties, and when, by a partial default, under their contract, the mortgagors subjected themselves to the provisions of this section, we think they subjected themselves to the entire statute, and not merely to a part thereof. As a part of the only procedure provided to carry out the sale agreed upon, the court was compelled to fix the amount that was then to be paid to the plaintiff, as a basis for its direction to the sheriff or commissioner who was to make the sale. It was the duty of the officer to make a return as to his proceedings in carrying out the orders of the court. And this statute which is thus invoked to carry out the sale agreed upon by the parties then provides that, in the event a deficiency is shown by the return, a judgment therefor shall be docketed for such balance as "still remains due." The balance thus referred to must be that portion of the amount fixed by the court to be paid to the plaintiff, which remains unpaid. We think that the "amount due" and the balance that "still remains due" mentioned in this section of the Code refer to the amounts which are due in the sense that they may be and are fixed by the decree as being then payable to the plaintiff. And. when the mortgagors agreed that the land could be sold and applied to the payment of all of the notes, regardless of the dates of maturity named in the respective notes, they agreed in effect and to all legal intent and purpose that the entire amount was then due.

[1] A further consideration is that this statute provides that there can be but one action for the recovery of such a debt as is represented by these notes, secured by this mortgage. This one action is that provided for in section 726 of the Code of Civil Procedure, being the one here taken. A view contrary to the one we have taken upon the question before us would leave this respondent without remedy, so far as the balance on these notes is concerned, and would ignore a part of the agreement of the parties. By their contract they provided that, in the event of a default, the mortgaged land could be sold and all of the notes paid from the proceeds. This statute, being the exclusive remedy provided, not only provides for a judgment in accordance with the amount then payable, but goes on to provide for a final judgment in the matter. This is in accordance with the general principle of equity that having once been invoked it will complete the matter.

In reference to a somewhat similar note and mortgage, the court said in Phelps v. Mayers, 126 Cal. 549, 58 P. 1048: "The defense is that the action was prematurely brought. Defendant maintains that the instruments in suit do not provide that the principal of the debt shall become due on default in payment of interest, and hence that a foreclosure for both principal and interest was unwarranted. The note and mortgage, however, must be construed together. * * * Interest on the note is payable semiannually, and the mortgage is clear that upon default in the payment of the interest, equally with default in the payment of the principal, the mortgagee may cause the premises to be sold, and retain from the proceeds 'the said principal and the interest.' There is scarcely room for interpretation in these provisions. They support the action for the amount of the note, both principal and accrued interest. Brickell v. Batchelder, 62 Cal. 623; Maddox v. Wyman, 92 Cal. 674, 28 P. 838."

The only acceleration clause present in that case was one in the mortgage authorizing the sale of the property and the retention of the proceeds in the event of a partial default, which was held to support an action for the full amount of the note. The language there used was quite similar to that used in the mortgage now before us, and not only does this language support this action for the full amount of the notes, but, judgment having been entered for the full amount in accordance with the contract of the parties, it supports the full procedure provided by the statute for all such cases of foreclosure.

[2] Considering the statute and the contract together, as we must, we conclude that this provision for selling the land and applying the proceeds therefrom to the payment of all of the notes is, in fact, an acceleration clause which justified the entry of a deficiency judgment when the proceeds of the sale proved insufficient to pay the amount for the payment of which the court, in accordance with the contract, ordered the land sold.

For the reasons given, the judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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122 Cal.App. 375

In re BARTLETT'S ESTATE.

Civ. 780.

District Court of Appeal, Fourth District, California.

April 6, 1932.

1. Charities ⚷21(1).

That beneficiaries of charitable trust constitute indefinite class does not render trust void, but is in itself one of requisites to its validity.

2. Charities ⚷21(1).

Neither provision nor policy of law prevents vesting title to trust created to educate indefinite class in certain named trustees.

3. Charities ⚷12.

Provisions of will providing scholarships for needy and worthy young people residing within state *held* to create valid public charitable trust.

4. Charities ⚷12.

Public charitable trust creating scholarships for use at any school within state *held* not invalid under statute as attempting to create trust for purpose of education without providing that funds should be used for benefit of tax-exempt institution (Civ. Code, § 1313).

5. Wills ⚷16.

Public charitable trust providing for scholarships, created over six months prior to death of testator leaving as heirs only half-sister and half-brother *held* valid (Civ. Code, § 1313).

Such trust was valid under the provision of Civ. Code, § 1313, providing that the inhibitions regarding the creation of testamentary trusts are not applicable where a will was executed at least six months prior to testator's death and where none of the heirs therein designated are left.

6. Charities ⚷25.

Trust created to assist worthy young people to get education, containing suggestion that trustees maintain certain orange groves, *held* not void as created for double purpose (Civ. Code, §§ 1317, 1321).

Facts disclosed that the suggestion that the particular orange groves be maintained was incidental to the dominant purpose disclosed, that of assisting worthy young people to get an education, and that such suggestion was expressly made subject to the judgment of the trustees.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Probate proceedings in the matter of the estate of W. P. Bartlett, deceased, in which John H. Bartlett contested the petition by J. A. Milligan and others, executors of the will, for distribution in accordance with the will. From the order of distribution in accordance with the petition, contestant appeals.

Affirmed.

John H. Bartlett, in pro. per.

Guy Knupp, of Porterville, for respondents.

BARNARD, P. J.

W. P. Bartlett died on July 5, 1929, leaving as his only heirs and next of kin a half-sister and a half-brother; the latter being the contestant herein. He left a will in which, after making certain bequests, he left the bulk of his estate, consisting of about $30,000 worth of property, in trust to three trustees. These trustees were given full power to control and manage the property; to collect and receive all income and pay all expenses in connection therewith; to sell and convert any and all of the property into cash; and to invest and reinvest from time to time, in their own discretion, all trust funds, including the proceeds of any sale of any property. It was then provided that the net income should be used as follows:

"The entire net income received or derived from the trust estate shall be used and applied by my said Trustees for the assistance of such worthy, talented, industrious and needy young men or young women residing in the State of California, as shall be selected by said Trustees, and for the purpose of enabling any such young man, or young woman to pursue his or her studies, or develop his or her talent in any school or university in the state of California. I direct that said income shall by my said Trustees be either loaned to the designated beneficiaries at small interest rate, or be given outright, as shall in the judgment of said Trustees seem advisable.

"I have for many years been greatly interested in young men and young women of special talent and industry, and I hope by means of the trust fund hereby created to serve the public interest and welfare by the development of talent and ability."

During the course of the probate proceedings, a petition for distribution in accordance with the terms of the will was filed, which was opposed by this contestant on the ground that the trust provisions of the will are invalid, and that the contestant and the half-sister are entitled to have the residue of the estate distributed to them. Distribution was ordered in accordance with the prayer of the petition, and this appeal followed. Reversal is asked upon three grounds, which will be taken up in order.

The claim is first made that this is not a public charitable trust, and that it is void because of the indefiniteness of the class affected, because this class is so small, and because the power of selecting the beneficiaries is vested in the trustees. The following definition of a charity has been quite generally approved: "A charity in a legal sense may be more fully defined as a gift to be applied consistently with existing laws, for the benefit of an indefinite number of persons—either by bringing their hearts under the influence of education, or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government." 5 Cal. Jur. 3.

[1-3] The fact that the beneficiaries constitute an indefinite class does not make such a trust void, but is in itself one of the requisites to its validity. The fact that they are uncertain and indefinite necessarily calls for a vesting of the power of selection in some person or in some body, and we know of no provision or policy of our law that would prevent the vesting of this power in certain named trustees. In effect, the trust provisions of this will create and provide for scholarships for the benefit of young men and young women in securing an education. The purpose and validity of similar trust provisions have been approved and sustained in such cases as Estate of Hinckley, 58 Cal. 457; Estate of Willey, 128 Cal. 1, 60 P. 471; Estate of Purington, 199 Cal. 661, 250 P. 657, and Mitchell v. Whittier College, 205 Cal. 744, 272 P. 748. In our opinion, the facts of this case bring it within the principles laid down in the cases cited, which need not be here further repeated.

[4, 5] It is next urged that, even if this be a public charitable trust, it is void under section 1313 of the Civil Code as attempting to create a trust for the purpose of education, although not providing that the funds are to be used for the benefit of an institution which is exempt from taxation under the Constitution, since, under the terms of the will, the beneficiary, when chosen, has the option of attending any school or university in the state. It is perfectly apparent that this will does not come within the exception contained in this section, which is thus referred to. It does, however, come within the last provision or exception set forth in the section, which provides that none of its inhibitions shall apply where a will was executed at least six months prior to the death of the testator, and where none of the designated heirs are left. In the case before us, the requisite time had elapsed, and the testator left none of the heirs referred to in the statute.

[6] The last point raised is that this trust is void, in that it was created for the double purpose of assisting worthy young people in getting an education and of maintaining certain orange groves as an object lesson to the community. It is insisted that, since the second of these purposes may not be sustained as a charitable trust, the entire trust fails. This argument is based upon one paragraph of the trust provisions. This paragraph, which follows one in which the trustees are given full power to sell and convert into cash any and all of the trust property, reads as follows: "The said Trustees are hereby given full power to invest, and in their discretion from time to time reinvest the trust funds in their hands, including the proceeds of any sale of any of the trust property made by them; provided, however, that said Trustees may in their discretion retain and hold as long as they deem desirable, any property which I may have at the time of my death, and in this connection, I would suggest, subject to the judgment of said Trustees, that the orange groves now owned by me be not sold, but be retained, both because of the satisfactory character of the investment, and as an object lesson of what may be accomplished in orange growing with good care, in this district."

Under established rules, a will is to be construed in accordance with the intentions of the testator, and, where possible, all parts thereof are to be construed with relation to each other in such a manner as to form one consistent whole. Civ. Code, §§ 1317 and 1321. It clearly appears that the intention of this testator was that the entire net income from the trust property should be used to assist worthy young people in obtaining an education. The expressed desire that these particular orange groves be retained is not only incidental to the dominant purpose disclosed, but it is expressly made subject to the judgment of the trustees. The suggestion that the groves be maintained as an object lesson in the community is not only coupled with an expression of the testator's confidence in the satisfactory nature of that investment, but it fully appears that the testator recognized that these conditions may be but temporary. In the very sentence in which they are suggested they are made subject to the judgment of the trustees, and in other portions of the trust provisions the trustees are given absolute power to sell this particular property and to reinvest the proceeds. It fully appears that the dominant purpose of the testator was the production of a satisfactory income for the purposes of the trust, and that, to that end, the trustees are given full power either to carry out this suggestion or not, according to their own discretion and judgment. The contention that the purpose of the trust is divided is without merit.

The decree of distribution appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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122 Cal.App. 499

HERCULES GASOLINE CO. v. SECURITY INS. CO. OF CALIFORNIA.

Civ. 8249.

District Court of Appeal, First District, Division 2, California.

April 12, 1932.

Rehearing Denied May 12, 1932. Hearing Denied by Supreme Court June 9, 1932.

1. Reformation of instruments ⚷45(1).

Court of equity will not refuse to reform written instrument on ground of mistake because testimony as to mistake is conflicting.

2. Insurance ⚷143(8).

That insured failed to read policy *held* not to prevent its reformation to properly describe vehicles covered, where insurer assured insured vehicles would be checked and correctly described (Civ. Code, § 3399).

3. Reformation of instruments ⚷45(14).

Evidence showed trailer was omitted from policy covering insured's vehicles by mutual mistake, warranting reformation of policy (Civ. Code, § 3399).

Appeal from Superior Court, Los Angeles County; Vaughn N. Thompson, Judge.

Action by the Hercules Gasoline Company against the Security Insurance Company of California. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

W. I. Gilbert, of Los Angeles, for appellant.

John M. Hall, of Los Angeles, and Arthur Allyn, of Fresno, for respondent.

JAMISON, Justice pro tem.

This action was brought to reform a contract for insurance and upon such reformation for judgment for $6,402.50 and costs amounting to $38.50. Judgment was rendered in favor of plaintiff and against defendant reforming said contract and for said sums with accrued interest and costs of suit. From this judgment defendant has appealed.

It appears from the evidence that in the years of 1924 and 1925 respondent was engaged in the business of refining and marketing gasoline and petroleum products in the county of Los Angeles and vicinity and that in carrying on said business it owned and operated in Los Angeles county and vicinity a fleet of motor vehicles, including trucks, tank wagons, and tank trailers.

On April 17, 1924, appellant issued to respondent its policy of insurance, effective for one year, covering this fleet of motor vehicles. Prior to November, 1924, respondent owned two trailers, both of them being known as "Utility" trailers. In November, 1924, respondent exchanged one of these utility trailers for a Hercules trailer No. 1247. After this exchange until the time of the accident, which gave rise to this action, respondent continued to own these two trailers; they being the only trailers owned by respondent, one of them being a "Utility" and the other a "Hercules," and it was the Hercules that was involved in the accident.

H. C. Johnson, a witness for respondent, testified that he was an insurance broker and that he handled insurance matters for respondent. That in April, 1925, and prior to the expiration of the first policy he, in company with M. J. Cramer, called at the office of appellant for the purpose of procuring a new policy covering said motor vehicles in place of the one, the first policy, which expired on April 17, 1925.

At the office of appellant he interviewed Roy Oliphant, who was the underwriter and manager of appellant's business, and informed him that respondent desired to renew, the said policy, witness requested Oliphant to have the said vehicles carefully inspected before rewriting the policy, stating that there perhaps had been changes and that he desired the policy correctly written. That said Oliphant told witness that he would have all of the motor vehicles covered by the policy inspected, witness Cramer corroborated this testimony of Johnson and further testified that Oliphant told Johnson that he would be pleased to have the policy written and he would send a man out at once to check the said motor vehicles so that there would be no mistakes in the policy.

Thereafter on April 17, 1925, the policy was duly issued and was mailed to Johnson and by him transmitted to respondent. This policy describes the motor vehicles, each of them being described in a separate rider or coverage endorsement. Two of these riders, Nos. 47 and 48, described two Utility 4½-ton trailers, factory No. 100–1–T. In rider 47 the year of the model is given as 1918; in rider 48 the model year is left blank.

On July 19, 1925, the Hercules trailer became stuck in the mud, and in attempting to remove it, the gasoline it carried exploded and this trailer and a Pierce Arrow truck were damaged. The fire from this gasoline also caused damage to persons and property in the vicinity.

Respondent was thereupon sued for the damage caused by this explosion and fire and it called upon appellant to defend the actions and to bear the loss to the extent of the limitations of liability under the policy. The defendant refused to do this, claiming that the loss occasioned by said explosion and fire was not covered under any vehicle described in said policy.

Respondent thereupon defended the several actions and settled same as follows: Settlement of claims on account of personal injuries and destruction of property $4,600; attorney's fees and costs arising from said actions, $1,302.50. In addition to this loss caused by said explosion and fire, respondent expended the sum of $500 in repairing the said Hercules trailer.

Appellant concedes that a court of equity has the right to reform a written instrument where by fraud or mutual mistake of the parties the instrument fails to contain the matters originally agreed upon. But it contends that the findings are not supported by the evidence and that the evidence is insufficient to support the findings, the conclusions of law, and the judgment.

The court found that a short time prior to expiration of the first policy respondent entered into negotiations with appellant for the issuance of a similar policy to cover all of its motor vehicles, and during the course of these negotiations appellant represented to respondent that it would make a careful check of all said vehicles for the purpose of obtaining a list and description of same to be set forth and described in said second policy. That contrary to said representation the coverage endorsements to said second policy did not set forth and describe said Hercules trailer, but did describe two Utility trailers, both of which were described as Utility trailers 4½ ton factory No. 100-1-T. That this policy was prepared by appellant at its own office, without consultation with respondent. That through the inadvertence and mistake of appellant the policy erroneously described a Utility 4½-ton trailer instead of said Hercules trailer. That it was the intention of appellant and respondent that said policy should contain and describe the Hercules 4½-ton trailer, and that its omission from said policy was the result of a mutual mistake. That said mistake was not known to or discovered by either appellant or respondent until after the accident on July 19, 1925.

Appellant is correct in the statement that the rights of respondent are fixed and determined by the provisions of section 3399 of the Civil Code, which is as follows: "When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value."

In the case now under consideration the court found that the failure to set forth and describe the Hercules trailer was caused by the mutual mistake of appellant and respondent. There is a decided conflict in the evidence regarding just what representations were made by appellant's manager during the negotiations for this second policy. Roy Oliphant, testifying on behalf of appellant, denied that he had made the representation which said witnesses Johnson and Cramer claimed he had made them.

C. R. Bird, the general superintendent of respondent, and witness Johnson, also testified that shortly after the accident they had a conversation with J. J. Bird, the claim superintendent of appellant, relative to the loss thereby incurred, and in the conversation Bird told them to have the Hercules trailer repaired and repainted and send the bill for same to appellant; that the mistake regarding the trailer was a typographical error that had been caused by both respondent and appellant. Bird denied that any such conversation occurred.

[1] In the case of Home & Farm Co. of Calif. v. Freitas, 153 Cal. 680, 96 P. 308, 310, the court said: "The only question upon this point is whether there was such mutuality in the mistake as to authorize a court of equity to correct it. But in this connection it is to be remembered, as was said by this court in Sullivan v. Moorhead, 99 Cal. 157, 33 P. 796, that while, to justify a court of equity in de-

creeing the reformation of a written instrument on the ground of mistake, the proof of the mistake must be clear, convincing, and satisfactory to the court, 'yet a mere conflict of testimony as to the mistake does not necessitate a denial of the relief (Hutchinson v. Ainsworth, 73 Cal. 452, 2 Am. St. Rep. 823, 15 P. 82; Wilson v. Moriarty, 88 Cal. 211, 26 P. 85), and the decision of the trial court upon such conflict of evidence is conclusive upon this court.'"

[2] The evidence upon the part of respondent establishes a clear case of mutual mistake in leaving out of said second policy the Hercules trailer. Nor does the fact that the agents and officers of respondent failed to read said policy militate against it. Respondent was assured by appellant that its motor vehicles would be checked so that a correct description of each of them would be set forth in the policy. Respondent relied upon this representation and its failure to read the policy does not prevent its reformation. California Packing Co. v. Larsen, 187 Cal. 610, 203 P. 102; Sullivan v. Moorhead, 99 Cal. 157, 33 P. 796; Travelli et al. v. Bowman, 150 Cal. 587, 89 P. 347; Cantlay v. Olds & Stoller Inter-Exchange etc. (Cal. App.) 7 P.(2d) 395.

The facts in the case of Bank of Fruitvale v. Fidelity & Casualty Co. of New York, 35 Cal. App. 666, 170 P. 852, cited by appellant, are not similar to those of the instant case. In that case plaintiff desired a policy that would protect it against loss by robbery, such loss to be covered on Saturdays up to 9 o'clock p. m. No assurance was given that the policy would be so written. The policy was issued covering loss on Saturdays up to 8:30 p. m. only. Under these circumstances it was held that while plaintiff would have been justified in refusing to accept the policy the facts were far from constituting fraud or mistake, mutual or otherwise, so as to authorize its reformation. Appellant contends that there is no evidence that respondent relied upon the representations of Oliphant, its business manager, who stated to Johnson and Cramer that he would have a careful check of all respondent's motor vehicles made so there would be no mistake in the policy. If reliance upon these representations is a fact necessary to be proven in this case, it would seem that the acceptance of the policy by respondent without first reading it over and checking each vehicle would be some evidence at least that these representations were relied upon.

There is no evidence that the Hercules trailer created a greater risk than a Utility would have created, nor that the appellant would not have as readily insured it as they would have insured a Utility trailer.

[3] We are of the opinion that the findings are supported by the evidence and that the court committed no error in denying the motions for a nonsuit, and for a new trial.

The judgment is affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

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122 Cal.App. 446

FEDERAL CONST. CO. v. BRADY.

Civ. 8193.

District Court of Appeal, First District, Division 1, California.

April 11, 1932.

Rehearing Denied May 11, 1932. Hearing Denied by Supreme Court June 9, 1932.

Appeal and error ⟹1011(1).

Finding of trial court determining disputed facts cannot be disturbed on appeal, where supported by substantial evidence (Code Civ. Proc. § 956a; Const. art. 6, § 4¾).

Appeal from Superior Court, City and County of San Francisco; F. M. Jamison, Judge.

Action by the Federal Construction Company against M. V. Brady. Judgment for plaintiff, and defendant appeals.

Affirmed.

Theodore J. Savage and Eliot G. Stoutenburgh, both of San Francisco, for appellant.

H. K. Eells, C. T. White, and Mathew Weber, all of San Francisco, for respondent.

PARKER, Justice pro tem.

The action is to foreclose a claim of lien resulting from the performance of certain street improvement work.

Plaintiff received judgment, and defendant appeals. It will be unnecessary to detail the facts, inasmuch as it is not our province to demonstrate why or how the judgment of the trial court was correct. The entire appeal is based upon the claim that the court below erroneously determined a conflict of fact, and, in support of the appeal, great stress is laid upon the provisions of section 4¾, article 6, of the Constitution, and section 956a of the Code of Civil Procedure. In Tupman v. Haberkern, 208 Cal. 256, 280 P. 970, 974, the Supreme Court has left little further to be said upon the intent and operation of these provisions of the Constitution and Code. There it is said: "Neither the constitutional amendment nor section 956a of the Code of Civil Procedure was intended to abrogate the general rule respecting the powers of the trial court in its determination of questions of fact or the rule that the reviewing court is bound by the findings of the trial court if based upon substantial evidence."

In the instant case, the finding of the trial court was based upon direct evidence, contradicted, it is true, but nevertheless supported by legitimate inferences that the trial court was permitted to draw. We concede the rule to be that, in the application of the rule limiting the scope of appellate review, the claimed conflict must be a real conflict rather than a mere evasion. Yet the concession does not aid appellant in the instant case. We might take the case before us, and step by step analyze each fact presented and each argument made, and we would end exactly where we began. We would still have a situation where a trial judge, with the additional advantage of having observed the witnesses, determined the disputed fact with substantial evidence to support his finding.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

122 Cal.App. 397

KENDALL v. KENDALL.

Civ. 8400.

District Court of Appeal, First District, Division 2, California.

April 7, 1932.

Rehearing Denied May 7, 1932.

1. **Statutes 🔑263.**
Statutes will be construed to operate prospectively only, unless contrary intention is clearly expressed.

2. **Constitutional law 🔑110.**
Judgment is vested right of property which Legislature cannot destroy or diminish or increase burdens imposed by it.

3. **Divorce 🔑310.**
Divorce decree that father pay monthly sum for support of minor daughter imposed duty to make payments until she became 18, where that was then legal age of females.

4. **Divorce 🔑310.**
Burden of judgment requiring contribution to support of daughter during minority was not increased by subsequent statute extending minority of females from 18 to 21 years (St. 1927, p. 1119).

Burden of judgment was not increased because it would be construed to operate prospectively only, so as not to interfere with vested rights.

5. **Divorce 🔑310.**
Statute increasing minority of females from 18 to 21 does not affect remedy, but rights of judgment debtor required to contribute to support of female child during minority and must operate prospectively only (St. 1927, p. 1119).

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by David Kendall against Georgia Kendall, in which judgment was rendered for plaintiff. From an order discharging an order to show cause why plaintiff should not make further payments for support of his minor daughter, defendant appeals.

Affirmed.

Eldon B. Spofford, of San Francisco, for appellant.

John E. Manders, of Redwood City, for respondent.

TUTTLE, Justice pro tem.

This is an appeal, by bill of exceptions, from an order discharging an order to show cause why further payments for the support of respondent's minor child should not be made.

On November 20, 1920, by a judgment of divorce between these parties, it was ordered that respondent pay to appellant the sum of $30 a month for the support and maintenance of their minor child. The minor became 18 years of age upon August 11, 1927. Upon July 29, 1927, an act of the Legislature became effective (St. 1927, p. 1119), whereby the age of minority of females was changed from 18 to 21 years. Thereafter respondent was cited to show cause why he should not be punished for contempt of court in failing to make the monthly payments mentioned. It is conceded that respondent made such payments until said minor reached the age of 18 years, but it is now contended by appellant that such payments should be made until the minor reached the age of 21 years. The trial court held that respondent had fully complied with the order, and discharged the proceedings.

The contention of appellant is that "as long as the child retains the status of a minor and the court has not modified its order the child is entitled to the payments ordered in the decree." In other words, that the act of the Legislature should be retroactive in effect so that the obligation of respondent to make said payments or his liability for the support of the minor, under the judgment would be extended for a period of three years.

[1] The general principle of law governing the disposition of this case is stated as fol-

lows, in Callet v. Alioto, 210 Cal. 65, 290 P. 438, 440: "It is too well settled to require citation of authority that in the absence of a clearly expressed intention to the contrary, every statute will be construed so as not to affect pending causes of action. Or, as the rule is generally stated, every statute will be construed to operate prospectively and will not be given a retrospective effect, unless the intention that it should have that effect is clearly expressed." In Sutherland on Statutory Construction, § 464, the rule is thus laid down: "A statute should not receive such construction as to make it impair existing rights, create new obligations, or impose new duties in respect to past transactions, unless such plainly appear to be the intention of the legislature. In the absence of such plain expression of design, it should be construed prospectively only, although its words are broad enough in their literal extent to comprehend existing cases." The foregoing rule applies with particular force to those statutes the retroactive operation of which would impair or destroy vested rights. 36 Cyc. p. 1210.

[2] Is a judgment a vested right? "A judgment is such a vested right of property that the legislature cannot, by a retroactive law, either destroy or diminish its value in any respect." 5 Cal. Jur. p. 755; 6 R. C. L. p. 319. By a parity of reasoning, neither can the legislature add to or increase the burden imposed upon one of the parties to such judgment. After the adjudication the fruits of the judgment become rights of property. These rights become vested by the action of the court and were thereby placed beyond the power of the legislature to affect.

[3, 4] Under the decree of divorce, it was adjudged that respondent should pay $30 per month for the support of the minor. The law then provided that she was a minor until she reached the age of 18 years. Thus, in effect, the duty was imposed upon respondent to pay this sum until she reached that age. Assuming, as appellant contends, that the judgment was subject to modification at any time, and that the amount which respondent be called upon to pay was uncertain in that respect, still the fact remains that his period of liability would, if appellant is correct, be extended for the definite period of three years. Clearly this would impose upon him "new duties in respect to past transactions" and impair his vested right to have his liability cease when the minor reached the age of majority specified in the statute as it existed when the judgment was rendered. To reach the opposite conclusion would do violence to the universal and salutary rule disfavoring the retrospective operation of statutes.

[5] Appellant relies upon the case of Christiano v. Christiano, 204 App. Div. 47, 197 N. Y. S. 72, 74, as supporting his contention that no vested right can arise out of the judgment. There a divorce was granted and alimony awarded. The statute then provided that if the defendant was *once* imprisoned for contempt on account of failure to pay alimony, he could not again be imprisoned. Thereafter the Legislature passed an act removing the limitation upon the number of contempt proceedings and terms of imprisonment. The court held that the last statute was applicable to the proceedings for the reason that: "Statutes regulating *legal remedies* are generally construed as operative upon an existing condition of things as well as upon conditions to arise after their enactment. Where a statute deals with procedure only, prima facie it applies to all actions—those which have accrued or are pending and future actions." "The action having been concluded and a judgment entered, subsequent statutes may not make modification or substantial change in the judgment." It is clear that the decision is just the contrary to appellant's contention, and that the case was disposed of under legal principles which are not involved here. The amendment to the statute here does not affect the remedy, but it affects the rights of respondent by extending the period of his liability. The rule in the state of New York is found in the case of Livingston v. Livingston, 173 N. Y. 377, 66 N. E. 123, 124, 61 L. R. A. 800, 93 Am. St. Rep. 600, which is cited in the Christiano Case. In the Livingston Case a divorce was granted and alimony in the sum of $4,000 per year was awarded the wife. At that time it was the law that the jurisdiction of the court terminated with the final judgment in divorce actions, and there was neither inherent power in nor authority conferred by the Code upon the court to modify the judgment. Shortly after the entry of the judgment, the Legislature amended the law permitting the court, after final judgment, to annul, vary, or modify the terms of such judgment in respect to the support of plaintiff. Thereupon defendant moved the court to reduce the amount of alimony from $4,000 to $3,000 and the motion was granted. The appellate division reversed the order (74 App. Div. 261, 77 N. Y. S. 476), and was sustained by the Court of Appeals. The opinion is exhaustive and well considered. It was held that "the judgment defined and created a new obligation on his [the husband's] part, and as the amendment of the statute necessarily affected the wife's right to compel exact performance, and bore upon the obligation, to her possible injury, it is obnoxious to the constitutional prohibition" (that no person should be deprived of property without due process of law). "It would be absurd to call it remedial, as affecting merely a remedy upon the decree. Even then it would violate a substantial right of the plaintiff. It was, however, in fact, the impairment of or interfer-

ence with a vested right conferred by a final judgment." The amendment to the statute in that case was made to apply to judgments theretofore rendered. The case of Springstun v. Springstun, 131 Wash. 109, 229 P. 14, 40 A. L. R. 595, presents precisely the same facts as are here involved, and it was there held that when the husband had made all his payments for the support of his minor daughter until she reached the age of 18 years, he was absolved from all further payments, and the amendment to the statute was not operative.

We conclude, therefore, that the amendment affected a right and not a remedy, and since there is no clearly expressed intention that it should be retroactive, it must be applied prospectively, and this construction is particularly imperative since it affected a vested right of respondent.

The order of the trial court discharging the proceedings was correct and is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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122 Cal.App. 476

ARNOUX v. WESTPHAL et al.

Civ. 759.

District Court of Appeal, Fourth District, California.

April 11, 1932.

1. Executors and administrators 🔑**315(6).**

In husband's action to quiet title to property, former uncontested distribution thereof to daughter under wife's will *held* res adjudicata as between daughter and husband claiming homestead rights therein.

2. Judgment 🔑**743(2).**

In husband's action to quiet title to property wife had willed to minor daughter, former judgment decreeing guardian, suing for minor, was owner thereof in fee, *held* res adjudicata as between guardian and husband claiming homestead rights therein.

3. Judgment 🔑**682(3).**

In action to quiet title to property, plaintiff could not collaterally attack legality of mortgage executed thereon by court's order through foreclosure of which defendant claimed title.

4. Judgment 🔑**652.**

In action to quiet title to property which defendant claimed through foreclosure of mortgage thereon, plaintiff who, as defendant in foreclosure, defaulted, could not contest legality of mortgage.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action to quiet title by J. A. Arnoux against Cora A. Westphal, individually and as guardian of the person and estate of Agatha Vivian Lawrence, a minor, and others, in which first-named defendant individually filed a cross-complaint. From the judgment for cross-complainant, plaintiff appeals.

Affirmed.

Thomas F. Lopez, of Fresno, for appellant.

Irvine P. Aten and Ernest Klette, both of Fresno, for respondents.

BARNARD, P. J.

This case presents another chapter in a long and strange line of litigation over a parcel of real property. On May 20, 1911, this plaintiff deeded the property in question to his wife, Anna Arnoux. On March 20, 1913, he brought an action against his wife to annul their marriage and to annul this deed. On June 24, 1913, Anna Arnoux filed a declaration of homestead on this property, in which she sets forth, "I do now, at the time of making this declaration actually reside with my minor daughter who is under my care and maintenance, on the land and premises hereinafter described," and also, "I make this declaration for the joint benefit of myself and family." On July 17, 1913, the plaintiff had his wife arrested on an insanity charge and about the same time she had him arrested on a charge of attempting to kill her. On March 9, 1914, judgment was entered in the action started on March 20, 1913, denying an annulment of the marriage, upholding the validity of the deed, and declaring the real property in question to be the separate property of Anna Arnoux. On May 6, 1914, Anna Arnoux died, leaving this property by will to her minor daughter, Agatha Vivian Lawrence; the property being later distributed to the minor through a guardian. On June 8, 1914, Cora A. Westphal was appointed guardian of this minor, continuing as such until after the minor reached her majority, which occurred on July 27, 1920. On March 15, 1919, Cora A. Westphal, as guardian of the minor, brought an action against this plaintiff in ejectment and to determine the title to the property. Judgment went for the plaintiff, the court decreeing that the plaintiff was the owner of the property in fee and entitled to the possession thereof, and also decreeing that the defendant (appellant herein) "has not any right, title, interest or estate in or to said real property or any part thereof, and he is hereby forever restrained and enjoined from asserting any claim or title thereto, or to any part thereof, adverse to the plaintiff." Upon appeal this judgment was affirmed. Westphal v. Arnoux, 51 Cal. App. 532, 197 P. 395. On July 7, 1921, the plaintiff herein filed an action against Cora A. Westphal as guardian, asserting title to this property in himself by virtue of the homestead above referred to. This action was dismissed by the plaintiff on March 20, 1923. On October 7, 1921, this plaintiff brought another action against this guardian to quiet title to the same property, which action was, on March 27, 1924, dismissed by order of the court. On July 17, 1922, a mortgage was executed under an order of court in the guardianship proceeding above referred to; the property being mortgaged to Mabel E. Holman for the purpose of paying certain expenses of the guardianship. On August 16, 1925, Mabel E. Holman brought an action against this plaintiff and against Agatha Vivian Lawrence, then Agatha Vivian Mueller, to foreclose this mortgage. Personal service of summons was had on Arnoux on August 7, 1925, in Fresno county. On November 3, 1925, summons was personally served on Agatha Vivian Mueller in the state of Washington. On April 12, 1926, the defaults of both defendants were entered. The property was sold at a commissioner's sale and bid in by Mabel E. Holman. On May 7, 1927, a commissioner's deed to the property issued to Cora A. Westphal, to whom the certificate of sale had been transferred. On July 10, 1928, this action was begun, seeking to quiet title to the property in the plaintiff; the complaint being in the usual form. Cora A. Westphal answered, denying the title of the plaintiff and asserting title in herself, subject to a subsequent mortgage given to the Helferichs. No answer was filed by Agatha Vivian Mueller until May 8, 1929, more than three and one-half months after the case was tried. Two days before the trial, Agatha Vivian Mueller conveyed to this plaintiff by deed any interest she might have in the property. The court made findings and entered judgment in accordance with a cross-complaint, quieting title to the property in Cora A. Westphal as against any and all claims made or to be made by this plaintiff or by Agatha Vivian Mueller, and decreeing that this plaintiff be debarred from asserting any title to the property. From this judgment this appeal is taken.

Two points are raised by the appellant, which are thus stated by him:

"1. The mortgage executed by Cora A. Westphal, as guardian, was and is invalid and void, and no title to the property passed through the foreclosure thereof.

"2. The title to the property vested absolutely in the plaintiff upon the death of his wife, by reason of the homestead, and there is nothing in the record to show that this title was subsequently divested."

[1, 2] Taking up the second point first and assuming, but not deciding, that the homestead referred to, the validity of which was seriously attacked in this proceeding, was a valid homestead, we think that as between the appellant and the minor, the question as to the title to this property has been heretofore fully adjudicated and settled in favor of the minor. It appears that in the administration of the estate of Anna Arnoux this appellant failed to assert any claim to the property under his alleged homestead rights and permitted the property to be distributed to the minor without objection, in accordance with the terms of the will. See Miller v. Pitman, 180 Cal. 540, 182 P. 50; McKenzie v. Budd, 125 Cal. 600, 58 P. 199. Subsequently, in the action brought by the guardian on March 15, 1919, upon the issues raised by the complaint, cross-complaint, and answers, it was adjudged that the plaintiff therein was the owner of the property in fee; that the defendant (the appellant here) had no right, title, or interest in the property; and that he was forever restrained and enjoined from asserting any such title. The matter thus became res judicata as between these parties.

[3, 4] In reference to the first point raised, it is contended that the mortgage given by the guardian under authority of the court was void and that no title passed through this mortgage and the foreclosure thereof, for the reason that the court was without authority to authorize such a mortgage after the minor became of age and during the process of closing the guardianship proceedings. Assuming, but not deciding, that this mortgage was not valid, the judgment entered in the proceedings to foreclose this mortgage cannot be here collaterally attacked by this appellant. Crouch v. H. L. Miller & Co., 169 Cal. 341, 146 P. 880; Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742; Hogan v. Superior Court, 74 Cal. App. 704, 241 P. 584. A further consideration is that in this foreclosure proceeding both this appellant and Agatha Vivian Mueller were made defendants and defaulted, and the subsequent judgment foreclosing all of their right, title, and interest in the property has become final.

In our opinion any claim of interest in this property on the part of this appellant, whether arising through the purported homestead or through any asserted defect in the mortgage, has been fully adjudicated against him, and under well-settled principles these former adjudications, which have become final, must be held to prevail. Not only was the purported conveyance to appellant from Agatha Vivian Mueller made after this action was filed, but she then had nothing to convey.

The judgment appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

TAYLOR et al. v. BUDD et al.*

Civ. 8389.

District Court of Appeal, First District,
Division 2, California.

April 6, 1932.

Rehearing Denied May 6, 1932. Hearing Granted by Supreme Court June 2, 1932.

1. Usury 🔑57.
Payment of brokerage commission to independent brokers for obtaining loan does not render loan usurious.

2. Usury 🔑56.
Payment of commission to lender's agent and attorney for obtaining loan without knowledge or consent of lender *held* not to render loan usurious.

3. Usury 🔑142(4).
Evidence in suit involving allegedly usurious note *held* to support finding that during year preceding commencement of action no usury was paid so as to entitle borrowers to credit of treble the sums of interest paid (Gen. Laws 1923, Act 3757, § 3).

4. Usury 🔑102(2).
There is no common-law right in California to recover usurious interest voluntarily paid.

5. Usury 🔑142(4).
Evidence *held* to support finding that usurious provision of note was modified by compromise and settlement which estopped borrowers to claim usury.

6. Usury 🔑95.
To obtain relief in equity from usury, borrower must tender amount admittedly due after deducting usurious interest.

7. Appeal and error 🔑1043(5).
Dissolution of temporary injunction was not prejudicial, where plaintiffs were not entitled to ultimate relief sought.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Felton Taylor and another against C. A. Budd and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

J. L. Smith, of San Francisco, for appellants.

Knight, Boland & Christin, Charles A. Christin, and Arthur Dunn, Jr., all of San Francisco, for respondents.

STURTEVANT, J.

The plaintiff and his wife commenced an action to obtain a decree (1) ordering an accounting as and for alleged usurious payments of interest; (2) an injunction prohibiting a sale under a certain trust deed until an accounting shall have been had; and (3) a decree establishing the amount due on the note secured by the trust deed after crediting all payments and set-offs.

On May 2, 1925, Helen E. Noble, as lender, loaned to the plaintiffs, as borrowers, the sum of $11,000. The loan was evidenced by a promissory note signed by the plaintiffs, and was made payable in one year. The interest was set at 12 per cent., and was made payable monthly in advance. The note was secured by a trust deed, and the defendant C. A. Budd was named as trustee. On the 2d day of November, 1926, the loan was due, and, not being paid, it was renewed for one year by a new note, secured by a trust deed of like import, except as to date.

On May 2, 1925, when the loan was made, $220 was paid to Madison & Burke as brokerage, and that firm paid to C. A. Christin $110 as and for legal services. There was evidence that Madison & Burke at one time were agents of the lender, but the evidence did not disclose the nature or the duration of the agency. Of that $220 the lender received no part. When the loan was renewed, November 2, 1926, the plaintiffs paid to the firm of Knight, Boland & Christin, $165 as for their services in negotiating the renewal. Of that sum of $165 the lender received no part. There was evidence that such payments by the borrower were customary. There was evidence that Mr. Christin had been the agent and attorney of Helen E. Noble for some years; and that he received a monthly retainer from her. There was evidence that Helen E. Noble married and went to New York to make her home. But there is no evidence that she had any knowledge of the payments, or that they were made with her consent, express or implied, or that she ratified any part or portion of the acts of her attorney or the acts of Madison & Burke. There was no evidence the charges were unreasonable in amount, nor was there any evidence that the charges were made as evasions of the law. The court found that the payments were not paid as bonuses.

From the time the first note was executed, the borrowers paid the interest in advance monthly; each installment being in the sum of $110. The payments so continued until September 2, 1927. At that time the parties were advised by a decision that had recently been handed down by the Supreme Court that interest at 12 per cent. per annum, payable monthly in advance, was usurious. The trustee sent for Mr. Taylor and informed him of the decision. At the same time she produced the note, struck out the words "in advance," and he put his initials on the margin. The installment falling due on September 2d was not paid, and thereafter no in-

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 18 P.2d 333.

terest was paid in advance. The action was commenced October 2, 1928. During the year immediately preceding that date the total sum of the interest paid was $660.

The plaintiffs contend that the first note showed usury on its face, that the second note showed the same fact, that the courts will treat the case as one transaction, and, that a lawful intention or unlawful intention is not a legal factor in the case. We do not understand the defendants to controvert any of these contentions.

However, the plaintiffs contend that at all times the note provided a rate of interest at the maximum legal rate of 12 per cent. per annum, and therefore (1) that the provision for the payment of interest in advance was usurious; (2) that, under the facts, the commission of $220 paid to Madison & Burke was usurious; (3) that, under the facts, the fee paid to Knight, Boland & Christin was usurious; and (4) that the payment of 12 per cent. per annum on $11,000 whereas of that sum the plaintiffs paid commissions and fees in the sum of $385 and had left only $10,615 and, on that sum, they were compelled to pay more than the maximum rate.

That the provision for the payment of interest in advance was usurious will be admitted. However, after the note was modified by striking out the words "in advance," that feature no longer appeared in the case.

[1, 2] The commission paid to Madison & Burke has no usurious feature. That is the rule in other jurisdictions (39 Cyc. 979), and the same rule has been followed in California. Niles v. Kavanagh, 179 Cal. 98, 101, 175 P. 462, 1 A. L. R. 831. See, also, Stuart v. Durland, 115 Neb. 211, 212 N. W. 31, 53 A. L. R. 739, note page 751. The fee paid to Knight, Boland & Christin stands on a slightly different basis because Mr. Christin had been acting as the agent of the lender. However, there is not anything showing that the payment to that firm was a device by means of which a greater compensation was obtained for the lender than the law authorized. In no manner did it purport to be a fraud on the law. In Niles v. Kavanagh, 179 Cal. 98, 175 P. 462, 1 A. L. R. 831, the court was considering the provisions of chapter 490, p. 978, St. 1911. That act contains an express prohibition against the payment of a commission or a bonus. However, on page 100 of 179 Cal., 175 P. 462, 463, Mr. Justice Sloss, speaking for the court, said: "A payment to an agent of the lender is, in effect, a payment to the lender himself. But where the lender is in no way interested in a charge, or connected with it, the transaction is not to be denounced as usurious." See, also, Stuart v. Durland, 115 Neb. 211, 212 N. W. 31, 53 A. L. R. 739, note page 754. In Wallace v. Zinman, 200 Cal. 585, 254 P. 946, 62 A. L. R. 1341, the question before the court was whether the restrictions on the payment of commissions and bonuses in the usury law were addressed to the subject of usury or to the subject of brokerage. At page 590 of 200 Cal., 254 P. 946, 948, Mr. Justice Preston, writing the opinion, said: "In practically every loan there will be legal expenses for some one or more of the above enumerated items and, if reasonable, they, of course, will be allowed without tainting the transaction as usurious." In Haines v. Commercial Mortgage Co., 200 Cal. 609, at page 617, 254 P. 956, 958, 255 P. 805, 53 A. L. R. 725, Mr. Justice Preston, writing the opinion, said: "The charge of 3 per cent. in this case cannot be allocated to any item of expense or service for which the lender could legitimately make a charge or urge a claim." In the light of the foregoing decisions, we are unable to state that the payment to Knight, Boland & Christin was to any extent usurious.

Because of what has been said in the two preceding paragraphs, it follows that the plaintiffs may not complain because they had $10,615 after paying the expenses of their loan instead of having $11,000. They had in truth and in fact received $11,000, and, because they had incurred certain expenses, they were not entitled to blame the defendants.

[3] It is not alleged in the complaint that any usury was actually paid or received during the year immediately preceding the commencement of the action. The trial court made a finding that none was paid during that period. That finding was clearly sustained by the evidence. Therefore the plaintiffs made no showing that they were entitled to a credit of treble the sums of interest paid during that period. I Gen. Laws, Act 3757, p. 1384, § 3.

[4] Closely connected with the points last discussed the plaintiffs contend that they have a common-law right to sue and recover the items of usury just discussed and have them credited as offsets. They cite and rely on 39 Cyc. 1030. The defendants reply that in this state one has no common-law right to maintain an action to recover usurious payments. Coleman v. Commins, 77 Cal. 548, 20 P. 77; Harralson v. Barrett, 99 Cal. 607, 34 P. 342; Matthews v. Ormerd, 134 Cal. 84, 66 P. 67, 210; Matthews v. Ormerd, 140 Cal. 578, 581, 74 P. 136. The plaintiffs reply by citing Westman v. Dye (Cal. Sup.) 4 P.(2d) 134. We do not understand that case as overruling those cited by the defendants. In the Westman Case, the court merely declared an exception to the other cases. It quotes with approval from Gladwin State Bank v. Dow, 212 Mich. 521, 180 N. W. 601, 13 A. L. R. 1233. In that case, at page 607 of 180 N. W., the Supreme Court of Michigan said: "The rule is well recognized in this jurisdiction that one who voluntarily pays usurious interest

may not maintain a suit to recover it while one against whom a usurious contract is sought to be enforced may avail himself of the statute as a defense. The statute is available as a shield, but not as a sword." In the instant case, the plaintiffs are not attempting to avail themselves of the statute as a defense, but they are attempting to use it as a part of their cause of action.

[5] When on September 2, 1927, the terms of the note were modified and the words "in advance" were stricken out, the plaintiffs assert that no compromise was made, that they did not waive their rights to recover back usurious payments theretofore made, and that when Mr. Taylor initialed the modification made in the note he acted alone and that Mrs. Taylor did not participate, and therefore there was no novation. The defendants reply that Mr. Taylor certainly acted for himself, that he also acted as the ostensible agent of Mrs. Taylor, and that a novation did take place. In this connection they call to our attention the fact that thereafter the plaintiffs made the payments in accordance with the terms of the modified note and fully accepted the benefits of Mr. Taylor's act in making the modification. The trial court made a finding, "It is true that on or about the 2nd day of September, 1927, the plaintiffs herein and defendant Helen E. Noble agreed to a compromise and settlement whereby plaintiffs waived for a consideration any and all rights to sue for any usurious payments arising out of any and all transactions between the parties; that as a result thereof plaintiffs are estopped to plead that any transaction between the parties was or is usurious and it is true that at said time said note was modified by the plaintiffs and initialed to provide that interest thereon was not payable in advance; it is true that since the second day of September, 1927, no interest has been paid in advance by plaintiffs, and no interest whatsoever has been paid on said obligation save and except the interest due March 2, 1928." Although the plaintiffs do not say so, we understand their argument to be in effect an attack on the finding just quoted; but we are not inclined to hold that there is no evidence sustaining the finding. Anderson v. Adler, 42 Cal. App. 776, 779, 184 P. 42.

[6] The defendants earnestly contend that the plaintiffs' complaint is wholly defective because the plaintiffs never tendered nor offered to tender the amount admittedly due after deducting usury. Jackson v. Shawl, 29 Cal. 267; Innes v. Goldwater, 30 Cal. App. 101, 157 P. 18. We will assume, without deciding, that in this state the borrowers under certain facts are entitled to maintain an action in equity to cancel a note and the security because the note is tainted with usury. 39 Cyc. 1050; 2 Pomeroy's Eq. Juris., § 937; Richlin et al. v. Schleimer (Cal. App.) 7 P.(2d) 711. The defendants assert that the plaintiffs were bound to tender them all that was due them, leaving out only such sums in excess of principal and legal interest as were usurious. Major v. Putney (Mo. App.) 293 S. W. 81. The plaintiffs reply that they were not bound to do so, and they cite and rely on Haines v. Commercial Mortgage Co., 200 Cal. 609, 619, 254 P. 956, 255 P. 805. That citation does not support them. That case was brought to recover the statutory penalty. The same point was made there that is made here, but the court specially calls attention to the issues that were made by the pleadings and clearly limits its own language. In the case of Vanasse v. Esterman, 147 Wash. 300, 265 P. 738, the Supreme Court of Washington was considering certain facts that are closely similar to the facts in the instant case. The court cited and followed the rule as stated in Pomeroy's Equity Jurisprudence (4th Ed.) volume 2, § 937: "It is a firmly settled rule, in the absence of contrary statutes, that where a borrower, who has not already paid the debt, brings a suit for affirmative relief against a usurious contract, he can obtain the remedy only upon the condition of repaying, or offering to repay, the sum which is justly and equitably due to his creditor—the amount actually loaned and legal interest. The absence of such an offer is ground for defeating the suit." In the case of Moncrief v. Palmer, 44 R. I. 37, 114 A. 181, 17 A. L. R. 119, the same question was before the Supreme Court of Rhode Island. The court ruled the same way. In expressing the reasons for its ruling, commencing on page 120, the court said: "The settled and clearly universal practice of courts of equity is opposed to the complainant's contention. The statutes of different states have various provisions directed towards the prevention of the extortion and oppression of usury. Whatever may be the method adopted by the legislature, however, although the legislative provision may go to the limit of our statute and declare the contract void and unenforceable, nevertheless courts of equity, in the absence of statute specifically constraining them to act differently, have insisted upon the equitable principle that he 'who seeks equity must do equity,' and have required the borrower, before he can be given the relief of cancelation of the contract, to perform the moral obligation resting upon him, and pay or offer to pay the principal of the loan with legal interest." Picking up our statute on usury it will be seen that, in so far as a tender is concerned, it contains not a single word altering the ordinary rules governing actions in equity. It follows that the plaintiffs were not entitled to a decree.

In opposition to what we have just said, the plaintiffs cite and rely on Haggerson v. Phillips, 37 Wis. 364. The case is not helpful. The Wisconsin rule rests on a special statute, Session Laws 1851, c. 172, which contains, among other things, a passage that no court of equity shall "require or compel the payment or deposit of the principle sum, or any part thereof, as condition of granting relief to the borrower, in any case of usurious loan forbidden by this act." In this same connection we note that the plaintiffs disclaim that this is an action to cancel the note and trust deed. If that is so, then the plaintiffs have no standing whatever to maintain this action. Westman v. Dye (Cal. Sup.) 4 P.(2d) 134.

[7] At the time the plaintiffs filed their complaint they asked for and were granted an injunction pendente lite. After the trial was had, as a part of the judgment, the trial court ordered the injunction dissolved. The plaintiffs claim the order was erroneous. It is not necessary to pass on the point. Whether it was erroneous or was not erroneous is immaterial, because from what we have said above it clearly appears that the error, if any, was not prejudicial.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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122 Cal.App. 344

MERRICK v. PORTER.

Civ. 8259.

District Court of Appeal, First District, Division 2, California.
April 4, 1932.

1. Statutes 🔑194.

In statutory construction, specific controls the general.

2. Elections 🔑271.

Violation of act regulating conduct of election campaigns and statement of campaign contributions and expenses is misdemeanor, not offense against elective franchise, and therefore furnishes no ground for contesting election (Deering's Gen. Laws Supp. 1929, Act 2262, § 1; Deering's Gen. Laws 1923, Act 2262, § 9; Pen. Code, §§ 41, 61; Code Civ. Proc. § 1111, subd. 3).

3. Criminal law 🔑13.

Crimes built up by courts with aid of inference, implication, and strained interpretation are repugnant to spirit and letter of criminal law.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Election contest by H. H. Merrick against John C. Porter. From a judgment of dismissal, contestant appeals.

Affirmed.

Arthur S. Guerin and E. H. Delorey, both of Los Angeles, and Swaffield & Swaffield, of Long Beach, for appellant.

William J. Clark, George B. Bush, and Joseph Scott, all of Los Angeles, for respondent.

DOOLING, Justice pro tem.

This is an appeal from a judgment of dismissal of a contest of the election of Mr. John C. Porter to the office of mayor of the city of Los Angeles. Section 1111 of the Code of Civil Procedure provides in subdivision 3 thereof for a contest of election in the following language: "Any elector of a county, city and county, city, or of any political subdivision of either, may contest the right of any person declared elected to an office to be exercised therein, for any of the following causes: * * * 3. When the person whose right is contested has given to any elector or inspector, judge, or clerk of the election any bribe or reward, or has offered any such bribe or reward for the purpose of procuring his election, or has committed any other offense against the elective franchise defined in title four, part one, of the Penal Code."

In title 4, part 1, of the Penal Code (section 40 et seq.) are found sections 41 and 61, reading respectively as follows:

"41. Every person charged with the performance of any duty, under the provisions of any law of this state relating to elections, who willfully neglects or refuses to perform it, or who, in his official capacity, knowingly and fraudulently acts in contravention or violation of any of the provisions of such laws, is, unless a different punishment for such acts or omissions is prescribed by this code, punishable by fine not exceeding one thousand dollars, or by imprisonment in the state prison not exceeding five years, or by both."

"61. Every person who willfully violates any of the provisions of the laws of this state relating to elections is, unless a different punishment for such violation is prescribed by this code, punishable by fine not exceeding one thousand dollars, or by imprisonment in the state prison not exceeding five years, or by both."

Section 1 of Act 2262, Deering's General Laws Supp. 1929, makes it the duty of every candidate at a public election to file a statement of moneys received and expended in aid of his election in detail and manner as therein prescribed.

Section 9 of the same act (Deering's Gen. Laws 1923, Act 2262) provides that "any person offending against any of the provisions of this act shall be guilty of a misdemeanor, and be dealt with as provided in the Penal Code."

The statement of contest in this case is in two counts, one charging certain willful violations of section 1 of Act 2262 by respondent in the making and filing of his statement of moneys received and expended in the campaign preceding the general election and the other charging willful violations of the same section in the statement of receipts and expenditures in the primary election campaign.

It is appellant's theory that the willful violation of section 1, Act 2262, is a crime under Penal Code, §§ 41 and 61, above set out, and hence furnishes a ground of contest under Code of Civil Procedure, § 1111. It is respondent's theory, on the other hand, that since section 9 of Act 2262 specifically makes any offense against that act a misdemeanor, sections 41 and 61 of the Penal Code can have no application to any violation of that act.

Appellant attempts to distinguish between willful violations of the act and those which are not willful, arguing that any violation of the act which is not willful is made a misdemeanor by section 9 thereof, and that willful violations are covered by sections 41 and 61 of the Penal Code. Several reasons compel us to hold that section 9 of the act in question excludes the application of the Penal Code sections to any offenses against Act 2262.

[1-3] It is axiomatic that in statutory construction the specific controls the general. Section 9 of the act in question is specific, providing as it does that "any person offending against the provisions of this act shall be guilty of a misdemeanor." Sections 41 and 61 of the Penal Code are general, referring to all laws concerning elections and not at all specifically to the act here under consideration. Section 9 of the act is broad enough in language and scope to cover all offenses against the act, those which are willful as well as those which are not, making all alike a misdemeanor. We are satisfied that section 9 of the act is all-inclusive of offenses against the provisions of the act and leaves no room for the application of sections 41 and 61 of the Penal Code thereto.

This conclusion is strengthened, if need be, by two other considerations: (1) "Constructive crimes—crimes built up by courts with the aid of inference, implication, and strained interpretation—are repugnant to the spirit and letter of English and American criminal law." Ex parte McNulty, 77 Cal. 164, 168, 19 P. 237, 239, 11 Am. St. Rep. 257. (2) When Act 2262 was adopted it expressly repealed an act of similar character approved February 23, 1893 (St. 1893, p. 12). In the act so repealed there was a provision in section 4 thereof providing specifically that any candidate for public office who should refuse or neglect to file, or make a false statement of moneys received or expended as required by that act should forfeit any office to which he had been elected in the election with reference to which the statement was required to be made. This was repealed by Act 2262 and no similar provision was included in that act. This would seem to indicate a deliberate intention on the part of the Legislature not to make violations of the provisions of Act 2262 result in a forfeiture of office.

Appellant calls attention to the fact that section 8 of Act 2262 provides that "no provision of this act shall be construed so as to repeal any provision of Title IV of Part I of the Penal Code." Sections 41 and 61 of the Penal Code are not repealed by the act or by our construction of it. They remain as fully effective as before. All that we hold is that they do not include offenses against Act 2262 itself.

We conclude that a violation of Act 2262 is not an offense against the elective franchise defined in title 4, part 1, of the Penal Code and hence furnishes no ground for contesting an election under subdivision 3, § 1111, Code of Civil Procedure. It follows that the statement of contest failed to state a cause of action and was properly dismissed.

Judgment affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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122 Cal.App. 281

TERMINAL INV. CO. v. POPE ESTATE CO.

Civ. 7973.

District Court of Appeal, First District, Division 1, California.

April 1, 1932.

Rehearing Denied April 30, 1932. Hearing Denied by Supreme Court May 31, 1932.

1. Landlord and tenant 🔑149.

Liability of tenant for taxes paid by landlord depends upon language of contract, context, and subject-matter of tax.

2. Landlord and tenant 🔑148(2).

Amount by which rental increased landlord's net federal income tax *held* tax levied against landlord by reason of "ownership" of, or against "income" from, premises within lease requiring payment by tenant.

Tax covenant of lease provided that lessee should pay all taxes levied or assessed against the premises, or against the landlord by reason of ownership of them, or against the income from said premises, it being the intention of the parties that rents reserved should be net income to landlord, equal in amount to said rents. Rental was a constituent part of landlord's total annual income, and increased proportionately the taxes paid, although the rental was not separately taxed as such.

[Ed. Note.—For other definitions of "Income" and "Ownership," see Words and Phrases.]

3. Landlord and tenant ⚿148(2).

Where tenant's covenant to pay taxes is broad enough to include corporate landlord's federal income tax attributable to rental, fact that lease antedated both income and corporation tax laws is immaterial.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by the Terminal Investment Company against the Pope Estate Company. From judgment for defendant on demurrer to amended and supplemental complaint, plaintiff appeals.

Affirmed.

Andrew F. Burke, of San Francisco, for appellant.

Pillsbury, Madison & Sutro and Alfred Sutro, all of San Francisco (Eugene M. Prince, of San Francisco, of counsel), for respondent.

PER CURIAM.

This appeal was taken from a judgment entered upon the sustaining of a demurrer to an amended and supplemental complaint, without leave to amend. The action was brought to recover $7,317.04 paid under protest by appellant to respondent as reimbursement for income taxes paid on rental it had received from appellant for the years 1920 to 1923, inclusive. Incidentally, it was for a decree declaratory of the rights and duties of the parties under the tax covenant of the lease, but this feature has been dropped from the case.

In 1909 the respondent, owner of a parcel of real property on Sacramento street, near Drumm, in San Francisco, made a fifty-year lease of the property to the appellant at a monthly rental ranging from $1,596 at the beginning of the term, to $3,100 at the end. In the lease the lessee agreed to pay all taxes levied against the lot and improvements, or against the owners by reason of their ownership, whether assessed to the property itself "*or upon or against the income from said land or its improvements.*" (Italics ours.) The respondent paid the federal tax on its net income from the leased premises for the year 1920 in the sum of $1,508.03; for 1921, $1,471.08; for 1922, $2,247.82 and for 1923, $2,090.11. Respondent has sources of income other than the property in question and its tax therefore was computed each year upon its total gross income from all sources, including the rent from these premises, which during each of these four years was $24,600. The gross income from all sources varied and fluctuated from year to year according to gains and losses, and it was of course subject to certain authorized exemptions and deductions. Taking the year 1922 as typical, the $2,247.82 paid was such proportion of the total income tax as represented the $24,600 rent derived in that year from the leased premises. After the payments had been made, respondent called upon appellant for reimbursement and threatened to exercise its option to terminate the lease in case of a refusal. Under protest the appellant paid, and then made a demand for repayment, followed by this action. These facts are pleaded in the complaint by appropriate allegations in four counts, which differ only in the amounts paid for each of the four years. In sustaining the demurrer, the learned trial court held that the language of the tax covenant obligated the lessee to repay that part of the income tax attributable to the rentals paid by appellant.

[1, 2] The appellant challenges the correctness of this holding upon the ground that the tax provision binds the lessee to pay such taxes only as may be levied upon the "rent" *as such*; that is to say, upon the rent *as a specific item of taxation*, and that the federal law does not tax rents, as such; it does not tax any of the specific items which go to make up the income of the taxpayer. Stated another way: That the $2,247.82 (for example) paid for 1922 was not a tax "against the income from said land or its improvements," but was *part* of a tax on respondent's net income for that year, which net income was computed upon gross income derived from various sources less exemptions and deductions allowed by law.

Regardless of the differing conclusions reached by the authorities upon this question (and it will be seen presently that the cases fall into two rather distinct groups), the cases are fairly in accord in holding that "The determination of any such question depends upon the words of the contract, the context in which they occur, and the subject-matter to which they are applied." Chief Justice Rugg in Stony Brook R. R. v. Boston & Maine R. R., 260 Mass. 379, 157 N. E. 607, 608, 53 A. L. R. 700, wherein will be found a rather full review of the cases. See, also, to the same effect, North Pa. R. R. Co. v. Phila. & R. Ry. Co., 249 Pa. 326, 95 A. 100. Moreover, there is like unanimity on the legal proposition "that taxation upon real estate means one thing, and taxation upon income means another" (Crosby, J., in Codman v. American Piano Co., 229 Mass. 285, 118 N. E. 344, 346), or as Chief Justice Rugg puts it in the Stony Brook Case, "An assessment upon income is an assessment upon a subject different from a tax upon property." In Brainard v. N. Y. C. R. R. Co., 242 N. Y. 125, 151 N. E. 152, 153, 45 A. L. R. 751, Justice Pound says in the same connection: "In actions * * * where the lessee agrees to pay all taxes levied and assessed on or in respect to the property, the distinction between taxes on the income of property and taxes on the property itself has been repeatedly pointed out. With monotonous frequency the courts have held in this connection that a tax on the rents or income of real property is not considered a tax on the property itself."

The pertinent and material provisions of the tax covenant are as follows: "As a part of the consideration for this lease, *the lessee covenants and agrees to further pay* or discharge *all taxes*, assessments, penalties, charges or rates or liens of any nature whatsoever which may, for the period following January 1, 1910, be levied, *assessed*, charged or imposed or claimed on or against said lot of land or any improvements or fixtures thereon or appurtenances thereto, or any part thereof, or *against the owner* or owners of said land or the improvements, * * * *by reason of said ownership*, by whatsoever authority levied, assessed, charged or imposed or claimed, and whether the same be upon or against the property herein leased, its improvements, fixtures or appurtenances, or any part thereof, or *upon or against the income from said land or its improvements*, * * * it being the intention of the parties to this lease that the rents herein reserved * * * shall constitute a net income to the lessor from said land herein leased, equal in amount to said rents." (Italics ours.)

In this inquiry we are concerned only with an assessment against the owner, by reason of his ownership, when it is "upon or against the income from said land or its improvements." The federal tax in question was levied against the owner by reason of its ownership. The tax, as we see it, was against the income from the leased premises despite the fact that there was, admittedly, no distinct, separate, specific levy against the rent as such and, indeed, no provision of law for such specific levy. The tax was against the net income of the respondent after various deductions and exemptions allowed by law had been made, but one of the items of gross income from which the net income was computed (and a very substantial item at that) was the $24,600 rental paid by the appellant. This rental was a constituent part of respondent's total annual income and the $2,247.82 was such proportion of the whole tax paid as represented this rental. We are unable to agree with appellant in its contention that merely because the income, $24,600, was not taxed *as $24,600*, or separately, or at the source, or "as rent," *the respondent has not paid a tax on income from the land*. The problem, it is true, would be simplified if the respondent had no income other than this rental. The appellant concedes that then "there would be no difficulty in determining the amount of the liability." But the practical difficulty in arriving at the amount, or the intricacy of the accounting or arithmetical problem presented, should not frustrate the intention of the parties if such intention is clear, as we think it is. "That is certain which can be made certain." Civ. Code, § 3538.

The draftsmen of the lease, in choosing its language, seem to have been careful to carry into the tax covenant the distinction stated in the Codman Case, namely, "that taxation upon real estate means one thing, and taxation upon income means another" for by apt and comprehensive language they imposed upon the lessee the tax burden in both forms. We see no escape from giving to the covenant the meaning given to it by the learned trial court, and we can find no basis for the claim that in order to carry into legal effect this promise to pay a tax upon the *income* from the leased premises, a tax upon the *rental*, as such, i. e., *as a specific item of taxation*, must exist. To adopt this view would be to read into the covenant something which the parties did not put there.

Again, "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Civ. Code, § 1641. If any doubt remains that the draftsmen of the lease intended to hold the lessee for taxes paid by the lessor under both forms of taxation, such doubt would seem to be dispelled by the following language with which they fortified that which had gone before, namely, "it being the intention of the parties to this lease that the rents herein reserved * * * shall constitute a net income to the lessor from said land herein leased, equal in amount to said rents."

In Republic Building v. Gaertner, 201 Ky. 509, 256 S. W. 1111, 1112, 30 A. L. R. 982 (a case practically parallel to the case at bar), Chief Justice Sampson said with respect to a similar undiminished-rent provision: "This latter clause no doubt was intended to make absolutely certain that which was reasonably certain from other words in the same paragraph of the contract; that is, that the lessee was to pay all taxes on the property * * * and all taxes or assessment on income giving the lessor the sums named as net rentals." For each of the four years in question the rental was $24,600. If the landlord who received it paid a tax upon it as income, it is obvious that his *net* income from the property would be what was left after the tax was paid, or the difference between $24,600 and the amount of the tax. For instance, in the year 1922, the tax was $2,247.82. His net income, then, would be $22,352.18. However, the covenant says that his *net income* shall be the rent reserved, namely, $24,600, and unless the holding of the trial court stands, the net income ceases to be the rent reserved which the parties agreed should remain in all its wholeness and integrity, but it turns out to be such rent *diminished by the tax.*

In all the cases cited by appellant, the courts held the covenants not sufficiently broad to include the obligation to repay federal income tax paid on the rent reserved. A typical case is Park Bldg. Co. v. Yost Fur Co., 208 Mich. 349, 175 N. W. 431, 432 (wherein most of the authorities are reviewed), where the lessee had agreed to pay all taxes upon the premises and buildings and any personal tax levied upon the lessor " 'upon the leasehold estate hereby created and upon the reversionary estate * * *; the intent hereof being to insure * * * a net rental hereunder, not chargeable with any burdens by way of taxes, or otherwise, resulting in the diminution of the same.' " The court said: "The tax section in detail and with apt phraseology takes cognizance of and requires that the lessee shall pay all taxes upon four estates in the property, directly named as follows: 'Said premises'; 'all buildings and improvements thereon'; 'the leasehold estate hereby created'; and 'the reversionary estate in said premises during the term hereby granted'—and the lessor, with detailed effort to make certain from the beginning prompt payment by the lessee of the taxes so specified," provided for certain other tax payments, but "with no suggestion indicating an intent that the tenant should pay any portion of the personal income tax * * * *a matter of greater moment and easier description than certain of the requirements clearly and distinctly specified.*" (Italics ours.) The implication is clear that had income tax been mentioned the case would have gone the other way.

The appellant also cites Des Moines Union Ry. Co. v. Chicago Great Western Ry. Co., 188 Iowa, 1019, 177 N. W. 90, 9 A. L. R. 1557; Catawissa R. R. Co. v. Phila. & R. Ry. Co., 255 Pa. 269, 99 A. 807; Sharon Railway Co. v. Erie R. Co., 268 Pa. 396, 112 A. 242; and Codman v. American Piano Co., supra, which hold that where a lessee covenants to pay all taxes levied or assessed upon the leased premises, or upon the interest of the lessor therein, or upon the receipts from business conducted therein, the lessee is not liable for any part of the income taxes of the lessor. Appellant makes no claim that these cases go any further than this, and it is needless, therefore, to discuss them in detail, the Park Building Company Case being typical.

In Young v. Illinois Athletic Club, 310 Ill. 75, 141 N. E. 369, 371, 30 A. L. R. 985, cited by appellant, the ninety-nine year lease contained a covenant binding the lessee to pay all taxes of every nature and kind whatsoever assessed upon the real estate demised, or upon the improvements, or upon any interest of the lessor under the lease, or which the lessor should be required to pay by reason of his interest in the property and improvements. The opinion reviews most of the cases and holds that: "It has been the universal holding of courts considering the question, so far as we are able to find, that *unless the lease expressly provides for the payment of taxes on the income or rentals received under the lease the imposition of such burden on the lessee is not justified.*" We have given emphasis to the concluding words because this case, like the Park Building Company Case, supra, recognizes that if income is mentioned in the covenant as a subject of taxation—as it is in the case at bar—a wholly different question is presented.

In none of the six cases just cited is the word "income" to be found in the tax covenant. They all hold, as might be expected, that a party is not to be bound beyond the language of his covenant and that the inclusion of one or more subjects of taxation excludes all others. They all recognize "that taxation upon real estate means one thing, and taxation upon income means another." If the covenant in the instant case had stopped short in its enumeration of taxable subjects, and had not mentioned income, these cases might have a bearing. As it is they have none. No cases except perhaps those from Missouri are cited by the appellant holding that in order to bind a lessee to pay taxes on "income" there must be found a provision for the taxation of rental as such, or against income from rental at the source (as in Suter v. Jordan Marsh Co., 225 Mass. 34, 113 N. E. 580) in order to give legal effect to a plain promise to pay the tax on income.

While "income" is not the subject of taxation in any of the cases thus far cited or discussed (save the instant case), the appellant does cite several Missouri cases where "income" was one of such subjects. We discuss these Missouri cases later on.

To the cases cited by appellant might well be added that of Stony Brook R. R. v. Boston & Maine R. R., supra, where the covenant bound the lessee to pay " 'all public taxes, assessments and charges whatsoever on the property, franchise or capital stock' " of the lessor " 'that shall be placed or assessed upon said first party or upon its stockholders residing in Massachusetts.'" The decision points out that the enumeration quoted "excludes 'income' from the subjects on which the lessee agrees to pay the governmental imposts. * * * The omission of income in this connection imports that it was not intended to require the lessee to pay taxes assessed on income. * * * The natural as well as the legal significance of income in connection with taxation is something different from property."

Our view, which is thoroughly in accord with that of the learned trial court, is amply supported by the authorities. Perhaps the closest case on the facts is Republic Building v. Gaertner, supra, where the lessee agreed "'to pay all taxes, assessments, water rents, or other assessments imposed, assessed, or levied upon said premises or upon any part thereof, or any buildings or improvements thereon, or the income from said premises. * * *'"

The contention of appellant herein is substantially the same as that made in that case, which was that: "The phrase in the lease 'income from said premises' does not mean the 'rent' payable to the lessor thereunder, because the word 'rent' would otherwise have been used therein; if such had been the intention of the parties." The decision frankly recognizes and states the rule followed in appellant's cases first cited herein as follows: "The general rule is that, unless the covenants of the lease expressly provide that lessee shall pay the income tax that may be required of the lessor on the rentals received by him from the lessee, the lease will not be enlarged by reading therein an obligation on the part of the lessee to pay any part of the lessor's income tax—the principle 'expressio unius est exclusio alterius' applying where the lease specifically designates the taxes which the lessee is to pay." Citing the Catawissa, Codman and Des Moines Cases, supra. The lessee there was held for the tax paid, the court saying: "In fact the contract required the lessee to pay every kind of tax or assessments 'whatsoever.' There was a tax on the income-rentals from the grounds. The rentals due by the lessee to the lessor were subject to an income tax. This was just as certain, definite, and regular as the ad valorem tax on the property each year. The mere fact it went to the federal government in place of the state government made no difference. It was a tax within the meaning and intent of the contracting parties who executed the lease, and we think the trial court did not err in so holding and requiring the lessee * * * to pay, not only the ad valorem tax and such other tax of that nature as may become due from the said property, but the income tax in controversy here as well, which may be found to be due on 'the income from said premises.'"

In North Pa. R. R. Co. v. Phila. & R. Ry. Co., supra, 249 Pa. 326, 95 A. 100, the lessee agreed to assume the payment of all taxes and assessments upon the "'yearly payments herein agreed to be made by the party of the second part to the party of the first part * * * for the payment or collection of which * * * the said party of the first part would otherwise be liable or accountable under any lawful authority whatever.'" "This clause," said the court, "is certainly quite broad enough to cover the income tax, payable out of and assessed upon the 'yearly payments agreed to be made.'" In that case it was contended, as it is in this, "that the income tax is a tax upon net income and not a tax upon the rents or profits derived from real estate," with respect to which contention the court said: "The real question to be considered is the meaning of the parties in view of the language used by them; there being no doubt, if defendant agreed in appropriate terms to pay the income tax or any other tax to which the plaintiff might be subjected, such agreement would be binding, regardless of whether the income tax be technically viewed as a tax on rent or on the net income from rent." There was no expression of intent respecting undiminished rent such as is found in the covenant herein, but the court held that the language used was its equivalent in the following language: "It was the apparent intention of the parties, that plaintiff should receive the amounts stipulated without deduction by reason of any tax, charge, or assessment of any kind."

Other cases from the same state to the same effect are Phila. C. P. Ry. Co. v. Phila. R. T. Co., 263 Pa. 561, 107 A. 329, and Phila., G. & N. R. R. Co. v. Phila. & R. Ry. Co., 265 Pa. 325, 108 A. 528. Suter v. Jordan Marsh Co., supra, held income tax withheld at the source (under the law as it then read) to be chargeable against the lessee under a covenant by which he agreed to pay "'all taxes and assessments whatsoever, * * * which may be levied for or in respect of the said leased premises, * * * or upon or in respect of the rent payable hereunder by the lessee, howsoever and to whomsoever assessed.'" This covenant, it will be noted, is not nearly so comprehensive as the one under examination.

In the same state in Kimball v. Cotting, 229 Mass. 541, 118 N. E. 866, 867, L. R. A. 1918C, 1189, the same rule was followed; the court saying: "Although the case at bar is not governed by Suter v. Jordan Marsh Co., 225 Mass. 34 [113 N. E. 580], it falls within the same class, and is distinguishable from Codman v. American Piano Co." The covenant bound the lessee to pay any taxes assessed "'to either the lessors or the lessees upon or against the rent payable hereunder * * * whether levied or assessed upon the same as rental or income. * * *' It is manifest," says Chief Justice Rugg, "* * * that it was the purpose of the parties to impose the obligation upon the lessee whether the tax was levied as a property or as an income tax."

In Kimball v. Cotting, 234 Mass. 172, 125 N. E. 551, the covenant in the Codman Case, supra, is quoted and the two cases distinguished. In the Kimball Case the covenant bound the lessee to pay any taxes "'upon or against the rent payable hereunder whether levied or assessed upon the same as rental or as income of any person or persons entitled thereto.'" The defendants conceded that they were liable for the normal federal income tax, but resisted payment of the surtax for which plaintiff also sought reimbursement. They were, however, held liable for the surtax upon the authority of the Kimball Case just cited. 229 Mass. 541, 118 N. E. 866, L. R. A. 1918C, 1189.

In Farmers' Loan & Trust Co. v. Park & Tilford, 127 Misc. Rep. 59, 215 N. Y. S. 244, 246, the covenant bound the tenant to pay all taxes which "'may become payable by any owner of the demised premises upon said rents as income of such owner.'" It is interesting to note that the defendant contended, just as this appellant does, "that the lease contemplates merely the payment of a tax on rents as such, and that, inasmuch as the federal * * * income tax laws impose no such tax on rents, nothing is herein recoverable." It was held, however, that the words of the covenant "unequivocally require the payment of income tax imposed upon the landlord on the amount received under this lease."

In none of appellant's cases thus far discussed do the covenants refer to income or taxes on income. The Massachusetts, Pennsylvania, Kentucky, and New York cases just reviewed are all cases where either rental or income, or both, were mentioned in the lease, and those terms were treated more or less interchangeably so long as the tax was against the rental or the income, and not against the property. Several cases, however, are relied upon by appellant wherein the covenants deal with income. The first of these is Dennehy v. Barnheisel, 218 Ill. App. 91, where the lessee agreed to pay "'all taxes, assessments, income tax (should there ever be any levied) * * * levied, charged or imposed *upon said premises, or any part thereof.* * * *'" The plaintiffs sued for reimbursement of an income tax paid by plaintiffs "*on the rents derived from the premises*" and it was held that they could not recover. (Italics ours.) The court points out that when the lease was made the income tax law was in effect, and adds: "If it were the intention to require the tenant to pay all income taxes which plaintiffs were compelled to pay by reason of the rent derived from this property, it would have been a simple matter to have stated so in plain language. The income tax which plaintiffs are seeking to recover is not 'levied, charged or imposed upon said premises.' It is a personal liability against the person receiving the income." The court then cites the Codman and Suter Cases, following the former and distinguishing the latter. The case turns simply upon the words: "income tax * * * upon said *premises*, or any part thereof." The court remarks that "The provisions of no two leases are the same, and each case must be decided upon the particular wording of the lease under consideration," and concludes: "If, in the future, however, the Congress should enact legislation which would impose any income tax upon the property in question, then the provision in the lease would become effective."

Another is Elliott v. Winn, 305 Mo. 105, 264 S. W. 391, 394, where the lessee covenanted to pay all taxes "'including all income or governmental taxes, and all of the assessments and charges which shall be assessed, either in the name of the lessor or the lessee against the demised premises or its improvements, or the said rents.'" The court said that the "record fails to show any assessment of a tax against the rents, as such. The only thing pleaded by the defendant is that he paid an income tax upon his net income, and that a part of that net income was from rent. * * * In other words, there is no income tax charged to this rent as was [done] by the Income Tax Act of 1913. The tax which defendant paid was a personal tax on his net income, and not a tax 'assessed * * * against the rents.'" The case follows Riesenberg v. Primary Realty Co., 214 Mo. App. 43, 258 S. W. 23, where the covenant was quite similar and the holding, likewise, in favor of the lessee. In the Riesenberg Case the lessee promised to pay "'such income tax as would be payable on account of the rent * * * reserved.'"

In the Farmers' Loan & Trust Co. Case, supra, the court has this to say respecting the three cases last cited: "the language of the lease related solely to a tax on rental as such." Laclede Gas Light Co. v. St. Louis Union Trust Co., 321 Mo. 782, 12 S.W.(2d) 432, 433 and Missouri Athletic Ass'n v. Delk Inv. Corporation, 323 Mo. 765, 20 S.W.(2d) 51, both follow the Riesenberg and Elliott Cases. In the Laclede Case it was held that the federal income tax is a personal tax on the individual's net income from all sources, not a "tax imposed * * * 'upon the income, rents and profits' arising from the demised premises" within lessee's covenant to pay all such taxes. The court says: "It is not a tax levied on income at its source. Lessors' income tax does not therefore fall within the terms of the covenant; it is not a tax imposed in whole, or even in part, 'upon the income, rents and profits' arising from the demised premises."

It is difficult, if not impossible, to reconcile these four Missouri cases with the Kentucky, Massachusetts, Pennsylvania, and New York cases cited, and as they do not convince us that our construction of the covenant is wrong, and as they are against the prevailing weight of authority, we are not inclined to follow them.

The fact that the lease was entered into four years before the Income Tax Law of 1913 (38 Stat. 114) was enacted and five months before the law imposing a tax upon corporations was adopted is stressed by the appellant in support of the argument that the form of taxation of income in effect in 1920–1923 had not been adopted in 1909, but that the taxation of rents, as such, was then a well-known form of taxation; that such form of taxation had been discussed in the Pollock Case, 157 U. S. 429, 15 S. Ct. 673, 39 L. Ed. 759; Id. 158 U. S. 601, 15 S. Ct. 912, 39 L. Ed. 1108; and that Congress might impose such a tax was a possibility which the parties "undoubtedly had in mind." However, in the cases dealing with this phase of the subject, little weight has been given to this point. Strangely enough, in several of the cases cited herein, holding the lessee liable for income tax paid by the lessor on rental, the leases were drawn many years before any income tax law was enacted. Thus in North Pa. R. R. Co. v. Philadelphia & R. Ry. Co., supra, 249 Pa. 326, 95 A. 100, the lessee road was held, under the terms of a lease made in 1879, for an income tax levied over thirty-four years later under the act of 1913. It was there said: "At the time the lease was made, there was no such thing as a federal income tax, but the words 'taxes and assessments' are sufficiently broad to cover such tax." In Phila. C. P. Ry. Co. v. Phila. R. T. Co., supra, 263 Pa. 561, 107 A. 329, the lessee road was likewise held under the act of 1916, upon a lease executed before the law in question was in existence. In Suter v. Jordan Marsh Co., supra, and Kimball v. Cotting, 234 Mass. 172, 125 N. E. 551, the point was raised as to a change in the law as to taxation during the term of the lease, but it was held to be "of no consequence." In Kimball v. Cotting, 229 Mass. 541, 118 N. E. 866, L. R. A. 1918C, 1189, the lessee was held for income taxes paid under the act of 1913 under the terms of a tax covenant found in a ninety-nine year lease drawn in 1902.

[3] The cases all turn, as this case too must turn, upon the language of the covenant. Granting, as counsel suggests, that the parties in 1909 had in mind when they framed the tax covenant the taxation of rents, as such, rather than the form of taxation which eventuated, the lessee's obligation is nevertheless measured only by the language the parties chose. In the case of Welch v. Phillips, 224 Mass. 267, 112 N. E. 651, 652 (cited in the Suter Case, supra, and in Kimball v. Cotting, 234 Mass. 172, 125 N. E. 551, on the point now under discussion), it is said: "Presumably the change in the tax law which makes them liable for the 1913 tax was not contemplated by them. But the payment of that tax comes precisely within the terms of the contract they made, and we can only construe and enforce it. *It is not for us to speculate as to what agreement they would have made if they had foreseen the likelihood of a change in the tax law, and to modify the lease in accordance therewith.*" (Italics ours.)

The difficulty of ascertaining the extent of the lessee's tax obligation under this covenant —because the present law taxes net income only—leads appellant to urge: (a) That the parties never intended to obligate the lessee to pay any part of the income taxes of the lessor, or (b) that if they did so intend, the lease is so indefinite and uncertain in that respect as to be incapable of enforcement. This subject has been already touched upon. Indeed, the difficulty is not new for in the North Pennsylvania Case, supra, 95 A. 100,[1] it appears that the plaintiff demanded that the defendant repay the amount paid as income tax "less such amount as represented the tax on income received from other sources." The opinion concludes as follows: "The only question remaining would be the practical one of separating the net revenue derived from these rents from that derived by plaintiff from other sources; but, as this question has been settled by agreement of the parties themselves, it need not be considered here." In the Suter Case, supra, the same difficulty was dismissed in the following language: "There are also deductions by way of expenses and otherwise. But these considerations do not overbear the direct and explicit words of the act which seem to us to bring the imposition here in controversy within the kind of tax and assessment which is described in the lease." Again, it must be remembered that in the Kimball Case, supra, 234 Mass. 172, 125 N. E. 551, the lessee was held for the surtax as well as for the normal tax and in the Philadelphia C. P. Ry. Co. Case, supra, 263 Pa. 561, 107 A. 329, the lessee was held for war excess profits tax as well as for income tax.

The difficulty under discussion was considered by the learned trial judge, and it is difficult to improve upon what he said respecting it: "It is conceivable that a practical problem may sometimes arise in the determination of the precise fraction of the total tax on the aggregate net income of the lessor which should properly be allocated to the rentals received. But problems of that sort must be met as they lift their heads, just as the problem of apportionment between the

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[1] 249 Pa. 326.

parties in the Bryant Park Building Case [133 Misc. Rep. 225, 231 N. Y. S. 451] was met; and there is scarcely a suit for an accounting in which there is not some practical question to be solved. So there is no good reason for shying at the shadow of a possible puzzle. No contention is made by plaintiff that if it was chargeable at all for the taxes of the years in question, its liability was for any lesser amounts than those demanded and paid under protest."

For the reasons herein given, and upon the authorities cited, we are satisfied that the judgment appealed from was correct and should be affirmed. It is so ordered.

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122 Cal.App. 466

McPHERSON et al. v. EMPIRE GAS & FUEL CO. et al.

Civ. 743.

District Court of Appeal, Fourth District, California.

April 11, 1932.

Rehearing Denied April 30, 1932. Hearing Denied by Supreme Court June 9, 1932.

1. Mines and minerals ⚷74.

Letter from assignor's successor authorizing ultimate assignee of lease to continue operation of single well on leased premises *held* under evidence waiver of right of forfeiture under notice of forfeiture for failure to drill third well.

The contract under which the lease was assigned provided for continuous drilling campaign until four wells were drilled, and further provided that, if production from preceding well did not amount to 300 barrels of oil per day average, the assignee might be relieved from obligation to drill additional well, and might keep, hold, and operate any producing well during life of lease by assigning lease back to assignor. The evidence disclosed that on a number of previous occasions notices of default and demands of prompt performance were given to holder of the leasehold, but that assignor's successor had relented and waived effect of such notices, and that in the present case the holder of the leasehold acted on offer to retain possession of the first well and continued to operate it and paid royalties which assignor's successor accepted and still retained.

2. Contracts ⚷318.

Contract will not be construed to provide for forfeiture, unless no other interpretation is reasonably possible (Civ. Code, § 1442).

3. Contracts ⚷316(1).

Obligee may waive right to declare forfeiture for breach of contract.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action by A. W. McPherson and another against the Empire Gas & Fuel Company, a Maine corporation, and another. Judgment for plaintiffs, and defendant named appeals.

Reversed, with directions.

O'Melveny, Tuller & Myers and Homer I. Mitchell, all of Los Angeles, for appellant.

Walter J. Little, William B. Gilroy, and Randall & Bartlett, all of Los Angeles, for respondents.

THOMSON, Justice pro tem.

This is an action against two corporations, each named the Empire Gas & Fuel Company. One corporation was organized under the laws of Colorado and the other was organized under the laws of Maine. The Maine corporation is the appellant, the Colorado corporation having assigned to the Maine corporation, prior to the incidents complained of, all of its right, title, and interest under the lease and contract which are the subject of the controversy. Two causes of action are set forth in the complaint. The first is a cause of action to have plaintiff's title quieted to the property in question, and is the ordinary form of a quiet title action. The second cause of action alleges the chain of title, the execution and delivery of said lease and said contract, the breach of said contract, the service of default notice on appellant by respondents, the obligation of appellant to assign said lease to respondents by reason of said default and to deliver possession of said property to respondents, and the failure of appellant to do so. The prayer of the complaint asks for a decree adjudging that defendants have no estate or interest in the premises or in said lease; that defendants be enjoined from asserting any claim to said premises adverse to respondents; that appellant be ordered to account to respondents for oil and gas produced after the date of alleged forfeiture; and such further relief as the court may deem proper.

The trial court gave judgment for plaintiffs and against defendants, quieting title in plaintiff and declaring that neither of defendants has any right, title, or interest in the land covered by said lease nor in the two oil wells on said land and that plaintiffs are entitled to immediate possession thereof; ordering defendants to execute to plaintiffs an assignment of said lease; and decreeing that plaintiffs recover from defendants the sum of $28,209.87, the gross receipts from said well from July 1, 1928, to the date of accounting. The appeal is taken by the Maine corporation from said judgment.

In 1922 the Calitroleum Oil & Gas Company secured a lease from the United States government giving it the exclusive right for the period of 20 years to extract oil and gas from a certain 120-acre parcel of land in the Maricopa district in Kern county, together with an easement for such use of the surface of the property covered by said lease as was necessary to the full enjoyment of the rights conferred by said lease. On May 20, 1924, said Calitroleum Oil & Gas Company assigned to appellant's predecessor, said Colorado corporation, all of its rights in the said lease from the United States government in so far as it appertained to a certain 40-acre tract of said land, which said assignment was approved by the Secretary of the Interior as required by law. At the same time said Calitroleum Oil & Gas Company, as first party, entered into an agreement with appellant's said predecessor, the said Colorado corporation, as second party, by the terms of which second party agreed to conduct and diligently prosecute a continuous drilling campaign for the development of oil and gas on said 40-acre tract, until at least four oil wells are drilled, second party to be allowed 30 days after the completion and testing of a well before it shall be required to commence operations on the next well, and provided that additional wells after the first well are required to be drilled only in case the preceding well produces not less than 300 barrels of oil per day for a 30-day period of production immediately following discovery. The contract provided that, in the event that the production from the preceding well does not amount to such average production, second party may, at its option, upon written notice to first party, be relieved from all obligations to drill additional wells on said land, in which event second party may keep and hold and operate any and all wells producing oil or gas in paying quantities during the life of the lease, and in such event second party shall assign to first party the lease on said 40 acres, subject to the rights of the second party to any wells theretofore drilled. This contract also provided that, in the event of the breach by the second party and its failure to remedy such default, or to commence in good faith appropriate operations to remedy such default, within 30 days after written notice thereof has been served upon second party, all rights of second party in the agreement shall cease and determine, and the second party agrees thereupon to execute to the first party an assignment of the lease on said 40 acres. Said Calitroleum Oil & Gas Company transferred to respondents its right, title, and interest in the property and in said United States government lease and said contract dated May 20, 1924. Appellant and its said predecessor have drilled two wells on said 40 acres at a cost of $240,000. The record does not show how much profit has been received by appellant or its predecessor from production of oil and gas from the two wells. A number of notices of default and demands of prompt performance were served on appellant by respondents, which were afterwards waived. Thereafter, on June 1, 1928, respondents served another notice to commence drilling a third well or to assign the government lease back to respondents. Appellant never did comply with said demand. On July 25, 1928, respondents sent appellant a letter which will be hereafter referred to. On August 18, 1928, respondents again notified appellant of its default by reason of its failure to drill a third well, and demanded an assignment of the lease. Appellant continued to operate the wells until the date of judgment, and the evidence shows that, after paying to respondents the 28 per cent. royalty provided for in the contract, appellant's gross receipts from production after July 1, 1928, amounted to $28,209.87.

Appellant urges a reversal of the judgment of the trial court on many different grounds. But, in view of our conclusion as to the effect of said letter of July 25, 1928, we deem it unnecessary to discuss these various grounds or to comment on the numerous authorities cited in support thereof.

We are satisfied that the trial court correctly decided that defendant and appellant breached its contract of May 20, 1924, in not drilling, or at least commencing to drill, the third well on the premises, and that respondents would have been entitled to repossess all of the property covered by said contract on or after July 1, 1928, had it not been for the letter which respondents sent to appellant dated July 25, 1928, which was admitted in evidence, and reads as follows:

"July 25, 1928.

"Empire Gas & Fuel Company, Maine Corporation, 850 Subway Terminal Building, Los Angeles.

"Gentlemen: As you have failed to remedy the default of which we notified you under date of June 1st, 1928, under the agreement entered into between the Calitroleum Oil & Gas Company, a California Corporation, and The Empire Gas & Fuel Company, a Colorado Corporation, dated May 20th, 1924, which agreement covered oil operations on the Southwest quarter of the Southeast quarter of Sec. 4, T. 11 N. R. 23 W., S. B. B. & M., Kern County, Calif., we hereby notify you that all your rights under said agreement cease and determine; and we demand that you assign to us the Government Lease covering this land, as provided in Section 19 of said agreement.

"*We take notice that you are at this time operating Well No. 1 only, and you may continue to operate same so long as you pay us 28% net of the oil and casing head gasoline produced from said property, and provided same is paid promptly on the 20th day of the month following its production.* (Italics ours.)

"You have violated the provisions of Section 11 of said agreement and thereby abandoned your right in Well No. 2.

"Royalty payments to us must be met. You may not expend money for any purpose and charge any part to us.

"J. D. Kneen and
"A. W. McPherson,
"By A. W. McPherson."

[1] The notice of June 1, 1928, was unconditional, and forfeiture would have followed in due time, but the letter of July 25, 1928, shows that the respondents considered said contract still in force because it expressly stated that appellant might remain on the premises and produce oil and gas from well No. 1. Under these circumstances it could not be said that the rights of appellant had terminated and were at an end, nor does it appear that respondents considered appellant's rights at an end. Respondents in their brief on appeal refer to this letter and state: "* * * A reading of the letter indicates that respondents were still willing to give appellant every opportunity to assign the lease to them and to thereby protect its investment in the property." As stated above, the contract provided that, if the production from a well did not amount to an average of 300 barrels per day, appellant at its option, upon written notice to first party, would be relieved from all obligation to drill additional wells on said land, in which event second party might keep and hold and operate any and all wells producing oil or gas in paying quantities during the life of the lease, and in such event appellant was obligated to assign to respondents the lease covering said 40 acres, subject to the right of appellant to any wells theretofore drilled.

If, at the time respondents sent said letter to appellant, respondents were still willing to give appellant an opportunity to protect its investment under the terms of the contract, it follows that respondents still recognized that the contract was in force and effect.

The circumstances of the case also indicate that the letter of July 25, 1928, was intended to modify the unconditional notice of default and demand for performance dated June 1, 1928. The evidence shows that there were two written deviations from the original contract. The first was by a written amendment dated December 31, 1924, under which the original contract of May 20, 1924, was changed, so that appellant's predecessor would not have to drill well No. 1 to a depth of 4,300 feet but need drill to a depth of only 3,920 feet; and on April 12, 1926, said original contract was again modified, so that well No. 2 need not be commenced until 30 days after the completion of a production test on well No. 1, made after said well No. 1 had been redrilled, and reducing the royalty to be paid to respondents from 35 per cent. to 28 per cent. Many conferences ensued between representatives of appellant and representatives of respondents, at which the drilling of well No. 2 was discussed, appellant being reluctant to drill a third well while complex and troublesome water conditions in well No. 2 continued to exist, and while certain work was being conducted on adjoining land which might clear up these unfavorable water conditions. On January 28, 1928, respondents sent to appellant a written demand for performance of the drilling requirements and notice that the lease would be canceled if appellant did not perform this provision of the contract. After a conference between the parties, and on March 14, 1928, respondents sent appellant a letter stating that appellant might disregard respondents' notice of cancellation, and respondents agreed not to issue another cancellation notice until May 15, 1928. On June 1, 1928, a notice was sent to appellant calling attention to its failure to drill wells as provided in said drilling contract, and appellant was notified that, if it did not commence drilling operations within 30 days, the lease would be canceled. In other words, on a number of previous occasions, a notice of default and demand of performance was given by respondents to appellant, and, after the time for forfeiture, respondents relented and waived the effect of such notice. Under such circumstances it is apparent that the portion of the letter of July 25, 1928, which is italicized above, is inconsistent with the declaration that appellant's rights were forfeited or terminated under the contract of May 20, 1924, and said letter therefore constituted another waiver. In stating that appellant might continue to operate well No. 1 under conditions which were identical with the requirements of the contract of May 20, 1924, the letter of July 25, 1928, in effect, recognized that the contract was still in effect. The letter therefore made the notice of June 1, 1928, ineffectual, and without such notice and demand of performance, under the terms of said contract, there could be no forfeiture. The evidence also shows that the royalty from the wells was paid by appellant to respondents promptly and accepted by respondents up to the time of trial.

[2, 3] The general rule of law in this state concerning forfeitures is clearly stated in 6 California Jurisprudence, 362: "A forfeiture stipulated in a contract will be enforced if the rights of the parties cannot otherwise be preserved. But a contract is not to be construed to provide a forfeiture, unless no other interpretation is reasonably possible. The law does not favor forfeitures, and will not enforce them in the absence of clearly stated conditions of forfeiture. As provided by the Civil Code, 'A condition involving a forfei-

ture must be strictly interpreted against the party for whose benefit it is created.'" Section 1442, Civ. Code.

That the breach of a contract by an obligor upon which a forfeiture might be predicated may be waived by the obligee, and his right to forfeit suspended is well recognized here. In 12 California Jurisprudence, 641, it is said: "The right to declare a forfeiture for breach of condition in a contract is a matter entirely for the benefit of the person entitled to assert it, and may be waived by him. The waiver may be by written agreement, or by parol, or it may be implied from the acts and conduct of the party. While it has been said that a waiver of forfeiture is sustainable upon a principle similar to an estoppel, it is settled that the waiver may be sustained by circumstances which do not present the strong equities required to sustain an estoppel. And it may be stated broadly that if, in any negotiations or transactions with the defaulting party after knowledge of the forfeiture, the party entitled to claim it recognizes the continued validity of the contract, or does acts based thereon, or requires the defaulting party, by virtue thereof, to do some act or incur some trouble or expense, the forfeiture, as a matter of law is waived. This latter rule has been frequently applied as against insurance companies, landlords, and vendors. The fact that the contract is in writing does not affect the rule, for parol proof of a waiver no more violates the parol evidence rule than does evidence by parol of the actual performance of the conditions. It follows from the fact that forfeitures are abhorred that a waiver of forfeiture is favored, and requires less evidence to establish than is required to establish a forfeiture. Indeed, it has been held that slight evidence of waiver is sufficient." Haserot v. Keller, 67 Cal. App. 659, 669, 228 P. 383; Redd v. Garford Motor Truck Co., Inc., 205 Cal. 245, 249, 270 P. 447; Taylor v. Hamilton, 194 Cal. 768, 776, 230 P. 656; J. Frank & Co. v. New Amsterdam C. Co., 175 Cal. 293, 296, 165 P. 927; Boone v. Templeman, 158 Cal. 290, 296, 110 P. 947, 139 Am. St. Rep. 126.

It is rather clearly established by the record before us that the respondents were acting within their rights in giving appellant the notice of June 1, 1928, requiring it to perform the obligations of its contract or quitclaim, or suffer the penalty of a complete forfeiture of all its rights in the property. It is also obvious that under the contract appellant had three courses of conduct open to it after its receipt of the notice of June 1: First, it might commence its drilling operations within 30 days; second, it might quitclaim the property and reassign the lease, reserving to itself the oil well or wells on said land producing oil or gas in paying quantities; and, third, by failure to follow either of the courses just mentioned, it faced the probability of a complete forfeiture of its rights under the lease and the loss of the wells already drilled. The right of election of which of the three courses it should follow was left entirely to appellant. Respondents could enforce only one of them, viz. the complete forfeiture of the lease and quitclaim of all appellant's rights in the property and its reassignment to them of the government lease. The respondents could get either all of the leased property or none of it under the terms of their contract, unless appellant acted under one of its options. In enforcing their right of forfeiture, respondents of necessity were required to stand on the letter and spirit of their contract. They could not relinquish parts of their right of forfeiture and enforce others. In their letter of July 25, 1928, they offered to permit appellant to continue to retain possession of and operate well No. 1 "so long as you pay us 28 per cent. net of the oil and casing head gasoline produced from said property, and provided same is paid promptly on the 20th day of the month following its production." No such plan of forfeiture was provided for in any contract. Appellant acted upon the offer, continued in possession of the well, operated it, paying all expenses of operation, and paid the royalties in the amount and at the times specified up to the time of the trial. Respondents accepted the royalties and still retain them. We have concluded that this letter and the actions and conduct of the parties after its delivery to appellant were a departure from the rights of forfeiture under the lease and the notice of June 1, 1928, and was therefore a waiver of the notice and the rights of forfeiture following its delivery to respondent, which rights of forfeiture could only be revived by giving another notice of breach of the conditions of the lease with requirements to remedy the breach within 30 days in accordance with the forfeiture clause of the agreement. No such notice was given by respondents.

From what we have just said it is apparent that appellant was not a trespasser in its operations on the leased property and that the court below was in error in giving judgment against it fcr $28,209.87, the value of the oil it produced from the leased property.

Judgment reversed, with directions to enter judgment in favor of appellants.

We concur: BARNARD, P. J.; MARKS, J.

122 Cal.App. 334

HUBER v. SCOTT et al.

Civ. 4491.

District Court of Appeal, Third District, California.

April 2, 1932.

Rehearing Denied May 2, 1932. Hearing Denied by Supreme Court May 31, 1932.

1. Automobiles ⚷245(59).

Evidence that negligence in traveling at excessive speed proximately caused collision with automobile coming from opposite direction, and as it was making left turn, *held* to make jury case (St. 1923, p. 553, § 113, subd. b, par. 7; subd. c; as amended by St. 1927, p. 1436, § 30).

> St. 1923, p. 553, § 113, subd. b, par. 7; subd. c; as amended by St. 1927, p. 1436, § 30, as it existed at time of accident, provided that it should be unlawful to drive vehicle on public highway at speed exceeding 40 miles an hour, and that speeds in excess of those set forth therein should be taken as prima facie, but not conclusive, evidence of violation of the section.

2. Automobiles ⚷242(8).

In automobile guest's action for collision injuries, alleged contributory negligence of guest and driver was matter of defense, with burden on defendants to establish such charge.

3. Automobiles ⚷245(80, 88).

Contributory negligence of motorist and guest in making left turn in face of rapidly approaching automobile coming from opposite direction *held* for jury (St. 1923, p. 558, § 130 (a), as amended by St. 1925, p. 412, § 15a).

4. Automobiles ⚷171(6).

Statute *held* not to prohibit motorist turning across highway until circumstances render crossing absolutely free from danger (St. 1923, p. 558, § 130 (a), as amended by St. 1925, p. 412, § 15a).

> St. 1923, p. 558, § 130 (a), as amended by St. 1925, p. 412, § 15a, provides that driver of any vehicle on public highway before starting, turning, or stopping shall first see that such movement can be made in safety, and, if it cannot be made in safety, shall wait until it can be made in safety.

5. Negligence ⚷122(1).

Burden of proving that injured automobile guest was engaged in joint enterprise with driver *held* on operators of automobile colliding with automobile in which guest was riding.

6. Negligence ⚷93(1).

Guest and motorist who voluntarily offered to take guest to place where he might solicit work *held* not engaged in "joint enterprise," as respects guest's right to recover for collision injuries.

[Ed. Note.—For other definitions of "Joint Enterprise," see Words and Phrases.]

7. Automobiles ⚷245(88).

Guest *held* not contributorily negligent as matter of law in failing to warn driver against making left turn in face of rapidly approaching automobile (St. 1923, p. 553, § 113, subd. b, par. 7; subd. c; as amended by St. 1927, p. 1436, § 30; St. 1923, p. 558, § 130 (a), as amended by St. 1925, p. 412, § 15a).

8. Automobiles ⚷246(20).

Instruction that speed exceeding 40 miles an hour is "prima facie" evidence of violation of law *held* not misleading and erroneous for omitting to state that such speed is not conclusive evidence (St. 1923, p. 553, § 113, subd. b, par. 7; subd. c; as amended by St. 1927, p. 1436, § 30).

> The instruction was not objectionable for failure to state that such speed should not be taken as conclusive evidence of violation of St. 1923, p. 553, § 113, subd. b, par. 7; subd. c; as amended by St. 1927, p. 1436, § 30, because "prima facie" evidence infers that it is not conclusive and that it is only controlling, in absence of other evidence which rebuts the presumption.
>
> [Ed. Note.—For other definitions of "Prima Facie," see Words and Phrases.]

9. Trial ⚷253(4).

Instruction *held* not erroneous as omitting to state that driver's negligence may be imputed to passenger if he has right to control operation of machine, even if he does not actually attempt to do so.

> The instruction was to the effect that, if jury should find from evidence that plaintiff was guest of operator of automobile, and that he had no control over automobile, and was not at time directing or controlling its movement, negligence of driver, if any, could not be imputed to plaintiff, and that any negligence of driver could not defeat guest's recovery against operators of colliding automobile if their negligence proximately caused collision, and if guest was himself in exercise of ordinary care. Such instruction could not be misleading, in view of other instructions specifically remedying alleged omission.

10. Trial ⚷285.

Instructions should be construed to support judgment, if reasonably possible to do so.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by J. B. Huber against L. Scott and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Edward Bickmore, of Merced, for appellants.

F. M. Ostrander, of Merced, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The plaintiff procured a judgment for $5,000 against the defendants for damages sustained in an automobile casualty. The cause was tried with a jury. This appeal was taken from the judgment and order denying a motion for new trial.

The Golden State highway runs southeasterly from Modesto to Merced. The paved portion of this highway is fifteen feet in width, with a macadam strip of two and a half feet and an additional oiled gravel shoulder of four feet in width on either side. The entire right of way is sixty feet in width. Adjoining this highway on the easterly side thereof, and about four miles southerly from Livingston is the Trainor's Service Station and an auto camp. Mr. C. W. Bryan, who owned the Ford touring car which was involved in this accident, was staying at this camp. The plaintiff was also temporarily located at the same camp. The plaintiff and Bryan were mere acquaintances. They were not associated in business or otherwise. Huber was a painter. He was, however, out of employment at the time of the accident. A building was being constructed by a farmer on a ranch near Livingston. On the morning of March 11, 1930, Bryan drove to Livingston on a business transaction of his own. He invited the plaintiff and a boy by the name of Welch to accompany him. Bryan told the plaintiff he would take him out to the ranch so that he might apply for the painting job. Upon this journey, Bryan drove his own car. The boy was seated in the rear seat. The plaintiff rode in the front seat at the right hand of the driver. The day was clear. The pavement was dry. The highway was straight and level.

Returning southeasterly along the highway, about 11 o'clock in the forenoon, as the Ford machine reached a point about sixty feet from the roadway leading into the autocamp, Bryan extended his left arm as a signal, and turned his automobile easterly across the highway toward the camp. At the time of making the signal for his turn across the highway, the machine was traveling about 25 miles an hour. The speed was, however, reduced to 10 or 12 miles an hour. There was then very little traffic on the highway. Not more than two or three cars were in sight. At the time of making the left-hand turn, both Bryan and the plaintiff saw the defendant's Graham-Paige automobile approaching on its proper side of the highway at a point about 350 feet distant. It was running at a high rate of speed. When the front wheels of the Ford car reached the easterly edge of the concrete, it was struck with great force by the Graham-Paige car, and the plaintiff was thrown out upon the pavement and seriously injured. This suit for damages was thereupon instituted. The jury returned a verdict of $5,000. Judgment was rendered accordingly. This appeal was then perfected. Neither the amount of the judgment nor the seriousness of the plaintiff's injuries is controverted.

The appellants contend the evidence fails to support an implied finding that they were guilty of negligence, and, upon the contrary, that it shows the driver of the Ford machine to have been guilty of contributory negligence which is imputed to the plaintiff, since he and Bryan were engaged in a joint enterprise at the time of the accident. It is also asserted the court erred in giving certain instructions to the jury at the request of the plaintiff.

[1] The evidence sufficiently supports the finding of negligence on the part of the defendants. Scott, who drove the defendant's car, was the agent of D. N. & E. Walter Company. There appears to have been nothing to obstruct Scott's view of the Ford machine as it approached. Scott testified: "I was not paying any particular attention to it. * * * I did see him making that turn." The defendant's machine was running at a high rate of speed. The plaintiff testified in that regard: "I know he was traveling at a high rate of speed, but I cannot estimate the rate. * * * It must have been going sixty miles an hour." The diagram of the scene of the accident is drawn on a scale of ten feet to the inch. Both the plaintiff and Welch located on this diagram the point where the machines collided, the point where the Ford car began to make the turn across the highway, and the point where the Graham-Paige machine was first observed. Both witnesses located the defendant's car at the time it was first seen near the "second telephone pole." This point is marked on the diagram as "H 3." The point where the Ford car began to make its turn is designated "H 4." The location of the accident is marked "H 1." By scaling the distances between the designated points on the diagram it appears the defendant's car ran nearly 300 feet after it was first seen by the plaintiff before the collision occurred. The Ford car ran about 60 feet from the point where the signal was given to the place where the turn was made. It thus appears the Graham-Paige machine was running at four times the speed of the Ford car. The excessive speed of the defendant's machine is also indicated by the fact that skid marks were left on the pavement for a distance of 40 feet to the point of collision. This was caused by the hard application of the brakes. The defendant's car also rolled 30 feet beyond the point of contact with the Ford machine. There appears to be no doubt

the defendant's machine was running at a high rate of speed. Since both the plaintiff and Bryan saw the Graham-Paige car 300 feet away, it seems reasonable that Scott, by the exercise of ordinary vigilance, should have seen them, observed their purpose to cross the highway, and regulated his machine accordingly. In truth, Scott does admit he saw them "making the turn." These facts furnish evidence sufficient to warrant the jury in assuming that the defendant's machine was running in excess of forty miles an hour immediately prior to the collision. This constituted negligence per se, as the law then existed. Section 113 of the California Vehicle Act (as amended by St. 1927, p. 1436, § 30) provided in part: "(b) * * * It shall be lawful for the driver of a vehicle to drive the same [on the public highways of this state] at a speed not exceeding the following: * * * 7. Forty miles an hour," under circumstances prescribed by the statute. This section of the act further provides that: "(c) In all charges for a violation of this section, speeds in excess of those set forth in subdivision (b) of this section shall be taken as prima facie but not as conclusive evidence of a violation of this section." To drive an automobile at a rate of speed in excess of that which is allowed by statute as it then existed was negligence per se. Benjamin v. Noonan, 207 Cal. 279, 277 P. 1045; Fitzpatrick v. Haskell (Cal. App.), 4 P.(2d) 580. It was the sole province of the jury to determine whether the defendant's machine was running at an unlawful rate of speed and whether that excessive speed proximately contributed to the cause of the accident. There is substantial evidence that defendant's machine was running in excess of 40 miles an hour. This was negligence per se. There are also circumstances from which the jury was warranted in assuming this excessive rate of speed, and possible inattention to his driving prevented Scott from stopping his machine in time to avoid the collision. While there is a sharp conflict of evidence regarding the negligence of the defendants, there is ample proof to support the implied finding that they were guilty of negligence which proximately contributed to the accident and the injuries sustained by the plaintiff as a result thereof.

[2, 3] The alleged contributory negligence of both Bryan and the plaintiff was a matter of defense. The burden was on the defendants to establish this charge. Upon the record in this case, we are unable to say as a matter of law that either Bryan or the plaintiff was guilty of contributory negligence. Bryan testified that, as he approached the Trainor's Service Station, where he intended to turn across the highway, he reduced the speed of his car and extended his left hand as a signal. The point where he gave the arm signal is marked on the diagram. It is about 60 feet from the place where he actually turned across the highway. This signal conforms to the requirements of section 130 (a) of the California Vehicle Act (as amended by St. 1925, p. 412, § 15a). Bryan said: "I saw Scott's car * * * about 300 feet [away], I think." There was a truck running 75 or 100 feet ahead of the Ford car. The truck evidently did not obstruct the view of the occupants of the Ford car from the approaching Graham-Paige machine for they testified to having seen it at the "second telephone pole," which was over 300 feet away. It does not seem unreasonable for one to cross a highway when the nearest approaching car is 300 feet away. Bryan had a right to assume the Graham-Paige car was running at a lawful rate of speed. There was no traffic to obstruct the view. It was broad daylight. He had a right to assume that the driver of the approaching car, observing the Ford about to cross its pathway, would, if necessary, slacken its speed so as to permit a safe passage. At least the question as to whether it appeared to Bryan to be reasonably safe to cross the highway under the circumstances was a problem for the jury to determine.

[4] Section 130 (a), supra, does provide that: "The driver of any vehicles upon a public highway before starting, turning or stopping such vehicle shall first see that such movement can be made in safety, and if it can not be made in safety, shall wait until it can be made in safety." This does not mean that a driver may not turn across a public highway until the circumstances render the crossing absolutely free from danger. Such a construction of the law is unreasonable. Construing this section of the California Vehicle Act, the court said in Ruperto v. Thomas (Cal. App.) 298 P. 851, 853: "This language does not mean the driver of a vehicle may not turn his machine at an intersection of streets unless there is absolutely no possibility of an accident. It must receive a reasonable construction. No specific acts or omissions of the driver of a motor vehicle in changing the course of his machine at the intersection of streets may be characterized as negligent under all circumstances. The negligence of a driver must be determined by an application of the well-settled rule of negligence as to what a reasonably prudent person should do under like circumstances. The language of section 130 (a) above quoted should be construed to mean that the driver of a vehicle upon a public highway, before starting, turning or stopping such vehicle must use such precaution as would satisfy a reasonably prudent person acting under similar circumstances that he could do so safely. The question as to whether the conduct of a driver of a vehicle amounts to contributory negligence under the particular circumstances is a problem for the determination of the trial court or jury."

[5, 6] It is contended the evidence in the present case proves that the owner of the Ford car and Huber were coadventurers engaged in a joint enterprise at the time of the accident, and that the negligence of Bryan in operating his machine is imputed to the plaintiff. The burden of proving a joint enterprise rests upon the defendants. Bennett v. Chanslor & Lyon Co., 204 Cal. 101, 266 P. 803. There is no merit in this contention of the appellants that a joint enterprise of the parties existed. Bryan and Huber were not engaged in the same enterprise. They were bent on separate missions. There is no evidence they had ever been interested in the same enterprise. Bryan invited Huber to go with him. He offered, voluntarily, to take the plaintiff out to the ranch where the building was being constructed so that Huber might solicit the job of painting. Bryan said: "I stopped [at Livingston] on my own business." Huber did not even contribute to the expenses of the trip. He neither possessed nor exercised control over Bryan in the operation of the machine. He was a mere invited guest. The doctrine of imputed negligence, based upon a joint enterprise, is not even remotely involved. The case of Williamson v. Fitzgerald (Cal. App.) 2 P.(2d) 201, 204, quotes with approval from Pope v. Halpern, 193 Cal. 168, 223 P. 470, as follows: "'Parties cannot be said to be engaged in a joint enterprise, within the meaning of the law of negligence, unless there be a community of interests in the objects or purposes of the undertaking, and an equal right to direct and govern the movements and conduct of each other with respect thereto. Each must have some voice and right to be heard in its control and management.' It will be seen * * * that in order that there be such a joint enterprise it is not sufficient merely that the passenger of the machine indicate the route, or that both parties have certain plans in common, such as a 'joy ride,' but the community of interest must be such that the passenger is entitled to be heard in the control and management of the vehicle." Bryant v. Pac. Elec. Ry. Co., 174 Cal. 737, 164 P. 385.

[7] It may not be held as a matter of law that the plaintiff was guilty of contributory negligence in failing to warn the driver of the Ford automobile against turning his machine across the highway under the circumstances of this case.

The question as to whether a passenger should remonstrate with the driver of a machine against excessive speed or other alleged dangerous conduct depends entirely upon the circumstances of the particular case, and is ordinarily a question for the determination of the jury. Curran v. Earle C. Anthony, Inc., 77 Cal. App. 462, 247 P. 236.

[8] Finally, the appellants contend that the giving of certain instructions by the court at the request of the plaintiff constitutes prejudicial error. The first challenged instruction correctly quotes that portion of section 113 of the California Vehicle Act which is applicable to the present case. It then states that "speed in excess of 40 miles an hour shall be taken as prima facie evidence of violation of the law." It is asserted this charge is misleading and erroneous because it omits that portion of subdivision (c) of section 113, to the effect that such excessive speed shall not be taken as "conclusive evidence of a violation of this section." We think a reasonable construction of the statute does not warrant this criticism. It has been repeatedly held that a violation of the statute as it then existed with respect to the limitation of the speed of a motor vehicle on the public highway is prima facie evidence of negligence. Authorities to that effect have been heretofore cited. To state that such violation is merely prima facie evidence of negligence necessarily infers that it is not conclusive. Prima facie evidence is a well-recognized term which infers that it is only controlling in the absence of other evidence which rebuts the presumption. 3 Bouvier's Law Dict. 2683; 6 Words and Phrases, First Series, page 5549. There was no error in the omission complained of.

[9, 10] The following instruction which was given to the jury at the request of the plaintiff is challenged as erroneous: "If you find from the evidence that the plaintiff J. B. Huber, at the time of the collision, was a passenger or guest in the automobile of C. W. Bryan, and that he had no control over said automobile, and was not at the time directing or controlling its movement, then the negligence of Bryan, if there was any negligence on his part, cannot be imputed to plaintiff, Huber, and if, under these circumstances the driver, C. W. Bryan, was negligent, that negligence, if any, cannot defeat a recovery by the plaintiff Huber, provided the negligence of the defendant L. Scott, if any, was the sole proximate cause of the injury or combined with the negligence of C. W. Bryan, if any, in causing an injury to said plaintiff, and provided further that plaintiff himself was in the exercise of ordinary care." It is contended this instruction omits to inform the jury that the negligence of the driver of a machine may be imputed to the passenger if he has the right to control the operation of the machine, even if he does not actually attempt to do so.

All instructions should be construed so as to support a judgment if it is reasonably possible to do so. We are of the opinion the foregoing instruction may be reasonably construed to mean that, "If you find * * * Huber * * * was a passenger or guest in the automobile * * * and that he had no (right of) control over said automobile," etc. To say that one has no control over the operations of a machine ordinarily means he has no authority to control it. This is the evident meaning of that phrase, for it is immediately followed by this language, "and was not at the time directing or controlling its movement." If we accept the appellants' construction of the first clause, then the last phrase merely duplicates the same idea. We do not think this instruction could have been misunderstood by the jury. If its meaning is doubtful, the instruction which immediately preceded it leaves no question regarding the alleged omission. It reads: "Before any negligence * * * can be imputed to the plaintiff * * * it is necessary that it be shown * * * that plaintiff Huber had joint authority with the driver over the control or management in the driving or operation of the automobile." Moreover, at the request of the appellants another instruction was given which clearly incorporates the feature of joint authority to control the operation of the machine. It contains this language: "If you should find * * * that plaintiff Huber and the driver of the automobile * * * were at the time of such accident engaged in a common or joint enterprise or undertaking, each having an equal right to direct the movements of the car," etc. In view of the entire charge of the court, it may not be said the challenged instruction is erroneous or prejudicial.

The jury was very fully and fairly instructed. There does not appear to have been a miscarriage of justice.

The judgment is affirmed.

We concur: PRESTON, P. J.; PLUMMER, J.

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121 Cal.App. 711

Ex parte YOUNG.

Cr. 1202.

District Court of Appeal, Third District, California.

March 18, 1932.

Hearing Denied by Supreme Court April 14, 1932.

1. Criminal law 🔑1001.

Neither judgment of commitment nor order suspending sentence are void for failure to formally direct that prisoner be placed under supervision of probation officer (Pen. Code, § 1203).

2. Criminal law 🔑1001.

Arrest of probationary prisoner for breach of terms upon which he is released may be made without warrant (Pen. Code, § 1203, subd. 2).

Pen. Code, § 1203, subd. 2, provides that at any time during the probationary period any probation or peace officer may without warrant, or other process, at any time until the final disposition of the case, rearrest any person placed on probation and bring him before the court.

3. Criminal law 🔑1001.

Probationary prisoner who violated terms upon which he was released *held* not entitled to trial or even formal hearing upon revocation of probation (Pen. Code, § 1203).

4. Criminal law 🔑1001.

Probationary prisoner whose probation was revoked waived any informality of procedure by failing to object thereto when taken before court for purpose of revoking his probation.

5. Criminal law 🔑1001.

Prisoner's probation may be revoked although he has not violated specified conditions of probation (Pen. Code, § 1203, subd. 2).

Penal Code, § 1203, subd. 2, provides that, upon bringing prisoner before the court having jurisdiction of the cause, the judge or justice may thereupon revoke probation if the interests of justice so require, and if the court in its judgment shall have reason to believe from the report of the probation officer or otherwise that the person so placed upon probation is "engaging in criminal practices, or has become abandoned to improper associates or a vicious life," so that the continued enjoyment of probation may depend upon the effect which the prisoner's liberty may have upon the peace or morals of society.

6. Criminal law 🔑1001.

Breach of terms of prisoner's probation or prisoner's unfitness to enjoy liberty need not be established beyond reasonable doubt to authorize revocation of probation, but judge need only have reason to believe them true from report of probation officer, or otherwise (Pen. Code, § 1203, subd. 2).

7. Constitutional law 🔑272.

Revocation of prisoner's probation without trial or formal hearing *held* not to deprive prisoner of liberty without "due process of law" (Pen. Code, § 1203).

Constitutional guaranty of due process is fulfilled when the prisoner is originally convicted of the offense for which he is suffering punishment, and prisoner would be entitled to require a formal written charge of the offense, a trial by jury, and an appeal from an unfavorable verdict only if the violation of probation were considered as a separate offense, entitling one to the application of the doctrine of due process, which construction would defeat the purpose of probation, since a suspended sentence is a mere incident to the imposition of a penalty for violating law.

[Ed. Note.—For other definitions of "Due Process of Law," see Words and Phrases.]

8. Criminal law 🔑**1001.**

Suspended sentence is awarded in sound discretion of court (Pen. Code, § 1203).

9. Criminal law 🔑**1001.**

Violation of terms of probation is not separate offense for which prisoner may be punished independently of his original sentence.

Application of D. O. Young for a writ of habeas corpus, prayed to be directed to the sheriff of Merced county to secure release from custody on the ground of illegal detention.

Writ denied, and prisoner remanded.

Ranse R. Sischo, of Merced, for petitioner.

Stephen P. Galvin, of Merced, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The petitioner was convicted of vagrancy December 22, 1931, in the justice's court of township No. 2, Merced county. He was sentenced to six months' imprisonment in the county jail. His sentence was suspended, and he was thereupon released on probation on condition that he would leave Merced. He failed to do so. Without warrant or formal charge of violating his parole, he was rearrested December 28th in Merced and taken before the justice of the peace who tried the cause. His probation was revoked and he was sentenced to the county jail for the term of six months. In the original proceeding the docket recites: "December 28, 1931; Suspended sentence revoked and defendant committed to the county jail for six months." The petitioner is now held in custody pursuant to the terms of his commitment.

The petitioner contends he was illegally arrested without a warrant, and that he is unlawfully restrained of his liberty for the reason that his suspended sentence was revoked without a trial upon the charge of violating the terms and conditions of his probation. It is asserted that the revoking of a suspended sentence, without the privilege of trial, violates the constitutional inhibition against depriving one of his liberty without due process of law.

[1] Under the provisions of section 1203 of the Penal Code, "The court, judge or justice thereof, * * * may suspend the imposing, or the execution of the sentence * * * for such period of time not exceeding the maximum possible term of such sentence, * * * and upon such terms and conditions as it shall determine." This section further provides that a defendant shall be placed under the supervision of the probation officer during the time his sentence is suspended. Neither the judgment of commitment nor the order suspending sentence are void for failure to formally direct that the prisoner be placed under the supervision of the probation officer. In re Giannini, 18 Cal. App. 166, 122 P. 831.

[2] The arrest of a probationary prisoner for breach of the terms upon which he is released may be made without warrant. Subdivision 2 of section 1203, supra, provides: "At any time during the probationary period * * * any probation or peace officer may without warrant, or other process, at any time until the final disposition of the case, rearrest any person so placed on probation * * * and bring him before the court." There is therefore no merit in the petitioner's claim that he was unlawfully arrested without warrant.

[3, 4] The petitioner was not entitled to a trial or even a formal hearing upon the revocation of his probation. The statute does not contemplate such trial or formal hearing as a prerequisite to the termination of probation. Moreover, the prisoner waived any informality of procedure by failing to object thereto, when he was taken before the court for the purpose of revoking his probation.

In State v. Charles, 107 S. C. 413, 93 S. E. 134, it was held that where the defendant is present in court, or is represented by counsel, at the time the order suspending his sentence is revoked, and makes no application to be heard thereon, he waives his right to complain of any informality in the procedure. To the same effect, the court said in Sylvester v. State, 65 N. H. 193, 20 A. 954: "The order granting a motion for a mittimus was not a judgment. * * * It was a mere finding of a fact involved in the interlocutory question whether the execution of the judgment should be further postponed. On this question he was no more entitled to another complaint and warrant, another arrest, the former summons, personal plea, appeal, or jury trial, than he would have been on a denial of his motion for a temporary stay of mittimus. * * * He had an opportunity to be heard, and the evidence was competent in support of the motion."

Subdivision 2 of section 1203 of the Penal Code further provides, upon bringing the prisoner before the court having jurisdiction of the cause, the judge or justice "may thereupon revoke and terminate such probation, if the interests of justice so require, and if the court in its judgment, shall have reason to believe from the report of the probation officer, or otherwise, that the person so placed upon probation is violating any of the conditions of his probation, or engaging in criminal practices, or has become abandoned to improper associates or a vicious life. * * * If the judgment has been pronounced and the execution thereof has been suspended, the court may revoke such suspension, whereupon the judgment shall be in full force and effect, and the person shall be delivered over to the proper officer to serve his sentence."

Many well-considered authorities hold that a statute may lawfully dispense with notice, trial, or formal hearing on the proceeding for revocation of probation for the violation of the terms thereof. Fuller v. State, 122 Ala. 32, 26 So. 146, 45 L. R. A. 502, 82 Am. St. Rep. 1; In re Patterson, 94 Kan. 439, 146 P. 1009, L. R. A. 1915F, 541; Kennedy's Case, 135 Mass. 48; People v. Dudley, 173 Mich. 389, 138 N. W. 1044; Owen v. Smith, 89 Neb. 596, 131 N. W. 914; Pagano v. Bechly, 211 Iowa, 1294, 232 N. W. 798.

[5, 6] It will be observed from the language of section 1203, supra, that the court is authorized to revoke the order for probation if there is "reason to believe from the report of the probation officer, or otherwise," that the prisoner has violated the terms of his probation. The procedure for revoking probation is wisely made informal. The statute does not contemplate a trial by jury or a formal hearing upon that issue. The authority to revoke a prisoner's probation does not even depend upon his violation of the specified conditions of probation. The order suspending his sentence may be set aside if the court "has reason to believe from the report of the probation officer, or otherwise," that he is associating with lawless or improper persons, or that he is engaging in criminal practices. The continued enjoyment of probation may depend upon the effect which the prisoner's liberty may have upon the peace or morals of society. A breach of the terms of probation and the unfitness of the prisoner to enjoy his liberty are not required to be established beyond a reasonable doubt according to the rule which prevails in ordinary criminal proceedings. It is only necessary that the judge shall have reason to believe them to be true from the report of the probation officer, or otherwise. No particular source, manner or degree of proof is required by statute. It may not be presumed a judge will arbitrarily revoke probation without reason therefor. Pursuant to our statute, however, the judge or justice having jurisdiction of the cause may, in the exercise of sound discretion, based upon facts presented in an informal fashion, from which he has reason to believe the prisoner has violated his probation or is unfit to be at large, revoke the order suspending sentence and commit him to jail.

[7-9] This informal procedure does not have the effect of depriving one of his liberty without due process of law. This inhibition of the Constitution has no application to the revocation of probation. In re Patterson, 94 Kan. 439, 146 P. 1009, L. R. A. 1915F, 541; In re Hall, 100 Vt. 197, 136 A. 24.

In the case of Brozosky v. State, 197 Wis. 446, 222 N. W. 311, 312, the defendant was convicted, sentenced, and paroled. Two months later he was brought before the court for violation of his parole. After a summary hearing his probation was revoked and he was committed to prison. The prisoner contends he was deprived of his liberty without trial or due process. Construing a statute in language precisely the same as section 1203 of the California Penal Code, so far as subdivision 2 thereof is concerned, the court said: "This statute, which in effect became a part of the judgment by which defendant was placed on probation, expressly authorized the court to sentence at any time before the end of the period of probation. * * * Beneficent results could not be secured under the probation law if every probationer was entitled to a trial—perhaps a jury trial—to determine whether his probation should be terminated. The Legislature has wisely charged the court with the duty of determining whether a defendant shall be placed upon probation in the first place, and given it the power to determine in a summary way whether that probation shall be terminated. The vesting of such power in the court does not deprive the defendant of any of his constitutional rights. When one has been found guilty of an offense against society, no constitutional provision guarantees him the right to produce proof or to try out the issue of what his punishment shall be. That is a question that must be determined by society, which has vested that power in the courts."

In Pagano v. Bechly, 211 Iowa, 1294, 232 N. W. 798, 799, the defendant was convicted, sentenced, and paroled. His probation was revoked without notice to him. The statute authorized the revoking of probation "at any time, without notice." It was contended this deprived the prisoner of his liberty without due process of law. The court said: "These sections of the statute, which necessarily become a part of the judgment entry, amounts to this: The court says to the defendant: 'I will suspend your sentence during good behavior, but reserve the power to revoke this suspension of sentence and parole at any time I may see fit without notice to you.' It is the claim of the plaintiff that he has vested rights by reason of this suspension of sentence and parol of which he cannot be deprived under the Constitution without notice and opportunity to be heard."

Comparing the effect of a pardon with that of the suspending of sentence, the court further says: "One is equally as much a matter of grace, favor, and forgiveness as the other, and when the defendant * * * accepts the grace and forbearance * * * he takes it with the conditions and limitations that go with it. * * * Being a matter of grace and forbearance * * * the defendant acquired no vested rights, and therefore, under the statutory provisions, he would not be entitled to notice and opportunity to be heard."

The constitutional guaranty of due process is fulfilled when the prisoner is originally convicted of the offense for which he is suffering punishment. If the violation of probation be considered a separate offense entitling one to the application of the doctrine of due process, then the prisoner would be entitled to require a formal written charge of the offense, a trial by jury, and an appeal from an unfavorable verdict. Clearly the statute requires no such absurdity. People v. Dudley, 173 Mich. 389, 138 N. W. 1044. This would defeat the purpose of probation. A suspended sentence is a mere incident to the imposition of a penalty for violating law. It is a wholesome means of encouraging an offender to become a law-abiding citizen. It is awarded in the sound discretion of the court. A violation of the terms of probation is not deemed to be a separate offense for which one may be punished independently of his original sentence. The breach of probation is inseparably associated with the original sentence. It consists of mere failure to conform to the conditions upon which temporary freedom is granted. Some authorities declare that an order for probation is not a judgment which creates vested rights, but is in the nature of a contract pursuant to the terms of which a prisoner accepts conditional liberty, with the tacit consent that his probation may be forfeited by his violation of the terms and conditions thereof. Upon the revocation of probation, no new penalty is administered, but the formal sentence is then restored to its original efficacy. The very nature and purpose of probation refutes the assertion that its violation becomes an offense separate from the original one so as to require a formal conviction thereof. Such construction would destroy the salutary benefits of probation.

In response to the contention that the revocation of a suspended sentence, without previous notice or hearing, deprives the accused of his liberty without due process of law, the court in Ex parte Patterson, 94 Kan. 439, 146 P. 1009, 1011, L. R. A. 1915F, 541, says: "The statute expressly provides that the court may grant the parole on such conditions and under such restrictions as it may see fit to impose. In its discretion it may attach any conditions to the parole that are not immoral, illegal, or impossible of performance, and, as the authority is to be exercised by a court or judge, it is expressly provided that the parole may be terminated at any time, and the convict remanded to prison without notice to him. It is competent for the Legislature to provide that the court may, upon information that is satisfactory to it, revoke the parole, and summarily remand the convict to prison to serve out a sentence legally imposed. The failure of the convict to observe the conditions of a parole is not a new offense, and the revocation of the parole and the returning of the convict to prison is not an added punishment for the offense of which he was convicted, nor a punishment for any other offense, but it is rather a disciplinary regulation of prison management in carrying out the sentence of the law already imposed, and growing out of the effort to ameliorate the condition of the convict. There was therefore no occasion for the making of an affidavit before petitioner's rearrest, nor any necessity for the filing of an information or indictment, nor for providing a trial by a jury. The rights which he is insisting upon, and which are guaranteed to him by the Constitution, were accorded to him when he was arrested and prosecuted for the offense of which he was convicted, and for which he is now imprisoned."

There are cases from other jurisdictions which hold that in the absence of statutory enactments to the contrary a prisoner is entitled to a formal trial upon the issue of his alleged violation of probation, before it may be revoked. The case of State v. Zolantakis, 70 Utah, 296, 259 P. 1044, 54 A. L. R. 1463, is relied upon by the petitioner to uphold his claim of a right to trial on the question of his violation of probation. The case does so hold. In that state there was no statute authorizing the revoking of a suspended sentence. The opinion was rendered by a divided bench. Three justices dissented from the prevailing opinion. This case does not furnish authority which is controlling in the present proceeding in view of the clear import of the California statute affecting probation.

In 16 C. J. 1335, § 3141, it is said: "When sentence has been suspended during the good behavior of defendant, either with or without statutory authority, the court has power to revoke such order and to impose the sentence without granting defendant a trial as to whether or not he has violated such condition."

This text is supported by several authorities. Sylvester v. State, 65 N. H. 193, 20 A. 954; People v. Court of Sessions of Monroe County, 141 N. Y. 288, 36 N. E. 386, 23 L. R. A. 856; People ex rel. Pasco v. Trombly, 173 App. Div. 497, 160 N. Y. S. 67; People v. Goodrich (Sup.) 149 N. Y. S. 406.

In State v. Everitt, 164 N. C. 399, 79 S. E. 274, 277, 47 L. R. A. (N. S.) 848, it was held a defendant was not entitled to a jury trial to determine whether he had violated the conditions upon which his sentence had been suspended. The court said: "Whether or not he had so demeaned himself [as to forfeit his probation] was not an issue of fact to be submitted to a jury, but a question of fact to be passed upon by the court. It was a matter to be determined by the sound discretion of the court, and the exercise of that discretion, in the absence of gross abuse, cannot be reviewed here."

In People ex rel. Pasco v. Trombly, 173 App. Div. 497, 160 N. Y. S. 67, it was held that the court, at will, may revoke a suspended sentence and commit the prisoner to serve his term. It was also held that a suspension of sentence, and a revocation thereof, are merely within the discretion of the court.

The authority in conflict with the foregoing principle which exists in some jurisdictions is accounted for by the fact that their statutes specifically provide that the revocation of a suspended sentence may be made only upon notice and formal hearing thereof. The California statute implies just the contrary.

We are of the opinion the petitioner was not entitled to a formal trial on the question of his violation of probation.

The writ is denied, and the prisoner is remanded.

We concur: PRESTON, P. J.; PLUMMER, J.

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121 Cal.App. 675

SAN DIEGO TRUST & SAVINGS BANK v. HEUSTIS.

Civ. 948.

District Court of Appeal, Fourth District, California.

March 17, 1932.

1. Wills 🔑229, 421.

One not heir of deceased nor legatee could not contest will before probate nor collaterally attack it thereafter (Probate Code, §§ 327, 328, 370).

2. Wills 🔑355.

Proceeding admitting will to probate is proceeding in rem, and judgment is conclusive after expiration of six months.

> Judgment is final and conclusive after expiration of six months from time will is admitted to probate, except as to minors and lunatics.

3. Wills 🔑355.

That intrinsic fraud was practiced on court in procuring probate of will *held* not ground for vacating probate.

4. Wills 🔑1.

Testatrix had right to dispose of her property as she saw fit.

5. Execution 🔑41.

Wife could not obtain satisfaction of judgment against husband for support and maintenance from funds of "spendthrift trust estate" created by will of husband's mother.

> The will directed the trustee to pay to testatrix' son from the income or principal or both of the trust estate $150 each month during life of trust, and directed that "the beneficiary of the trust is restrained from any right, power or authority to sell, transfer, pledge, * * * or in any other manner affect or impair his beneficial and legal rights * * * in and to the income and/or principal of this trust during the entire term thereof, and that the rights and interests of the beneficiary hereunder shall not be subject to claims of creditors, nor subject nor liable to any process of law or court, and all the income and/or principal under this trust shall be transferable, payable, and deliverable only, solely and exclusively and personally to the above-designated beneficiary."

6. Husband and wife 🔑299(4).

Wife obtaining judgment for support and maintenance against husband became judgment creditor, and could enforce her rights as such.

7. Execution 🔑41.

Under will providing for vesting of title to trust property in beneficiary after ten years, with remainder over in case of beneficiary's death prior thereto, beneficiary's interest *held* contingent, hence levy of beneficiary's judgment creditor on trust funds was ineffectual.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action for declaratory relief by the San Diego Trust & Savings Bank, a corporation, as executor and trustee under the last will and testament of Caroline Heustis, deceased, against Anna Heustis. From an adverse judgment, defendant appeals.

Affirmed.

Jesse George and Nottley S. Hammack, both of San Diego, for appellant.

John A. Hewicker, of San Diego, for respondent.

LAMBERT, Justice pro tem.

The material facts leading up to this appeal are briefly: Robert J. Heustis and Anna Heustis, defendant and appellant herein, were married in the year 1919. This marriage has never been dissolved. In the month of August, 1928, the appellant, Anna Heustis, brought an action against Robert J. Heustis in the superior court of San Diego county, and obtained a judgment against him for her support and maintenance in the sum of $100 per month. Nothing was ever paid on this judgment except $50. The said Robert J. Heustis, soon after the suit was filed, left the state of California and went to the state of Texas and located at El Paso. He took whatever property he had with him. After approximately $2,400 had accumulated on this judgment, and on the 26th day of May, 1930, Caroline Heustis, the mother of Robert J. Heustis made her last will and testament. In this will she created what is commonly known as a "spendthrift trust" in favor of her only son and heir, the said Robert J. Heustis. The San Diego Trust & Savings Bank, respondent herein, was made the executor and trustee under this will. Caroline Heustis died on November 28, 1930; her estate amounted to approximately $33,000, which consisted of about $9,000 cash, Texas bridge bonds of the value of $10,000 and real property situated in the state of Texas of the value of about $14,000. The will of the deceased, omitting therefrom the attestation clause, was in words and figures following:

"Last Will and Testament

"I, Caroline Heustis, a widow of the age of seventy years, residing in the City of San Diego, County of San Diego, State of California, and being of sound and disposing mind and memory and not acting under duress, menace, fraud or undue influence of any person whomsoever, do make, publish and declare this my last Will and Testament, and do hereby expressly revoke all other and former Wills and Codicils to Wills by me made.

"First: I hereby direct my executor hereinafter named to pay all my just debts and funeral expenses as soon after my demise as can be lawfully and conveniently done.

"Second: I hereby give, devise and bequeath all the rest, residue and remainder of my estate, both real, personal and mixed, of whatsoever kind or character, and wheresoever situated, to the San Diego Trust and Savings Bank, a corporation, of San Diego, California, to be held in trust for the following uses and purposes, in relation to the same:

"(a) That the said Trustee shall pay to my son, Robert J. Heustis, from the income or principal, or both, of the said trust estate, One Hundred Fifty Dollars ($150.00) each calendar month during the life of this trust.

"(b) The beneficiary under this trust is hereby restrained from, and is and shall be without right, power and authority to sell, transfer, pledge, mortgage, hypothecate, alienate, anticipate or in any other manner affect or impair his beneficial and legal rights, titles, interests, claims and estates in and to the income and/or principal of this trust during the entire term hereof, nor shall the rights, titles, interests and estates of the said beneficiary hereunder be subject to the rights or claims of creditors of the said beneficiary nor subject nor liable to any process of law or court, and all of the income and/or principal under this trust shall be transferable, payable and deliverable only, solely, exclusively and personally to the above designated beneficiary hereunder at the time entitled to take the same under the terms of this trust, and the personal receipt of the designated beneficiary hereunder shall be a condition precedent to the payment or delivery of the same by the said Trustee to such beneficiary.

"(c) Ten years (10) from the date of the filing of this will for probate, this trust shall ipso facto cease and determine, and the entire trust estate shall go and be by said Trustee conveyed, transferred and delivered in fee to the said Robert J. Heustis.

"(d) Said Trustee shall exclusively manage said estate and it may sell, exchange or otherwise dispose of such securities as I may now own, or it may, in its discretion, retain and hold so long as it deems desirable any property which it may receive from my estate. However, the said Trustee shall not invest any of the estate in any securities not permissible by law for savings bank investments.

"(e) That all fees and compensation payable to said trustee shall be fixed by the Superior Court of the County of San Diego, State of California.

"Third: Should my son, Robert J. Heustis, die during the lifetime of this trust herein created, then and in that event this trust shall ipso facto cease and terminate, and all of said remaining property and residue thereof shall be distributed as follows:

"(a) One Thousand dollars ($1,000.00) to Harold Warren Holland.

"(b) One Thousand Dollars ($1,000.00) to Ida Whelan.

"(c) All the rest, residue and remainder unto my nieces, Lizzie and Lulu Zachman, 234 Lafitte, San Antonio, Texas, share and share alike.

"Fourth: I hereby nominate and appoint the San Diego Trust and Savings Bank, a corporation of the City of San Diego, County of San Diego, State of California, the executor of this my Last Will and Testament.

"In Witness Whereof I have hereunto set my hand and seal this 26th day of May, 1930, in the City of San Diego, County of San Diego, State of California.

"Caroline Heustis."

On December 28, 1930, an execution was issued out of the superior court for the sum of $2,650 then due on the judgment. This execution was levied on the executor and trustee under the will, the respondent herein, on February 24, 1931. The respondent made the return that it had no property belonging to the said Robert J. Heustis, the respondent, and then filed an action for declaratory relief against Anna Heustis asking the court to determine whether the said Anna Heustis had a right to satisfy said judgment out of property in its hands as a trustee. The complaint alleged, in substance:

"(1) The Corporate existence of the plaintiff.

"(2) Joinder of fictitious defendants.

"(3) The death of Caroline Heustis leaving Last Will and Testament.

"(4) Petition for probate of Will.

"(5) Admission of Will to probate after due notice.

"(6) Inventory filed showing estate to be of approximate value of $24,000. (Some property came into the hands of trustee after inventory was filed.)

"(7) Expenses and claims, costs of administration; general terms of spendthrift clause set out.

"(8) The levy of execution on the plaintiff.

"(9) Negative return by the plaintiff to the sheriff.

"(10) Threat of Anna Heustis to make plaintiff pay the judgment.

"(11) Assertion that the claims of defendant were without any right."

To this complaint the said Anna Heustis filed an answer. The second amended answer contained two parts, what is called the "First separate defense and claim for affirmative relief" admitted, denied and alleged in paragraphs as follows: (1) Admitted paragraphs 1, 8, and 10 of the complaint; (2) denied everything not admitted; (3) admitted paragraphs 3, 4, and 5 of the complaint; (4) admits inventory returned, but denied it contained all the assets of the estate, and sets forth that a lot worth $2,000 in Pacific Beach, California, had been transferred to one Ida Wheeler; (5) denies $1,800 is the true amount of the claims and expenses of administration; denies will cuts off the wife; (6) denies plaintiff and executor has no property belonging to the beneficiary Robert J. Heustis, and alleges the trust under the will is void; (7) sets forth the marriage of Robert J. Heustis and Anna Heustis, his abandonment of her, and her obtaining a judgment against Robert J. Heustis, and that Robert J. Heustis took all of his property to Texas, where it still is; the attorneys for Robert J. Heustis and the mother are the same; (8) alleges that the return of respondent on garnishment is false in that the property of the estate is subject to garnishment.

"Second and Separate defense" alleges in numbered paragraphs, as follows: (1) Makes all allegations, denials, and admissions contained in paragraphs 1, 2, 4, 6, and 8 of the first defense; (2) denies that the document is in fact the last will and testament of Caroline Heustis; denies the will is entitled to be admitted to probate, but does not deny that it was admitted, and alleges testatrix was of unsound mind; (3) denies plaintiff is rightfully in charge of the estate, but admits that it is actually in charge; (4) admits that Exhibit A to the complaint is a true copy of the will admitted to probate as a last will of decedent, but denies that it is actually a will because of decedent's unsound mind; (5) admits the negative return of complaint and alleges spendthrift clause void; (6) alleges unsound mind of decedent and that signature on the will was traced; (7) alleges undue influence of one Tompkins, a witness to the will; decedent mentally incompetent and acted under undue influence; (8) alleges finding of prior will and sets forth provisions thereof, wherein the said Robert J. Heustis had been willed property outright, of the value of $10,000; (9) alleges fraud on the court in having the will admitted to probate, perjury and concealment having been practiced on the court; (10) alleges will admitted without knowledge of defendant; did not know of fraud until six months expired, and that the defendant is without funds; (11) alleges she was prevented from contesting the will because of failure of plaintiff and attorneys until six months expired admitting will to probate, and that the order admitting will to probate has become final and binding upon defendant, and that defendant has been deprived of her rights as a judgment creditor.

[1, 2] The respondents filed a demurrer to the entire second amended answer, a demurrer to the first separate defense and claim for affirmative relief, and then a demurrer to the second separate defense and claim for affirmative relief. A motion was also made to strike certain portions of the second amended answer, which it is not necessary to specifically designate or discuss. The respondent made a motion for judgment on the pleadings, and the court granted the motion to strike, sustained the demurrer, and granted judgment on the pleadings, declaring that the defendant had no right to subject the funds in the hands of the trustee to the payment of her judgment. We will simply be concerned with the judgment of the court denying the defendant any relief because the demurrers, motions to strike, and motion for judgment on the pleadings all raise the same issue. If there are any issuable facts stated in the answer, it would have been error to have granted any of the motions. Felch v. Beaudry, 40 Cal. 439. It is quite apparent, however, from the reading of this answer, that it presented nothing but an issue of law. As to the attempt in the second and separate defense to thus attack collaterally the will of Caroline Heustis, very little may be said. Appellant has no standing to contest the will because she is not a party interested as specified by the Code section 370 of the Probate Code, formerly section 1307, Code of Civil Procedure. See State v. Superior Court, 148 Cal. 55, 82 P. 672, 2 L. R. A. (N. S.) 643. If she could not contest the will before probate,

of course she could not afterwards. Appellant was not an heir of deceased nor legatee under the will. She was a mere stranger, and was not entitled to any notice of the probate proceedings. Probate Code, § 327, formerly section 1303, Code Civ. Proc.; Probate Code, § 328, formerly section 1304, Code Civ. Proc. Furthermore, a proceeding admitting a will to probate is a proceeding in rem and the judgment is final and conclusive after the expiration of six months from the time it was admitted to probate, except as to minors and lunatics. In Tracy v. Muir, 151 Cal. 363, at page 372, 90 P. 832, 835, 121 Am. St. Rep. 117, it is said: "By the offer of the will for probate the proponents tender to the world the issue as to its genuineness. Any person interested may appear and contest the instrument so offered upon various grounds, including all grounds substantially affecting its validity or the question of its due execution. Failing to appear and contest before probate, the right exists for a full year after probate. One who must be held to have had actual notice of the proceedings in time to make his contest, and who fails to take advantage of the opportunity afforded of opposing the will by appearing and contesting within the time allowed by law, must, at least unless he can be held to have been prevented from so appearing and contesting by some fraud of those procuring the probate, be held concluded by the decree as to any matter concerning which he could have obtained relief by a contest. It can be no excuse for his failure to appear and contest that he did not know that the alleged will was not genuine. That it was genuine was one of the very issues tendered him by his adversary, which he was called upon to meet within the time allowed by law or forever thereafter admit." See, also, In re Estate of Baker, 170 Cal. 578, at page 585, 150 P. 989; In re Estate of Allen, 176 Cal. 632, 169 P. 364; In re Estate of Henderson, 196 Cal. 623, 238 P. 938.

[3] Finally, if it could be admitted, for the purpose of argument only, that appellant had a right to attack this will for fraud, the allegations contained in her second amended answer set forth not collateral nor extrinsic fraud, but, on the contrary, intrinsic fraud, which is not in any case actionable. Pico v. Cohn, 91 Cal. 129, 25 P. 970, 27 P. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159; Langdon v. Blackburn, 109 Cal. 19, 41 P. 814; Tracy v. Muir, supra.

It should be borne in mind in connection with the cases cited on this branch of the case that time governing contests of wills for probate has been changed from one year to six months. The pleadings herein show that appellant had knowledge of the admission to probate of this will within less than three months after it was admitted. As to that part of the answer seeking to set aside a deed, how this could be done without the grantee of the deed being a party we are not advised, but if the deed was set aside, the property conveyed therein would fall back into the estate and pass under the will. Nicholson v. Leatham, 28 Cal. App. 597, at page 608, 153 P. 965, 155 P. 98. What has been said disposes of this branch of the case adversely to the appellant.

[4, 5] This now brings us to the only question in the case that calls for serious consideration, that is, whether the appellant wife is entitled to collect her judgment from the funds of the trust estate. This requires a construction of the will as a whole. The will hereinbefore set forth appoints the respondent as executor of said will, and, after directing the payment of debts, gives all of her estate of every kind, and wherever situated, to the respondent to be held in trust for the following purposes, that is, "that the said trustee shall pay to my son Robert J. Heustis from the income or principal or both of the said trust estate one hundred and fifty dollars each calendar month during the life of this trust, and the beneficiary of the trust is restrained from any right, power or authority to sell, transfer, pledge, mortgage, hypothecate, alienate, anticipate or in any other manner affect or impair his beneficial and legal rights, titles, interests, claims and estates in and to the income and/or principal of this trust during the entire term thereof, and that the rights and interests of the beneficiary hereunder shall not be subject to claims of creditors, nor subject nor liable to any process of law or court, and all the income and/or principal under this trust shall be transferable, payable, and deliverable only, solely and exclusively and personally to the above-designated beneficiary thereunder, and that the personal receipt of the designated beneficiary is required as a condition precedent to the payment or delivery of same by the said trustee to such beneficiary." It then provides that ten years from the date of filing of the will for probate the trust shall cease and the entire trust estate shall go and be by the trustee conveyed, transferred, and delivered in fee to the said Robert J. Heustis. From the above it will be seen that the trust is a strict unlimited trust executed by a mother in favor of her son and only heir at law. The mother was under no obligation, either legal or moral, to maintain the wife of her son, and had a right to dispose of her property as she saw fit. The question of spendthrift trusts first came before the Supreme Court of this state in Seymour v. McAvoy, 121 Cal. 438, 53 P. 946, 41 L. R. A. 544. At page 442 of 121 Cal., 53 P. 946, 947, it is there said: "By the great weight of authority in America, it is settled that the author of a trust to pay to or apply for the benefit of another the income of property, or a portion of such income, may lawfully provide that the interest

of the beneficiary shall not be assignable, or shall not be subject to the claims of his creditors. Out of the many decisions to this effect, we may refer to Nichols v. Eaton, 91 U. S. 716, 725 [23 L. Ed. 254]; Steib v. Whitehead, 111 Ill. 247; Broadway Bank v. Adams, 133 Mass. 170 [43 Am. Rep. 504]; Roberts v. Stevens, 84 Me. 325, 331, 24 A. 873 [17 L. R. A. 266]; Lampert v. Haydel, 96 Mo. 439, 446, 9 S. W. 780 [2 L. R. A. 113, 9 Am. St. Rep. 358]; Jourolmon v. Massengill, 86 Tenn. 81, 100, 5 S. W. 719; Garland v. Garland, 87 Va. 758, 13 S. E. 478 [13 L. R. A. 212, 24 Am. St. Rep. 682]; Overman's Appeal, 88 Pa. 276, 284; Maryland, etc., Agency v. Lee, 72 Md. 161, 19 A. 534; Wallace v. Campbell, 53 Tex. 229; Wales v. Bowdish, 61 Vt. 23, 17 A. 1000 [4 L. R. A. 819]."

And in McColgan v. Magee, Inc., 172 Cal. 182, 155 P. 995, Ann. Cas. 1917D, 1050, this doctrine was reaffirmed. It is there said at page 186 of 172 Cal., 155 P. 995, 997: 'The general doctrine that spendthrift trusts, inalienable by the beneficiary and inaccessible to his creditors during his life or for a term of years, are valid in this state, is well established. Seymour v. McAvoy, 121 Cal. 438, 442, 41 L. R. A. 544, 53 P. 946. The doctrine that property may be made inalienable by such declaration of trust rests upon the theory that a donor has the right to give his property to another upon any conditions which he sees fit to impose, and that, inasmuch as such a gift takes nothing from the prior or subsequent creditors of the beneficiary to which they previously had the right to look for payment, they cannot complain that the donor has provided that the property or income shall go or be paid personally to the beneficiary and shall not be subject to the claims of creditors. For this reason and upon grounds of public policy, it is further held that one cannot by any disposition of his own property put the same or the income thereof beyond the reach of his creditors, so long as he himself retains the right to receive and use it. This qualification of the doctrine is as well settled as the doctrine itself. In Seymour v. McAvoy, 121 Cal. 438, 41 L. R. A. 544, 53 P. 946, referring to the first branch of the proposition above stated, the court said: 'There is nothing in the policy of the law prohibiting a donor from providing that his bounty shall be enjoyed by those to whom he intends to extend it, and that the property devoted by him to a trust otherwise valid shall not be diverted from its appointed destination.' In Pacific Nat. Bank v. Windram, 133 Mass. 175, the court said: 'Creditors of the beneficiary have no right to complain that the founder did not give his property for their benefit or that they cannot reach a greater interest in the property than the debtor has, or ever had.' "

The same general doctrine prevails in other states of the Union. Appellant contends that the trust is void as against the wife upon the grounds of public policy; that is, by reason of the relation of husband and wife she stands in some position apart from other creditors, and relies chiefly upon the case In re Estate of Mary H. Moorehead, 289 Pa. 542, 137 A. 802, 803, 52 A. L. R. 1251. This case does lend some support to appellant's claim, but the court in that case was compelled to labor exceedingly hard to arrive at the conclusion which it did, and when carefully read the case is distinguishable from the instant case. The trust provision in the Moorehead Case, supra, reads: "I will and direct that neither the income payable to my grandson, William H. Watt, nor the corpus from which the same is derived, shall be liable to or for the contracts or debts of said William H. Watt, or to execution or attachment at the suit of any of his creditors; but shall be absolutely free from the same, and he shall have no power to sell, assign or incumber the same or any part thereof, or to in any way anticipate the said income."

The trust in the instant case contained this provision: "nor subject nor liable to any process of law or court, and all of the income and/or principal under this trust shall be transferable, payable and deliverable only, solely, exclusively and personally to the above-designated beneficiary hereunder at the time entitled to take the same under the terms of this trust, and the personal receipt of the designated beneficiary hereunder shall be a condition precedent to the payment or delivery of same by the said trustee to said beneficiary."

The conclusions in the Moorehead Case, supra, were arrived at by a construction of the whole will as noted from the language in the opinion, wherein it is said at page 804 of 137 A.: "Construing this will then as a whole and giving adequate attention, in conjunction with the examination of its terms, to the circumstances attending testatrix, and which concerned her, we are unable to avoid the conclusion that when she hedged in the trust in favor of her grandson with the restrictive words employed, she had in mind only contracts or debts ordinarily made and incurred in usual contractual or financial transactions. Undoubtedly she meant to create a spendthrift trust. Her purpose in this is manifest, as it is obvious in practically every instance of the creation of similar trusts, viz., to protect the object of her bounty from wasting his income by his extravagance and dissipation; and certainly the career Moorehead followed and has continued to follow furnishes ample justification for these protective inhibitions. But that it was her intent to deliberately enable him to unlawfully deprive his family of the necessary care, protection, and support which by law he owed them neither the terms of the will nor the circumstances attending testatrix at the time of making it permit. The very fact that the name of the wife of her grandson is not mentioned is in itself evidence that such a contingency was not in the mind of testatrix. Determined as she was to protect her grandson from the effects of his own folly and extravagance in his relations with people in general, would she not, had she intended to include the wife within the range of the trust inhibitions as to contracts and debts, have added a provision to that effect? It will be informing to give attention to dates and events relative to and connected wiith the execution of the will. It bears date June 13, 1903. The codicil by which she surrounded the trust with restrictions against the liability of her grandson for contracts and debts was added January 21, 1905. The testatrix died August 21, 1908. The marriage of her grandson took place May 4, 1903. It will thus be seen that the will and codicil were both executed subsequent to the marriage, the first less than two months after and the codicil a year and six months later. She continued in life for five years following the marriage, and we find nowhere in the will the slightest intimation of animosity on her part toward the wife of her grandson, and if after a period of five years' association with the young wife, the latter's future welfare and happiness had become in the mind of testatrix a matter of indifference, assuredly not one word in the will provides the slightest evidence of such unconcern. On the contrary, we find by the terms of the will themselves, and by noting its general tenor of kindness, love, and solicitude for those testatrix was leaving, that while she made no direct reference to the wife of her grandson, she had her solicitously in mind when she executed the will. Taking all the clauses and the codicil into consideration, we do not find one expression which breathes other than the most tender regard and anxiety for the well being of her relatives and friends. That, in fact, is a plain characteristic of the entire document, and hence to reach the intention of testatrix it becomes necessary to interpret it in this inclusive sense."

The will concludes: "I hope you may live an undivided happy family, and think of me always as being your devoted and loving grandmother, sister and friend, and hope and expect to meet you *all* on the other shore, where parting is no more, is the wish of one who has tried to make you all happy."

The court continues: "That is not the prayer of a woman whose intention was to encourage a grandson in the lawless abandonment of his lawful wife and to exult over the privations, the misery, and the humiliations which she must suffer as the fruits of such desertion. Is it to be conceived that this aged woman, her thoughts freighted with the tenderest solicitude for *all* her loved ones—and she herself has italicized the enlightening word *all*—whose large intelligence enabled her to know the full range of meaning of the words used in her will, could have deliberately intended and required that among all those upon whom she left her final friendly benediction, there was one, the young wife of her grandson, upon whom that last and gentle blessing should not rest? We cannot find in her will any word or phrase that permits even an intimation of so strange an intention."

[6] It is true the court does say in this case that such a trust as was contemplated there would be against public policy, but it did not base its decision on that ground. That it is the duty of the husband to support his wife of course no one could or would dispute, but the question here is whether this trust estate can be reached for that purpose. The wife has several remedies open to her under the laws of the state of California, and if the husband has property in the state of Texas of his own, of course it can be reached, but it seems that when she obtained a judgment for support and maintenance she became a judgment creditor, and the relation of debtor and creditor exists between her and her husband. See Lisenbee v. Lisenbee, 42 Cal. App. 567, 570, 183 P. 862; Barber v. Barber, 21 How. 582, 16 L. Ed. 226. There can be no question but that by the great weight of authority she is a judgment creditor.

In the case In re Wakefield's Estate, 182 Wis. 208, 196 N. W. 541, at page 544, it is said: "When a divorced wife has her judgment for alimony, she is a creditor and entitled to the remedies of other judgment creditors. This is the rule sanctioned by the great weight of authority." See, also, Dow v. Blake, 148 Ill. 76, at page 87, 35 N. E. 761, 39 Am. St. Rep. 156; Remmers v. Wolf's Estate, 206 Mo. App. 159, 226 S. W. 290, at page 292.

In a case reported from Missouri it was held that a judgment of a wife for maintenance, not having been recognized by payments thereon after the statutory period, was barred by the statute of limitations, and no recovery could be had thereon.

The old common-law doctrine that a husband and wife are one and the same person, which is one of the reasons given in the Moorehead Case, is, of course, not the law in California and has not been since the adoption of the Codes. It is a contradiction to say a husband and wife are one when the marriage has been disrupted to the extent that one spouse has gone into court and obtained a judgment against the other for support. It must be borne in mind that Anna Heustis had no vested interest in the mother-in-law's property; Caroline Heustis did not even need to give this property to her son. She also, under the authorities, had the right to arrange its disposition as she saw fit, provided she violated no law, and we take it that anything that is within the law is not against public policy. Public policy is a very vague and uncertain term, and, while it has a place in the law, a document should not be construed to contravene public policy unless it clearly appears to be necessary. And if the proposition is sound that a donor of property may arrange for its disposition to suit his will, we see no reason why this cannot be done against one creditor as well as another. It seems to us that the following cases cited by the respondent cover the instant case and are not necessarily contrary to the Moorehead Case, supra, although they are not mentioned in that case. In Thackara v. Mintzer, 100 Pa. 151, which was a case in which it appears William G. Mintzer died leaving a will bequeathing his property in trust for his children, the will provided in part, as taken from the above report at page 154 of 100 Pa., as follows: "It is expressly my will that the income which I have heretofore directed to be paid to my children respectively, is to be for their respective sole, separate and exclusive use and benefit * * * so that the same shall not be in any manner pledged, appropriated, disposed of or parted with by anticipation or before the same shall have accrued and become payable; nor be subject to execution, attachment, or sequestration, for any debts or liabilities whatever."

Eleanor J. Mintzer, the wife of the son George, obtained a divorce from bed and board and sought to attach the income of George in the hands of the trustee. The lower court decided in her favor, and the Supreme Court reversed the lower court. The court said, at pages 154 and 155 of 100 Pa., as follows:

> "It is now attempted to collect by attachment execution, against the plaintiff in error, as garnishee of George, the sum now due to the latter under the will of his father.
>
> "An unbroken line of cases from Fisher v. Taylor, 2 Rawle [Pa.] 33, down to [Overman's Appeal] 7 Norris [88 Pa.] 276, has settled the law in this commonwealth, that a father may, by creating a trust in proper form, provide for a son without exposing his bounty to the debts or improvidence of the beneficiary.
>
> "In the will before us the testator, in due and legal form, has expressed such intent in clear and unmistakable language. He created in the plaintiff in error, an active trust. The fund in question was to be kept by him for 'the sole, separate and exclusive use and benefit' of George, and not be subject in the hands of the trustee for 'any debts or liabilities whatever of George.'
>
> "It is contended that the character of the debt in this case, on which the attachment issued, is not within the meaning of the testator's exemption. It is for alimony awarded by the court to the wife of George after a verdict and judgment against him, for a divorce a mensa et thoro, in her favor. The attachment issued on a debt of record fixed by judgment and decree. Whether the judgment be for a breach of contract or for a tort, matters not. The testator recognized no such distinction. He impressed on the fund exemption from all kinds of legal process against the trustee, not only for debts, but also for 'all liabilities whatever' of George. Language broader and more comprehensive could not be used. The testator made no distinction between the character of the obligations which might rest on George. He designed to cover all, legal, equitable and moral. If we depart from the clearly expressed will of the testator in this respect, we make a new will instead of enforcing the one he made.
>
> "The question whether George should justly apply the money after it has reached his hands, to the discharge of this obligation, or in case he refuses so to do, what form of legal proceedings may be instituted against him, does not now arise. We are dealing solely with the case of legal proceedings against the trustee, instituted for the purpose of intercepting his action and defeating the trust stamped on the fund by the donor. As the wife of George has become one of his creditors and seeks to enforce her claim by adverse process against the trustee, the debt as well as the proceedings come within the prohibitory clause of the will."

In Board of Charities, etc. v. Lockard, 198 Pa. 572, 48 A. 496, 82 Am. St. Rep. 817, it appears that Wm. F. Lockard bequeathed a share of his estate in trust to a corporation for the benefit of his son, Edward J. Lockard. The trust clause provided as follows: "All moneys or legacies herein bequeathed are to be paid to the legatees in person, and to no one else, and shall not be assignable or transferable, nor subject nor liable in any way whatever for any debts or obligations of any of said legatees, heretofore or hereafter incurred or contracted or created."

Alida Lockard, wife of Edwin J., the son, served an execution upon the trustee for money due for her maintenance. The lower court ruled in favor of the wife, and the Supreme Court reversed the lower court. The court, at page 496 of volume 48 of the Atlantic Reporter, says:

> "The general rule of law in Pennsylvania sustaining spendthrift trusts is admitted; but it is strongly urged, upon the ground of public policy, that an exception should be made in the case of a beneficiary having a wife and children dependent upon him for support. If the fund had been attached after coming under the control of the legatee, the action of the court below would have been entirely justified. But the difficulty is that

the fund was attached before it was within the control of the beneficiary, and while it was yet in the hands of the trustee. The fund did not originate with the beneficiary, but the bequest was made by another,—the father,—who had a right to bestow his benefactions as he pleased, and, in this case he chose to bestow them upon the son, and upon him alone.

"We agree entirely with all that has been said about the duty of the beneficiary to support his wife and child; but that does not authorize interference with the right of another individual to dispose of his own property as he may see fit. In this case, the pressure was prematurely applied. There are methods of reaching the beneficiary directly.

"The general validity of spendthrift trusts in Pennsylvania is thoroughly well settled, and is not now an open question. The present case is ruled directly by that of Thackara v. Mintzer, 100 Pa. 151. It was there argued that an intention to exempt an income payable to the cestui que trust from liability for the support of his family would be contrary to the policy of the law. This court, however, held that no such distinction could be recognized. The testator impressed on the fund exemption from all kinds of legal process against the trustee. He made no distinction between the character of the obligation which might rest upon his son. The court there said: 'If we depart from the clearly-expressed will of the testator in this respect, we make a new will, instead of enforcing the one he made;' and it positively refused to sanction any legal proceeding against the trustee instituted for the purpose of intercepting his action and defeating the trust stamped on the fund by the donor.

* * *

"In the present case the testator was extremely careful to exclude the cestui que trust from all control of this fund. He provided that the money was to be paid to the legatee in person, and to no one else; that it should not be assignable or transferable, nor subject nor liable in any way whatever for any debts or obligations of any of said legatees. We are of opinion, therefore, that a strict spendthrift trust was here created, and that there can be no seizure of the fund in the hands of the trustee. The judgment is therefore reversed. * * *"

And then, in Kiffner v. Kiffner (1919) 185 Iowa, 1064, 171 N. W. 590, it appears that the father placed $10,000 in trust for use of his son, the trustee from time to time to make payments for the maintenance of the son. A creditor of the son, the wife with an alimony judgment, levied on the trustee. The trial court found against the creditor and she appeals. The Supreme Court said, 185 Iowa, 1064, 171 N. W. 590, 591, at page 591:

"Sufficient to say in general terms that the testator owed no duty legal or moral to provide for the debts of his son; that he had a right to dispose of his own estate as he would; that he had a right to create a trust fund and place the same in the hands of a third party as trustee and to confer upon such trustee such full power over the fund as the testator himself would have had if living; and that he had a right to adopt this course for the very purpose of enabling the trustee to support the improvident son and yet prevent his creditors from appropriating the benefaction. * * * It is true, of course, that when the fund has once passed into the hands of the beneficiary, it becomes his unqualified property, and is subject to the same processes in his hands as any other property. But as long as it is withheld from the control of the debtor, it is beyond the reach of the creditor also. * * *

"The plaintiff first sought to reach the fund by garnishment of the trustee. Thereupon this suit was brought in aid of the garnishment. Later the garnishment was dismissed, and equitable relief alone is now asked. If the grounds upon which plaintiff bases her equity suit are good, we see no reason why she might not have maintained a garnishment on the same grounds. As a ground for equitable relief, she avers that her debtor and the trustee are in collusion against her to prevent the collection of her judgment. This allegation is a mere legal conclusion and an erroneous one. The trustee owes no duty to the creditor. On the contrary, his trusteeship is in hostility to the creditor. He was not bound, therefore, to exercise his discretion in favor of the creditor. Indeed, the clear implication of the condition of the trust was that he should not do so."

The case of McColgan v. Magee, Inc., 172 Cal. 182, 155 P. 995, Ann. Cas. 1917D, 1050, supra, relied on by appellant, simply holds that a person cannot make a spendthrift trust from his own property. Naturally that would be against public policy and void. That a court would be asked to uphold such a trust is the only unusual thing about it. The case specifically affirms the general doctrine of spendthrift trusts. The case of Wetmore v. Wetmore et al., 149 N. Y. 520, 44 N. E. 169, 33 L. R. A. 708, 52 Am. St. Rep. 753, is not exactly in point either, for there a clause in the will simply provided that: "* * * No person for whose benefit any trust is hereby created shall have power to anticipate or to dispose of any income directed to be paid or applied to the use of such person until the same shall have fully accrued and become payable to such heir, and the trustees of said respective trusts are empowered and requested to disregard and defeat every assignment or other act in contravention of this clause in my will."

It was also specifically provided in the will that every part of the will was made with reference to existing laws and statutes of the state of New York relating to trusts or trust estates and the disposition of personal estates by will or legal distribution. What was actually held in this case was that, under the statutes of New York, a trust is created to receive and pay from the income of the personal property; an action may be maintained by a judgment creditor of the beneficiary after the return of the execution unsatisfied to reach the surplus income beyond what is necessary for the suitable support and maintenance of the beneficiary and those dependent upon him, and that a judgment for alimony in favor of the woman makes her a judgment creditor of her former husband, and as such she is entitled to avail herself of all the remedies given by the statute to judgment creditors, and that a wife in whose favor a judgment has been rendered for alimony may satisfy it out of personal property devised by a trust of the father of her late husband with directions to apply the net income to the support of the son so long as he was living, and that a judgment awarding alimony in a suit for divorce, to be paid to the plaintiff for her future support and for her children, makes the husband in effect a debtor, owing the wife the amount adjudged to be paid, and entitles her to the same remedies as any other judgment creditor. And where a trust is created in a will and the trustee directed to pay the income for the support of the testator's son, the wife of the latter is included within the equity of the trust and the whole of the trust income, leaving none for the husband, if it appears that he has other estate ample for his support. This case holds at common law the husband and wife are recognized as one, and while the trust was made for the benefit of the son, yet, owing to their unity of person and his duty to support her, equity would not permit the interposition of other creditors until there is a surplus over and above that which is necessary for the support of himself and his wife and infant children.

[7] Respondent also contends that the judgment of the trial court should be upheld because the beneficiary Robert J. Heustis has only a contingent interest, and therefore any levy of the appellant on the funds of the estate is premature and ineffectual. This contention seems to be sound. Under the terms of this will, the property could not vest in Robert J. Heustis until after ten years from the date of the filing of the will for probate, and in case of his death before that time the property was devised over to other persons. In other words, if Robert J. Heustis dies at any time before the ten-year period expires, his heirs would not take the property, and if he made a will his devisees could not take the property. The case of In re Estate of Blake, 157 Cal. 448, 108 P. 287, 289, seems to cover this point. In that case Francis Blake died, leaving his widow and two daughters, Alice S. Blake and Helen F. Witcher, and a granddaughter, Ethel Pomroy, then nine years of age, as his only heirs at law. He left a large estate which, by his will, be devised to trustees in trust as follows: "'After the payments of the bequests enumerated in article 3, I direct my said executrix, executors and trustees to convert the rest and residue of my personal estate, if any there be, into money, and to invest the same in improved real property, and to hold all the rest and residue of my estate and pay over the net income therefrom in equal proportions quarterly to my said daughters, Alice S. Blake and Nellie F. Witcher, and my granddaughter, Ethel Pomroy, until they shall respectively arrive at the age of thirty years, and as each of my said daughters and granddaughter arrives at the age of thirty years she shall have the right to demand and receive one-third of the rest and residue of my said estate as her distributive share thereof, and to have and hold the same to her and her heirs forever, *and if either of my said daughters or granddaughter shall die without issue and before she receives her distributive share of my estate, it is my desire that her share of my said estate shall go to the surviving daughter, daughters or granddaughter as the case may be, share and share alike.*' The portion of the trust we have italicized above was omitted from the decree of distribution which in due course was made in the estate."

The beneficiary, Ethel Pomroy, married Beach C. Soule, and two children were born to them. She died intestate at the age of twenty-seven years, leaving as her sole heirs at law her husband and two minor children. Later the trustee filed her petition for distribution under the trust, setting forth that she did not know to whom the corpus of the trust should be distributed, and asked the court to judicially determine the question. The trial court held that one-third vested in Alice S. Blake, one-third in Helen F. Witcher, and one-third in the heirs at law of Ethel Pomroy Soule, deceased.

The question as stated by this court at page 457 of 157 Cal., 108 P. 287, is as follows: "This brings us to the consideration of the appeal on its merits—the nature of the remainder devised to Ethel Pomroy—whether it is to be considered as a contingent or vested remainder, and if the former, was there still a devise to the issue of the beneficiary by implication?"

After a preliminary discussion by the court that the cardinal rule of interpretation of a will is that it "is to be construed according to the intention of the testator" (Civ. Code, § 1317), the court, at pages 459 and 460 of 157 Cal., 108 P. 287, 291, says:

"Now, coming to a consideration of the terms of the trust, itself, we think that the language of the testator given its legal import, clearly shows that only a contingent remainder was devised to Ethel Pomroy, and that as far as that question is concerned the the trial court properly so held.

"There can be no question as to the rule relative to contingent and vested remainders and the difference between them. The difficulties which have filled the books with dissertations on the subject have arisen in an endeavor to determine from indefinite terms of devise to which class the remainder belongs. The general rule is that, where the legacy or devise is given to a person to be paid at a future time, it vests immediately. When, however, it is not given until a future time, it is contingent and does not vest until that time occurs. As said in the note to Goebel v. Wolf, 113 N. Y. 405, 10 Am. St. Rep. 470, 21 N. E. 388, quoted approvingly by this court in In re Rogers, 94 Cal. 526, 530, 29 P. 962: 'The leading inquiry upon which the question of vesting or not vesting turns is whether the gift is immediate, and the time of payment or of enjoyment only postponed, or is future and contingent, depending upon the beneficiary arriving of age, or surviving some other person, or the like. * * * According to the prevailing doctrine, a postponement of the time of payment will not of itself make a legacy contingent unless it be annexed to the substance of the gift; or, as it is sometimes put, unless it be upon an event of such a nature that it is to be presumed that the testator meant to make no gift unless that event happened. Thus, where the legacy is given, payable or to be paid when the legatee attains the age of 21 years, the legacy vests immediately upon the death of the testator. It is a present gift, the time of payment only being postponed; but where the time is annexed, not to the payment only, but to the gift itself—as when the legacy is given to the legatees at 21 or "if" or "when" he attains the age of 21—the legacy does not vest until the legatee attains that age. His attaining the age specified is a condition precedent; and, if the condition be not fulfilled, the legacy never vests.'

"Examining the trust provisions of the will under this clear distinction between vested and contingent remainders, and giving to the language used by the testator its proper legal import, we perceive no room for question but that the attainment of the age of 30 years by the beneficiary, Ethel Pomroy, was made a condition precedent to the vesting of the corpus of the trust property in her, both in title and possession, and, hence, the devise was of a contingent remainder.

"This conclusion reasonably follows, whether we look at the provisions of the trust separately or view them collectively. The testator had devised the legal title in the trust property to his trustees and in the first portion of the trust clause, as far as the beneficiaries, including Ethel Pomroy, are concerned, provided only for the payment to them of the net income of the estate in equal proportions 'until they shall respectively arrive at the age of thirty years.' The meaning of this provision is plain. The trustees simply took the legal title to the trust property to the extent that it was necessary for the fulfillment of their trust duties. There is nothing in it whereby any title was passed to the beneficiaries."

We therefore conclude that the construction the trial court placed upon this will is supported by reason and the weight of authority. The judgment appealed from is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

VAN HORN v. JUSTICES' COURT OF SAN BERNARDINO TP., IN AND FOR SAN BERNARDINO COUNTY et al.*

Civ. 644.

District Court of Appeal, Fourth District, California.

April 8, 1932.

Rehearing Denied April 30, 1932. Hearing Granted by Supreme Court June 2, 1932.

1. **Justices of the peace** ⚿42.

Action on $500 note against defendant residing in San Bernardino county, outside San Bernardino township, in township having less than 30,000 population, should have been commenced in San Bernardino county superior court, not San Bernardino township justices' court (Const. art. 6, §§ 1, 5, as amended; art. 6, § 11, as amended, and § 11a, as added in 1928; Code Civ. Proc. § 106; § 112, as amended by St. 1929, p. 834; §§ 831h, 832, 835a, 900b; Pol. Code, § 4185a).

> While general effect of St. 1929, p. 834, Code Civ. Proc. §§ 112, 831h, 835a, 900b, and Pol. Code, § 4185a, was to enlarge the jurisdiction of justices' courts in townships having a population of thirty thousand or more, so that they might hear and determine civil actions at law in which the demand or damages sought to be recovered do not exceed $1,000, it did not enlarge the territorial jurisdiction of a justices' court, which Code Civ. Proc. § 106 still limits to the boundaries of his township.

2. **Justices of the peace** ⚿42.

Statute *held* not to extend jurisdiction of justices' courts in townships of over 30,000

⚿For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 13 P.2d 704.

population to that enjoyed by municipal courts, but only to apply municipal court procedure to such justices' courts (Code Civ. Proc. § 831h).

3. Justices of the peace 🔑84(2).

Where defendant appeared generally, and filed answer raising fact issues, he waived justices' court's lack of territorial jurisdiction (Code Civ. Proc. § 106).

Petition for a writ of mandate by Jay Van Horn prayed to be directed to the Justices' Court of San Bernardino Township in and for the County of San Bernardino, George W. Holbrook, Justice of the Peace, directing respondents to proceed with the trial of a civil action.

Writ granted.

N. C. Peters, of San Bernardino, for petitioner.

Joseph R. Rensch, of San Bernardino, for respondents.

Fred A. Wilson, of San Bernardino, amicus curiæ, for respondents.

MARKS, J.

This is an original proceeding instituted in this court whereby petitioner seeks a writ of mandate compelling respondents to proceed with the trial of the case of Jay Van Horn v. H. R. Van Horn, instituted in the respondent court on September 25, 1930. Summons was served on May 14, 1931. An amended complaint was filed, to which the defendant made written answer, and the case was set for trial in the respondent court on February 26, 1932. On this day the respondent justice of the peace refused to proceed with the trial because of lack of jurisdiction.

From the amended complaint it appears that the action was brought to recover judgment upon a promissory note in the sum of $500, executed and made payable in the state of Texas. The note bears interest and provides for attorneys' fees in case it be placed in the hands of an attorney for collection. It is alleged that the entire amount of principal and interest is due and unpaid, and that the defendant is a resident of the county of San Bernardino, but not of the township of San Bernardino therein.

The answer denied all the allegations of the amended complaint except the execution of the promissory note; that its obligation was incurred and was to be performed in the state of Texas; that the defendant at all times has resided outside of the township of San Bernardino. These latter facts are expressly admitted.

San Bernardino township has a population in excess of thirty thousand. The sole question to be considered here is whether jurisdiction over the case of Van Horn v. Van Horn rested in the justices' court of San Bernardino township or in the superior court of the county, there being no municipal court in the city of San Bernardino, which is within the township of the same name.

The legislative enactments of 1929, giving an increased jurisdiction to justices' courts in townships having a population of thirty thousand or more, have presented many new and interesting questions and have been the prolific source of numerous decisions by the Supreme and Appellate Courts of the state since they went into effect, in August, 1929. We are cited to no case in which the problem here presented has been decided.

Section 1 of article 6 of the Constitution (1879) as originally adopted provided that the judicial powers of the state be vested in the state senate, sitting as a court of impeachment, the Supreme Court, the superior courts, justices of the peace, and such inferior courts as the Legislature might establish in any incorporated city, town, or city and county. This section was amended in 1904 to provide for the creation of District Courts of Appeal. It was again amended in 1911, omitting direct reference to justices of the peace, but continuing legislative authority to establish inferior township courts. In 1924 it was again amended to provide for the creation of municipal courts in cities and cities and counties. The provisions relating to inferior township courts were not changed.

Section 5 of article 6 of the Constitution of 1879 gave superior courts original jurisdiction in numerous civil cases which we are not concerned with here, and in all civil cases "in which the demand, exclusive of interest or the value of the property in controversy, amounts to three hundred dollars." It also gave the superior courts appellate jurisdiction "in such cases arising in *Justices' and other* inferior Courts in their respective counties as may be prescribed by law." The section was amended in 1911 by the omission of the italicized words from the sentence just quoted. It was again amended in 1924, which amendment does not concern us here. By an amendment adopted in 1928 it was provided that "the superior courts shall have original jurisdiction in all civil cases and proceedings except as in this article otherwise provided, and except also cases and proceedings in which jurisdiction is or shall be given by law to municipal or to justices in other inferior courts."

Section 11 of article 6 of the Constitution originally provided as follows: "The Legislature shall determine the number of Justices of the Peace to be elected in townships, incorporated cities and towns, or cities and counties, and shall fix by law the powers, duties, and responsibilities of Justices of the Peace; provided, such powers shall not in any case trench upon the jurisdiction of the several Courts of record, except that said Justices shall have concurrent jurisdiction with the Superior Court in cases of forcible entry and detainer, where the rental value does not exceed twenty-five dollars per month, and where the whole amount of damages claimed does not exceed two hundred dollars, and in cases to enforce and foreclose liens on personal property when neither the amount of the liens nor the value of the property amounts to three hundred dollars."

The amendment of this section in 1911 is not important to the question we are considering. The reference to "justices of the peace" was omitted in the amended section and "inferior courts" substituted therefor. Two amendments were adopted in 1924, one of which was repealed in 1928. The other provided for the creation of municipal courts and continued the power of the Legislature to determine the number "of the inferior courts in incorporated towns, and in townships or counties, or in incorporated cities or cities and counties, where there is no municipal court" with other powers in the Legislature not necessary for us to consider. In 1928 there was added to the Constitution section 11a of article 6, which provides as follows: "The legislature shall determine, according to population, the number and jurisdiction of each of the inferior courts in incorporated cities or towns wherein there is no municipal court, and in townships, counties or cities and counties, and the number of judges or justices thereof and their qualifications and compensation, and shall fix by law the powers, duties and responsibilities of each of such courts and of the judges or justices thereof; and may provide that the jurisdiction of such courts shall be exclusive."

It is apparent from the foregoing constitutional provisions that at all times material to this proceeding the jurisdiction of the superior court in civil actions for money ended when the amount involved in the litigation was less than the amount specified as the maximum amount that could be recovered in a justice's court. There was no constitutional line of demarkation separating the jurisdiction of the two courts, such matter being left entirely to legislative enactment. A law increasing the jurisdiction of the justices' court would automatically reduce the jurisdiction of the superior court by the exact extent that jurisdiction had been granted to the inferior court.

Under the authority granted to it in 1879 the Legislature in 1880 proceeded to provide for the establishment of justices' courts throughout the state. We need only concern ourselves with the legislation applicable to township justices' courts. Section 106 of the Code of Civil Procedure, as then adopted (Code Amdts. 1880, p. 34) and still in force, provided as follows: "The civil jurisdiction of justices' courts extends to the limits of the townships in which they are held; but mesne and final process of any justice's court in a county may be issued to and served in any part of the county." Section 112 of the same Code, as adopted in 1880 (Code Amdts. 1880, p. 35), in so far as its provisions are involved here, limited the jurisdiction of justices' courts to an amount of not to exceed $300 sought to be recovered in actions on contracts. An important amendment to this section was enacted in 1929 (Stats. 1929, p. 834), which we will consider in connection with the legislation following the adoption of section 11a of article 6 of the Constitution. Section 113 of the Code of Civil Procedure (Code Amdts. 1880, p. 35) gave justices' and superior courts concurrent jurisdiction in certain actions of forcible entry and detainer and to foreclose liens on personal property. Section 114 of the same Code (Code Amdts. 1880, p. 36) contained a legislative declaration of some of the provisions of section 11 of article 6 of the Constitution as it was first adopted. These two latter sections were repealed in 1929 (Stats. 1929, p. 834). Section 832 of the Code of Civil Procedure, in effect at the time the case of Van Horn v. Van Horn was instituted, placed the venue in such an action (omitting here the consideration of the amount involved) "in the township or city in which the defendant resides."

It clearly appears, and has been held in numerous cases, that prior to the Code amendments of 1929, giving enlarged jurisdiction to justices' courts in townships having a population of thirty thousand or more, the plaintiff, Jay Van Horn, should have brought his action in the township of the residence of the defendant had the recovery he sought been less than $300, and in the superior court of the county of the residence of the defendant where he sought to recover a greater amount.

Following the adoption of section 11a of article 6 of the Constitution, the Legislature in 1929 passed several acts increasing the jurisdiction and changing the procedure in justices' courts in townships having a population of thirty thousand or more. No change which it is necessary to note was made in justices' courts in townships having a lesser population. Sections 112, 831h, 835a, 900b, Code Civ. Proc.; section 4185a, Pol. Code. The general effect of these amendments was to enlarge the jurisdiction of justices' courts in townships having a population of thirty thousand or more, so that they might hear and determine civil actions at law in which the demand or damages sought to be recovered do not exceed $1,000. Jurisdiction was also increased in other instances not necessary to detail here.

It was also provided that in these justices' courts actions be commenced and prosecuted in the same manner and under the same rules of pleading as were provided by law governing civil actions and the enforcing of judgments in municipal courts of the state. The qualifications for justices of the peace in these courts was also fixed.

It should be observed that San Bernardino township has had a justices' court with a justice of the peace presiding therein since the adoption of the Codes. His jurisdiction over the subject-matter of actions has been changed by previous amendments of the Codes. His territorial jurisdiction has always been limited to the boundaries of his township by section 106 of the Code of Civil Procedure since its adoption in 1880. This section has not been amended.

[1] The case of Proctor v. Justice's Court, 209 Cal. 39, 285 P. 312, 313, contains a careful review of the legislation in California since 1850 affecting justices' courts. The conclusion is there reached that "section 112 of the Code of Civil Procedure relates to the kind of civil causes * * * of which the justices' courts may take cognizance" and that this section does "not purport to fix the territorial jurisdiction of these courts."

It has been very generally held that in actions based upon contract for recovery of a money judgment the action must be commenced in the township in which the defendant resides (Holbrook v. Superior Court, 106 Cal. 589, 39 P. 936), unless there is an agreement to perform elsewhere, or unless the defendant submits himself to the jurisdiction of the court. Section 106 of the Code of Civil Procedure still limits the territorial jurisdiction of a justices' court to the boundaries of his township, and we do not find that any of the amendments of 1929 have changed this rule. We conclude that the action of Van Horn v. Van Horn should have been commenced in the superior court of San Bernardino county, the recovery being sought for more than $300 and the defendant residing without the boundaries of San Bernardino township and within San Bernardino county in a township having less than thirty thousand population and he not having undertaken to perform within San Bernardino township.

[2] We do not believe that the provisions of section 831h of the Code of Civil Procedure were intended to extend the jurisdiction of justices' courts in the larger townships to that then enjoyed by municipal courts, but only to apply municipal court procedure to these justices' courts.

Jurisdiction of justices' courts is often spoken of as being divided into jurisdiction over the subject-matter of the action and territorial jurisdiction or jurisdiction over the person of the defendant as the expression must be understood in this case.

[3] The justices' court of San Bernardino township had jurisdiction over the subject-matter of the action, as the demand of plaintiff's complaint was less than $1,000 and the township had a population of thirty thousand or more. It did not originally have territorial jurisdiction or jurisdiction of the person of the defendant. The defendant appeared generally in the action without objection to the jurisdiction of the court and filed an answer in which he raised issues of fact to be determined at the trial. This had the effect of his moving himself within the territorial jurisdiction of the court for the purpose of the trial and was a waiver of the lack of the territorial jurisdiction of the court. It has been expressly held that a general appearance of a defendant in a justices' court is a waiver of a lack of jurisdiction over his person. Olcese v. Justice's Court, 156 Cal. 82, 103 P. 317; Vance v. Superior Court, 48 Cal. App. 327, 191 P. 945; Gulick v. Justice's Court, 101 Cal. App. 619, 281 P. 1031, 1033. In the Gulick Case, appears the following quotation from the Olcese Case: "'Pleas based upon lack of jurisdiction of the person are in their nature pleas in abatement, and find no especial favor in the law. They amount to no more than the declaration of the defendant that he has had actual notice, is actually in court in a proper action, but, for informality in the service of process, is not legally before the court. It is purely a dilatory plea; and, when a defendant seeks to avail himself of it, he must, for very obvious reasons, stand upon his naked legal right, and seek nothing further from the court than the enforcement of that right. He will not be heard to ask of the court anything further than an adjudication upon his plea, and if he does ask anything further, then, by logic of the fact, he must necessarily have waived the irregularity of his summons before the court. Here is one reason for the well-settled rule that, if a defendant wishes to insist upon the objection that he is not in court for want of jurisdiction over his person, he must specially appear for that purpose only, and must keep out for all purposes except to make that objection. Another reason, equally valid, is that if such defendant shall ask for any relief other than that addressed to his plea, he is seeking to gain an unconscionable advantage over his adversary, whereby, if the determination of the court be in his favor, he may avail himself of it, while if it be against him, he may fall back upon his plea of lack of jurisdiction of the person. So it is well settled that, if a defendant, under such circumstances, raises any other question, or asks for any relief which can only be granted upon the hypothesis that the court has jurisdiction of his per-

son, his appearance is general, though termed special, and he thereby submits to the jurisdiction of the court as completely as if he had been regularly served with summons.'"

In the case of Jay Van Horn v. H. R. Van Horn the respondent court had jurisdiction of the subject-matter of the action and the defendant submitted his person to the jurisdiction of the court by his general appearance therein. This completed the jurisdiction of the court, and the plaintiff is entitled to have his action tried there.

Let the peremptory writ of mandate issue as prayed for.

We concur: BARNARD, P. J.; JENNINGS, J.

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122 Cal.App. 275

PEOPLE v. LITTLE.

Cr. 1188.

District Court of Appeal, Third District, California.

March 31, 1932.

Rehearing Denied April 15, 1932. Hearing Denied by Supreme Court April 28, 1932.

1. Criminal law ⚷655(1).

In prosecution for crime against child, court's conduct in bringing before jury fact that defendant refused to submit to physical examination at hands of county doctor *held* prejudicial.

The prosecution contended that defendant, in commission of acts complained of, transmitted gonorrhea to the child, and court, among other things, asked defendant's counsel if he had not refused to permit the county doctor to examine defendant, and his remarks were prejudicial because from his statements jury might have inferred that defendant had venereal disease and was therefore guilty of crime charged, or he would have submitted to examination, and also because they were calculated to discredit testimony of defendant's witness, a physician who had just testified that he had examined defendant and found no trace of gonorrhea.

2. Criminal law ⚷1186(4).

Where court persists in making discourteous and disparaging remarks to defendant's witnesses, new trial is necessary (Const. art. 6, § 4½).

3. Criminal law ⚷1186(4).

That record shows sufficient evidence to warrant conviction does not necessarily determine that there has been no miscarriage of justice (Const. art. 6, § 4½).

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

E. A. Little was convicted of violating Pen. Code, § 288, and he appeals.

Reversed, and new trial ordered.

J. R. King, Jr., of Gridley, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM.

Defendant was convicted by a jury of a violation of section 288 of the Penal Code.

A motion for a new trial was made and denied. From the judgment and order denying a new trial, the defendant prosecutes this appeal.

The crime for which defendant was convicted was alleged to have been committed on the night of August 1, 1931, between 11 and 12 o'clock, in an automobile which was parked near a dance hall, at Durham in Butte county. The defendant was attending the dance and while there met the prosecutrix, a girl of the age of six years, who was in the company of her father and mother and younger brother. Previous to this night, defendant had known the child and her family for about a year and was upon friendly terms with all the family.

The defendant, with the consent of the parents of the child, took the prosecutrix and her younger brother from the dance platform to his car to put them to sleep. Defendant returned to the dance platform shortly afterwards with the younger child, who was crying.

It was testified to by the prosecutrix that the defendant returned to the car and perpetrated the acts for which he was convicted.

The prosecutrix was the only witness to the crime. The child made no outcry or complaint against the defendant at the time. It was not until one week later that the mother, by questioning the child, drew from her the story of the alleged crime. The following day, with full knowledge of the story told by the child, the mother met the defendant at the home of a neighbor, and spent several hours in his company, allowing him to play with her younger child, and made no charge against him at that time.

Three contentions are made for a reversal of the judgment. We will consider the last contention, which, in our opinion, necessitates a reversal of the judgment and order.

[1] Appellant strenuously contends that the conduct of the trial judge was prejudicial to the rights of the defendant.

In order to fully understand the seriousness of this contention, it will be necessary to state more of the facts and circumstances occurring during the progress of the trial. Mrs. Clark, the mother of the girl, testified that the girl complained of soreness around her private parts and that "her limbs broke out in sort of blisters." Dr. E. A. Kusel also testified for the prosecution to the effect that he examined the little girl about August 10, 1931, which was about ten days after the commission of the alleged offense, and discovered that she had a discharge from her privates, and that this discharge was of gonorrheal origin. From the testimony of these two witnesses, the prosecution contended that defendant, in the commission of the acts complained of, transmitted gonorrhea to the child.

To contradict this testimony, the defense produced as its witness Dr. Kilduff, a duly licensed physician and surgeon. During the progress of the examination of Dr. Kilduff by Mr. King, attorney for the defendant, and after a few preliminary questions had been asked, the following proceedings occurred in open court in the presence of the jury:

"Mr. King:

"Q. Doctor, state whether or not, you have examined Mr. Bill Little for any communicable disease? A. I examined him * * *

"Q. When did that examination take place? A. Last Thursday or Friday, I forget which date.

"Q. Will you tell the jury just what sort of examination you made?

"Mr. McPherson, prosecuting attorney: We are objecting to this line of testimony on the ground it is not a proper portion of the allegations of the res gestae of this case.

"The Court: The objection may be overruled.

"The witness: Shall I answer the question?

"Mr. King: * * * Tell the jury what your examination was without using the name of the disease.

"A. I asked to examine the defendant to find out whether he had a certain disease.

"The Court: Who asked you to do that? A. Mr. King.

"Mr. McPherson: I am again objecting to the testimony of this man upon the ground that a proper court order was not had for the examination of this defendant, and that this defendant was offered an examination by three physicians.

"The Court: I want it to go before the jury as to how he came to examine him and I asked the question, and he said Mr. King asked him. To the Clerk: Mr. Clerk, was there any court order directing Dr. Kilduff to examine this man?

"The Clerk: There was not, your Honor.

"The Court: You stipulate there was not?

"Mr. King: There was not—Oh, yes, by the way, just a moment.

"The Court: Just a moment.

"Mr. King: Now, just a moment, your Honor.

"The Court: Now, you just a moment * * * are you objecting on the ground it was too remote from the first of August?

"Mr. McPherson: I certainly am. Here is my objection in that regard * * *

"Mr. King, interrupting: We will object to his Honor's suggestion in directing the district attorney what his objections should be, and I assign that suggestion as prejudicial to the rights of my client and ask that the jury be instructed to disregard that question. It is certainly unfair.

"The Court: You mean his objection is highly unfair?

"Mr. King: The court instructs the district attorney as to what to object to?

"The Court: Now, I do not do that. I want to get his ground of objection, and I simply asked him if he was objecting on the ground it was too late, that is. * * *

"Mr. King: The district attorney had not mentioned that. * * *

"The Court: Never mind, Mr. McPherson, did I for the first time apprise you to make the kind of an objection, or did you have it in your mind?

"Mr. McPherson: I have three lines of objections in my mind as to the testimony of this witness, I am objecting on the ground * * *

"Court interrupting: You have not answered my question.

"Mr. McPherson: No, you did not.

"The Court: Did you have it in mind?

"Mr. McPherson: I certainly did.

"The Court: Very well, proceed.

"Mr. McPherson: My objection is this, that the testimony of this witness is entirely incompetent, immaterial and of no consequence and no part of the res gestæ of this case. That is one point. The second point is that this man testified that he examined this man on the 28th of October.

"The Court: Last week sometime, Thursday or Friday of last week.

"Mr. McPherson: My second objection is that it is too remote in point of time, and my third objection is that this defendant never secured a court order and was offered the services of the county physician previous to or at the time he was arrested.

"Mr. King: It is very true, your Honor, that he did not get a written paper from your Honor, saying that he could bring this letter into court in the courtroom, or that he examine the defendant; that is true, but for your Honor's recollection, the conversation I had with you in the chambers, that I asked you if I could bring in an independent doctor, and not the doctor who had been connected with the county; and I will call your Honor's attention and ask you to recall the conversation, and I believe it was with your Honor's permission that I called in this doctor.

"The Court: Mr. King, didn't I request that in order to facilitate matters that Dr. Epperson, the county doctor, examine this man and you refused to agree to that?

"Mr. King: I did on the ground he was not a licensed M. D., and for that reason alone.

"The Court: Just a moment, now, bring Dr. Epperson in here, Mr. Sheriff.

"Bailiff French: He is at the county hospital right now.

"The Court: Call the county hospital and tell him we want him. * * *

"The Court to Mr. King: Regarding what you were saying about your private conversation with me, Mr. King, did not Dr. Epperson come to the jail and didn't you refuse to allow him to examine this man?

"Mr. King: Your Honor, as I recall it, Dr. Epperson came in and talked with the undersheriff, Mr. Alexander, and I was in the office at that time; and I heard Dr. Epperson inquire from the sheriff's office: 'Can I examine Bill Little?' and the sheriff's office said: 'No, you cannot.' I did not say a word—I did not say a word to Dr. Epperson.

"The Court: Because you already refused—hadn't you before that refused to have Dr. Epperson examine him?

"Mr. King: I do not recall that.

"The Court: Didn't you tell me you did not want Dr. Epperson to examine him?

"Mr. King: As far as the conversation went in there it was on the ground of his not being a licensed M. D. and I did not think his testimony would be competent in this case.

"The Court: We will find out from him whether he is or not. Proceed.

"Mr. McPherson: I certainly insist upon my objection to this question.

"The Court: The objection will be overruled. * * *

"Mr. King:

"Q. Did you find any disease? A. No, I did not.

"Q. Did you find any signs that there might have been a disease previously? A. I did not find any signs, no.

"Q. You made a thorough examination, did you? A. Yes sir.

"Q. And you are positive of that are you? A. I am."

After further examination of Dr. Kilduff, both direct and cross, and after a great deal of apparent hostile colloquy between Mr. King, attorney for the defendant, and the trial court, Dr. Epperson was called to the stand as a witness for the prosecution, and during the course of his examination the following proceeding took place in the presence of the jury:

"The Court: Let him tell, I ordered Dr. Epperson to examine this man and the way I happened to do it was that I understood Mr. King, without any authority or anything of that kind, had brought Dr. Kilduff down there to examine this man and not being able to get into communication with you I thought the People should have a physician also and that a physician on each side should examine him and I requested it but it was not a court order, but I requested Dr. Epperson as the County Physician I would have—

"Mr. King interrupting: I object to any reference to that and ask that the jury be admonished to disregard any reference made by Dr. Epperson to any conversation he had with me in the sheriff's office or anything else that he has testified to here today for the reason that he was not ordered by the Court to come here except by the verbal order just now to bring in Dr. Epperson.

"The Court: Your objection will be overruled. That is all, Dr. Epperson."

Many other remarks and statements made by the trial court during the progress of the trial and questions asked by the court of witnesses and counsel are also claimed to have been highly prejudicial to the rights of the defendant. It is unnecessary to set out any more of the record in detail. Suffice it to say, from the record, it appears, that there was a running battle between the court and counsel for the defendant throughout the entire trial, and many remarks and statements made by the court were improper and prejudicial to the rights of defendant.

The examination of Dr. Epperson by the court before the jury amounted, in effect, to the trial court becoming a witness against the defendant.

The court brought before the jury the fact that defendant had refused to submit to a physical examination at the hands of Dr. Epperson.

The jury, from the statements and questions by the court, might well have inferred that the defendant had a venereal disease and therefore guilty of the crime charged, or he would have submitted to the examination.

These unusual proceedings were also calculated to discredit the testimony of Dr. Kilduff, who had just testified that he had examined defendant and found no trace of gonorrhea in his system. The court was, in effect, contradicting the testimony of Dr. Kilduff.

The jury should have been allowed to impartially weigh all the evidence, both for the prosecution and the defense, uninfluenced by the trial court or any one else.

[2] When, as in this case, the trial court persists in making discourteous and disparaging remarks to defendant's witnesses and counsel and utters frequent statements, from which the jury may plainly perceive that the testimony of the witnesses for defendant is not believed by the judge, and in other ways discredits the cause of the defense, it has transcended so far beyond the pale of judicial fairness as to render a new trial necessary.

Neither can a plea for the application of section 4½ of article 6 of the Constitution save the situation.

[3] The fact that the record shows sufficient evidence to warrant a verdict of guilty in this case does not necessarily determine that there has been no miscarriage of justice.

A careful examination of the entire record fully convinces us that defendant did not have that fair trial guaranteed to him by the law and the Constitution.

The judgment and order are reversed and a new trial ordered.

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122 Cal.App. 402

PATTERSON v. REALTY HOLDING CORPORATION OF CALIFORNIA.

Civ. 7164.

District Court of Appeal, Second District, Division 1, California.

April 7, 1932.

Rehearing Denied May 2, 1932. Hearing Denied by Supreme Court June 4, 1932.

Corporations 🔑426(10).

Corporation receiving and accepting benefits of attorney's services *held* liable for their reasonable value, notwithstanding president was not formally authorized by directors to hire attorney (Civ. Code, § 1589).

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by Earl S. Patterson against the Realty Holding Corporation of California. From a judgment for plaintiff, defendant appeals.

Affirmed.

Halverson & Halverson, of Los Angeles, for appellant.

Patterson, Bailey & Montgomery, of Los Angeles, for respondent.

YORK, J.

This is an action wherein plaintiff seeks to recover for legal services rendered to the defendant corporation. The answer admits the services, but denies that they were rendered at defendant's instance and request or at the instance and request of any duly authorized officer or agent of the defendant, and alleges that any services rendered by plaintiff were contracted for by one W. Douglas Lee in his individual and personal capacity.

The court found the reasonable value of the services rendered by plaintiff to be the sum of $6,500, upon which defendant had paid the sum of $938.90 on account, leaving a balance due of $5,561.10, for which amount judgment was given, and from which the defendant now appeals.

Appellant contends that the findings are not supported by the evidence, and specifies certain errors in the admission of evidence. The finding as to the services which were rendered by plaintiff is as follows:

"IV. That the services constituted the organizing of the defendant corporation; in qualifying the defendant corporation in the State of California and securing various permits from the Commissioner of Corporations in the State of California; in drawing and engrossing various leases, papers, documents, contracts and other instruments in writing and in meeting and consulting with the Board of Directors and Executive Committee and counseling and advising said bodies; in interposing a defense to a certain suit brought against said defendant; in holding conferences with the officers and Executive Committee of the defendant corporation relative to the incorporation of a certain corporation to succeed the defendant in its business and in preparing Articles of Incorporation for said succeeding corporation, which Corporation was to be known as The Los Angeles Merchants Exchange Building Company."

After a careful check of the record in this case, we are convinced that there is sufficient evidence to support each finding made by the trial court, and that the defendant corporation was in no way prejudiced by the introduction of any of the evidence complained of.

The defendant corporation was incorporated by W. Douglas Lee and his associates under date of November 27, 1927; the services for which plaintiff seeks remuneration were rendered between the dates of September 1, 1927, and December 1, 1928. As was found by the court, these services included the work required in the organization of the corporation. Immediately upon its incorporation, W. Douglas Lee was elected president of the corporation and also a member of the board of directors. As such president he procured the services of an attorney, and the corporation, having received and accepted the benefits of the services rendered by such attorney, is liable for the reasonable value thereof, even though the president was not formally authorized by the directors to employ the attorney. Henry P. Goodwin v. Central Broadway Building Co., 21 Cal. App. 376, 131 P. 896; Burns v. Valley Bank, 94 Cal. App. 254, 271 P. 107; Civ. Code, § 1589.

The judgment is affirmed.

We concur: CONREY, P. J.; TAPPAAN, Justice pro tem.

122 Cal.App. 234

ASSOCIATED SALES CO., Inc., v. ELMER E. FROST & CO. et al.

Civ. 7196.

District Court of Appeal, Second District, Division 1, California.
March 30, 1932.

Rehearing Denied April 20, 1932. Hearing Denied by Supreme Court May 26, 1932.

1. Reference 🔑99(2).

Order referring matter to referee to be heard, tried, and determined was general in nature, and referee's finding stood as finding of court and judgment could be entered thereon (Code Civ. Proc. § 644).

2. Affidavits 🔑18.

Affidavits upon information and belief, where information was readily obtainable, had but weak probative force.

3. Account stated 🔑1.

Certainty of amount *held* vital to existence of account stated.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by the Associated Sales Company, Incorporated, against the Elmer E. Frost & Company and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

Louis Lamy and Mose Katzev, both of Los Angeles, for appellants.

John F. Clark and Hal R. Clark, both of Los Angeles, for respondent.

TAPPAAN, Justice pro tem.

[1] This is an appeal from a judgment in plaintiff's favor. The cause of action as joined involved an accounting between the parties, and the trial court referred the matter to a referee, to be "heard, tried and determined." Pursuant to this order, hearings were had and the referee made and filed her report and findings with the court. Thereafter, and on the date fixed for the hearing of said referee's report, appellants presented to the court exceptions to said report, and after a hearing thereon, the court refused to modify the referee's report and ordered judgment in accordance therewith. Appellants state their position on this appeal in the following language: "The defendants appeal from said judgment, and ask for a review by this Court of the trial court's action in refusing to modify the Referee's report." Although the record presented here is somewhat meager, there can be no doubt, after an examination of the order of reference, and the report and findings of the referee, that the order of reference was general in its nature, and under the provisions of section 644 of the Code of Civil Procedure, "The finding of the referee or commissioner upon the whole issue must stand as the finding of the court, and upon filing of the finding with the clerk of the court, judgment may be entered thereon in the same manner as if the action had been tried by the court." Lewis v. Grunberg, 205 Cal. 158, 162, 270 P. 181, 182. The finding made by the referee, in so far as it is material here, was a finding of fact. From an examination of appellants' specifications of error it appears that their objection was that the finding was unsupported by the evidence. From an examination of the evidence as presented in the bills of exceptions, there is found evidence supporting all of the questioned matters. "The evidence is certainly not very satisfactory, for it is conflicting, confused, and uncertain, but we cannot say that it is insufficient to support the finding." Jackson v. Puget Sound Lumber Co., 123 Cal. 97, 101, 55 P. 788, 790.

[2, 3] Appellants contend that as to certain commissions allowed in the account, these same commissions had been adjudicated in a former action between the same parties in the municipal court. That action was one in claim and delivery brought by the respondent as plaintiff to recover certain furniture held by appellant. A cross-complaint for storage was stricken. Judgment went for plaintiff. A proposed bill of exceptions in the claim and delivery case stated: "That said commissions claimed by plaintiff were allowed by the Court to be offset against the claim of the defendants for storage lien." The only attempt made by appellants to identify these commissions thus referred to with the commissions allowed in the account by the referee, was made at the time of the hearing on the report by the court, when appellants introduced two

affidavits, both on information and belief, and both averring that the judge of the municipal court considered the same commissions in rendering his judgment. Affidavits upon information and belief, especially where the sources of the information are readily obtainable, as was the case here, but were not brought forward, have but weak probative force. Higgins v. City of San Diego, 126 Cal. 303, 314, 58 P. 700, 59 P. 209. A question of fact was presented. At best appellants have shown but a conflict in the evidence. What has been said in reference to the matter of the commissions applies with equal force to appellants' contention that there was an account stated at some time between the parties. The record shows beyond question that any settlement made was conditional in nature and lacked that certainty of amount that is vital to the very existence of an account stated.

For the foregoing reasons the judgment appealed from is affirmed.

We concur: CONREY, P. J.; YORK, J.

122 Cal.App. 404

CALIFORNIA COTTON CREDIT CORPORATION v. SUPERIOR COURT OF CALIFORNIA IN AND FOR MADERA COUNTY.

Civ. 4661.

District Court of Appeal, Third District, California.

April 7, 1932.

1. Mandamus 🔑151(1).

Mandamus will not issue to require superior court to recall execution issued on judgment where judgment creditor is not made party.

> Mandamus will not issue, because interests of judgment creditor would be vitally affected by issuance of writ, and such creditor is entitled to his day in court before issuance.

2. Mandamus 🔑153.

Where absence of indispensable party was not called to court's attention until after hearing and submission of application for mandamus, statute permitting bringing in of additional parties will not be applied (Code Civ. Proc. § 389).

Application for writ of mandate by the California Cotton Credit Corporation against the Superior Court of the State of California in and for the County of Madera to require recall of an execution issued upon judgment.

Writ denied without prejudice.

Irvine P. Aten, of Fresno, for petitioner.

George Mordecai, of Madera, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

This cause is before us upon an application of the above-named petitioner for a writ of mandate to be directed to the respondent court, directing and requiring the recall of an execution issued upon a judgment in a certain action theretofore tried in the said court, known as and numbered "action 4587," wherein one J. W. Gilstrap obtained a judgment against the petitioner in the sum of $410 and costs, and further praying that said court, and that the defendant J. W. Gilstrap, in said action, his agents and representatives, be enjoined and restrained from proceeding with an execution in said action until the further order of this court.

It further appears by the record that the California Cotton Credit Corporation, a corporation, has instituted an action in said court against the defendant, J. W. Gilstrap, to recover the sum of $1,162.25, alleged to be the balance due upon a certain promissory note executed by the said Gilstrap to the California Cotton Credit Corporation, a corporation, secured by a chattel mortgage on growing crops and on certain personal property. The complaint in the action just referred to further prays that the judgment in favor of the defendant Gilstrap against the above-named corporation, as hereinabove mentioned, be set off and allowed as a credit upon the note and mortgage held by the California Cotton Credit Corporation, a corporation, against the said Gilstrap.

The facts as disclosed by the record show that during the month of March, 1931, J. W. Gilstrap executed a promissory note in favor of the California Cotton Credit Corporation, a corporation, for the principal sum of $3,600, and at the same time executed a chattel mortgage covering crops to be grown upon the premises described therein, and also including in the chattel mortgage the following personal property: "One Fordson tractor with plow attachments; one team of grey horses; one cotton planter; one riding cultivator; 1 section harrow; 2 sets of harness; 1 trailer; and one middle buster." Upon this note the record shows that there has been paid the principal sum of $2,437.35. Thereafter, the petitioner in this action began a suit against the said J. W. Gilstrap, in claim and delivery, and took possession from the said Gilstrap of the following personal property: "1 Roan horse, age 9, Wt. 1200#; 1 Bay horse, age 8, Wt. 1300#; 1 black mare mule,

age 10, Wt. 900#; 1 grey mare mule, age 10, Wt. 850#; 1 bay mare mule, age 9, Wt. 900#; 1 bay horse mule, age 9, Wt. 900#; 1 case tractor 15–27; 1 set double harness; 1 plow, John Deere 4-gang 10″; 1 Killifer disk; 1 planter; 1 John Deere cultivator; 1 cultivator; 2 sections spring-tooth harrow."

Upon the trial of this action the defendant Gilstrap had judgment for the return of said personal property, or the value thereof, including costs, in the sum of $410. This suit was prosecuted in the justice's court and was subsequently appealed to the superior court by the California Cotton Credit Corporation, a corporation, and a like judgment was therein entered in favor of the said Gilstrap against said corporation, for the return of said property, or the value thereof, in the sum which we have mentioned. The claim and delivery action for the possession of the personal property which we have described appears to have been prosecuted upon the theory that the property of which the plaintiff took possession was the property described in the chattel mortgage. The judgment of the court is, however, to the contrary, and a comparison of the descriptions of the property amply supports the judgment of the trial court.

[1] It is this judgment which the petitioner before us in the action now being prosecuted in the respondent court seeks to have offset as a credit against whatever judgment the corporation may obtain against the defendant Gilstrap, as a balance due upon the note and chattel mortgage referred to. In other words, that the amount of the judgment obtained by Gilstrap shall be allowed and entered as a credit on the indebtedness, if any, still existing in favor of the corporation, on the note and chattel mortgage, and this court is asked to enjoin the stay of execution, and by its writ of mandate require the trial court to recall the execution heretofore issued on the $410 judgment obtained by Gilstrap against the corporation.

By reason of what we have just stated it clearly appears that the interests of J. W. Gilstrap would be materially affected by the issuance of a writ of mandate and injunction herein as prayed for by the petitioner. His right to have the execution already issued carried into effect would be determined, and, if an injunction were issued, his right to take any proceedings based upon the judgment which he holds against the petitioner would likewise be affected; the same would be true were an order made directing the trial court to make any orders by reason of which the judgment in the sum of $410 held by Gilstrap against petitioner should be considered as a credit or offset to any judgment that might be obtained by the petitioner in its foreclosure suit. Such orders cannot be made, nor can it be determined whether the property, or any portion thereof, for the conversion of which Gilstrap obtained judgment against petitioner, was or was not exempt without affecting Gilstrap's right or interest therein.

The foregoing clearly establishes that Gilstrap is entitled to his day in court. Without the presence of parties whose interests are substantially affected, the writ prayed for will not lie, and the relief asked by petitioner will not be granted.

In Powell v. People ex rel., 214 Ill. 475, 73 N. E. 795, 105 Am. St. Rep. 117, 2 Ann. Cas. 551, it is directly held that mandamus will not lie where it appears upon the face of the petition or the face of the record that a necessary party, or a party whose interests are directly affected, has been omitted; the court of its own motion will decline to issue the writ. There, as here, the want of the necessary party appeared upon the record, and it was there held that a plea of such want of the necessary party was not necessary to bring the fact to the attention of the court.

The same rule is set forth in 18 Ruling Case Law, 330. The text supported by the authorities cited is to the effect that, while proceedings in mandamus may be against an officer who is required to act, yet, when the interests of third persons are affected by the judgment, such persons must be made parties or the writ will not issue.

To the same effect is the text found in 38 C. J. 853, where authorities are cited to the effect that it is generally held that parties whose interests are affected should be joined as respondents.

That mandamus will not lie under such circumstances is also held in Farmers' High Line Canal Co. v. People, 8 Colo. App. 246, 45 P. 543; State v. Trustees of Internal Improvement Fund, 20 Fla. 402; Dement v. Bokker, 126 Ill. 174, 19 N. E. 33; Cullem v. Latimer, 4 Tex. 329.

[2] By reason of the fact that this defect in the proceedings was not called to the attention of the court until after hearing was had and the cause submitted for determination, and being also in the nature of a summary proceeding for a prerogative writ, we do not think that section 389, Code of Civil Procedure, providing for the bringing in of additional parties, should be resorted to, assuming that the provisions of that section apply.

The petition herein is denied without prejudice.

We concur: PRESTON, P. J.; R. L. THOMPSON, J.

122 Cal.App. 458

KRULY et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 8289.

District Court of Appeal, Second District, Division 2, California.

April 11, 1932.

Dismissal and nonsuit ⚷60(2).

Where plaintiff introduced his evidence and rested, and case, not having been finally submitted, was reset years thereafter, defendants *held* not entitled to require dismissal under statute requiring dismissal unless action is "brought to trial" within five years after filing of answer (Code Civ. Proc. § 583).

> Defendants were not entitled to have action dismissed, since case had in fact been "brought to trial" and Code Civ. Proc. § 583 does not require dismissal where case has been brought to trial, nor does it require dismissal during suspension of proceedings after case has been brought to trial.

Application by J. L. Kruly and another for a writ of mandate directed to the Superior Court of the State of California, in and for the County of Los Angeles, to compel respondent to dismiss an action against petitioners.

Alternative writ discharged, and peremptory writ denied.

Morse & Shoop and George R. Maury, all of Los Angeles, for petitioners.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Deputy Co. Counsel, both of Los Angeles, for respondent.

CRAIG, Acting P. J.

In an action commenced in the superior court of Los Angeles county against the petitioners herein, as defendants, the plaintiff, pursuant to all preliminary proceedings the regularity of which is not in question, introduced his evidence and rested. Some years thereafter the same was reset, whereupon the said defendants moved to dismiss the action upon the ground that section 583 of the Code of Civil Procedure constituted a mandatory legislative cessation of the cause of action. Said section recites, in part: "* * * Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the defendant has filed his answer, except where the parties have stipulated in writing that the same may be extended. * * *"

The petitioners erroneously interpret numerous decisions requiring the dismissal of actions under the foregoing provisions which had been set for trial but had not been "brought to trial," as determinative of the question here presented. In Hoopes v. Superior Court, 71 Cal. App. 564, 235 P. 739, 741, quoting from Boyd v. Southern Pacific R. Co., 185 Cal. 344, 197 P. 58, it was said: " 'The trial of an action and the setting of it for trial are quite distinct things, and an action is certainly not brought to trial until the trial is commenced.' " It is not denied that as distinguished from those cases, the instant case was in fact brought to trial. It is conceded that the trial was commenced and, for aught that may be made to appear by the record before us, was concluded with the exception of final submission. The section invoked by the petitioners does not require a dismissal notwithstanding such action is brought to trial within the time therein specified, nor during suspension of proceedings after the same shall have been brought to trial. Its language is clear in this respect, and is conclusive.

The alternative writ is discharged, and the peremptory writ of mandamus is denied.

We concur: IRA F. THOMPSON, J.; FRICKE, Justice pro tem.

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122 Cal.App. 370

OREKAR et al. v. LAGER.

Civ. 8404.

District Court of Appeal, First District, Division 2, California.

April 6, 1932.

Rehearing Denied May 6, 1932. Hearing Denied by Supreme Court June 2, 1932.

1. Lis pendens ⚷18.

Mere pendency of suit does not charge subsequent purchaser with notice, in absence of lis pendens of record (Code Civ. Proc. § 409).

2. Lis pendens ⚷18.

Where plaintiff filed lis pendens but cross-complainants did not, purchaser pendente lite is not affected with constructive notice of facts alleged in cross-complaint (Code Civ. Proc. § 409).

Appeal from Superior Court, City and County of San Francisco; J. B. Landis, Judge.

Action by Frank Orekar and another against David Lager. From a judgment for plaintiffs, defendant appeals.

Reversed.

Henry E. Monroe, of San Francisco (Julia M. Easley, of San Francisco, of counsel), for appellant.

Marion Vecki, of San Francisco, for respondents.

TUTTLE, Justice pro tem.

This action was brought to annul and cancel a deed of trust. Judgment went for plaintiffs, and the appeal is prosecuted from said judgment.

On June 17, 1927, one Tony Ownes filed a suit against respondents herein and Pacific Coast Apartment Builders' Corporation, seeking to set aside a deed from respondents to said corporation, upon the ground that the same was executed for the purpose of defrauding plaintiff, a creditor. Upon the same day the plaintiff in said action duly filed for record a lis pendens, giving notice of the pendency of the action.

On November 18, 1927, respondents herein filed an amended answer and cross-complaint in said action, seeking to set aside as fraudulent a deed whereby they had conveyed said real property to said corporation. The cause of action was alleged false representations made by Anton Usik and the said corporation, who were named as cross-defendants. No lis pendens was filed by the cross-complainants.

On December 29, 1927, Pacific Coast Apartment Builders' Corporation executed a deed of trust covering said property, to secure the payment of the sum of $2,200. Appellant herein is the grantee and assignee of the beneficiary under said deed of trust.

On March 28, 1928, judgment in said action was entered in favor of respondents herein setting aside their deed to said corporation.

Upon proof of the foregoing facts, the trial court in this case adjudged that respondents' title be quieted against said corporation, and enjoined the latter from setting up any claim to said real property. The effect of the judgment was to annul the trust deed, and thus deprive appellant of his security.

It is conceded by both parties that the sole question involved in this appeal is whether or not the said trust deed was taken subject to constructive notice of the right and interest in the real property which respondents sought to assert in their said cross-complaint. Appellant contends that the lis pendens recorded when the complaint was filed was not constructive notice of the pendency of the action set forth in the cross-complaint. It is the contention of respondents "that the lis pendens recorded by the plaintiff, Tony Ownes, gave notice to the world of the claim of defendants Frank and Barbara Orekar (respondents herein), at least from the time that their cross-complaint was filed."

Section 409 of the Code of Civil Procedure reads as follows: "In an action affecting the title or the right of possession of real property, the plaintiff, at the time of filing the complaint, and the defendant, at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterwards, may record in the office of the recorder of the county in which the property is situated, a notice of the pendency of the action, containing the names of the parties, and the object of the action or defense, and a description of the property in that county affected thereby. From the time of filing such notice for record only, shall a purchaser or encumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names."

[1, 2] It has been held that the mere pendency of a suit does not, as at common law, charge the subsequent purchaser. A notice of lis pendens must appear of record. Warnock v. Harlow, 96 Cal. 298, 31 P. 166, 31 Am. St. Rep. 209. It will be noted that the statute we have quoted expressly provides that "the defendant, at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterwards, may record * * * a notice of the pendency of the action." In the Ownes case affirmative relief was claimed in the answer, and an entirely distinct and different cause of action from that contained in the complaint was alleged. This much is conceded by all parties hereto. The cross-complainants in that case (respondents herein) admittedly and obviously failed to comply with the provisions of the statute in neglecting to file a lis pendens when their cross-complaint was filed, or at any time afterwards. They argue that when appellant or his grantor saw the record of the lis pendens filed by the *plaintiff* in the action, he was thereby charged with notice of the allegations of all pleadings on file in said action, including the cross-complaint. To adopt such a rule would abrogate the express provisions of the Code section. If the Legislature had in mind such result, why did it provide for a lis pendens for *both* the complaint of plaintiff and the affirmative relief of defendant? Can we assume that they meant what they said in one case, and made an idle gesture in the other? If no lis pendens is filed by the plaintiff, there is no constructive notice of the pendency of the action, and purchasers and encumbrancers without actual notice take title free and clear of any rights asserted in the action and any subsequent judgment rendered therein. Where defendant in his answer sets up an affirmative defense based upon an absolutely different cause of action, the same rule is laid down by the statute.

In the numerous cases cited by both counsel herein, no statute similar to or resembling our Code section is involved. In the state of

Georgia, where the common-law rule obtains, and the lis pendens dates from the filing of the complaint, it was held that: "Relatively to such affirmative cross-action or cross-complaint the defendant occupies the position of a plaintiff, and the lis pendens as to such cross-complaint operates as against a purchaser from the plaintiff only from the time when it is filed." Bridger v. Exchange Bank, 126 Ga. 821, 830, 56 S. E. 97, 101, 8 L. R. A. (N. S.) 463, 115 Am. St. Rep. 118. Quoting further from that case, the court says: "If the rule which we have suggested above is not a correct one, and if a person who purchases from a plaintiff in a pending lawsuit were bound to anticipate all possible cross-complaints, which might greatly broaden the scope of the action or alter the nature of the relief sought, and if he were affected by the lis pendens as to all such possible cross-complaints before they were filed, it would be an exceedingly dangerous matter to purchase property at all from any person who might happen to be either plaintiff or defendant in any sort of action." The foregoing case is referred to for the purpose of indicating that under the common-law rule, where a cross-complaint is filed, the defendant becomes an actor, and to all intents and purposes a plaintiff, and that the general doctrine of lis pendens applies with equal force to both. Such is the rule laid down in 2 Pomeroy's Equity Jurisprudence (4th Ed.) § 634.

Respondents rely upon the case of Welton v. Cook, 61 Cal. 481. An examination of that opinion discloses that the court expressly refrained from determining this question. Plaintiff filed an ordinary complaint to quiet title, and recorded a lis pendens. Defendant cross-complained by seeking to quiet title to the same property. Pending the action plaintiff conveyed the property to one Cook. Judgment was rendered for defendant, who brought suit to quiet title against Cook. The latter contended that he was not bound by the action for the reason that no lis pendens had been filed by the defendant. The court stated that, "admitting (which we do not) that in such case the Weltons [defendants] were bound to file a notice of their claim for affirmative relief, as Cook had notice that an equitable action was pending, the judgment of the court that Learned had no title was binding upon him." 61 Cal. page 486. "By the lis pendens filed by the plaintiff (Learned) in that action, his grantee (Cook, defendant here) had notice that while he, Learned [the plaintiff], claimed to be the rightful owner of the premises, the defendants, Weltons, claimed an interest therein adverse to him, and that the Court was asked to adjudicate upon the respective claims." 61 Cal. page 486. In other words, as the causes of action in the complaint and cross-complaint were identical, a lis pendens filed under one would be notice of both. A cross-complaint filed under such circumstances does not set up "affirmative relief," in the sense that such words are used in the statute, hence no lis pendens is required.

The notice relied upon by respondents is constructive only, and no attempt was made at the trial to prove actual notice, either express or implied. Judging from the record before us, it is quite possible that such matters may be developed upon a retrial of the case. We are constrained to hold, however, that appellant cannot be charged with constructive notice of the allegations of the cross-complaint by reason of the failure of respondents to comply with the provisions of section 409 of the Code of Civil Procedure.

The judgment is reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.

KINGSBURY v. ROSS.*

Civ. 7061.

District Court of Appeal, Second District, Division 2, California.

April 11, 1932.

Rehearing Denied May 11, 1932. Hearing Granted by Supreme Court June 9, 1932.

Executors and administrators ⟹315(6).

In suit for rents and profits collected by administrator from lands to which plaintiff claimed title, final decree of distribution of estate to defendant *held* not subject to collateral attack.

Appeal from Superior Court, Los Angeles County; Stephen G. Long, Judge.

Action by J. M. Kingsbury against Estelle M. Ross. From a judgment for defendant, plaintiff appeals.

Affirmed.

W. S. Allen and Lawrence W. Allen, both of Los Angeles, for appellant.

Charles S. Darden, of Los Angeles, for respondent.

CRAIG, Acting P. J.

The plaintiff and appellant instituted an action, founded upon an assertion of title to certain real property, demanding the rents, issues, and profits derived therefrom and collected by the administrator of the estate of a deceased person. He appealed from a judgment rendered in favor of the defendant.

The undisputed evidence upon which judgment was rendered below showed that a deed purporting to convey title to said property

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⟹For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 19 P.2d 784.

had previously been set aside, that the administrator had rendered an account, and that the final decree of distribution to respondent had been entered. The decree is not subject to collateral attack, and upon that ground alone the respondent must prevail. In re Estate of Schmierer, 168 Cal. 747, 145 P. 99.

The judgment is affirmed.

We concur: IRA F. THOMPSON, J.; FRICKE, Justice pro tem.

122 Cal.App. 448

HAMMOND LUMBER CO. et al. v. TIMOURIAN.

Civ. 8251.

District Court of Appeal, First District, Division 2, California.
April 11, 1932.

1. Appeal and error ⚷673(2).
Claim that plaintiffs' rights were exhausted by sale cannot be considered on appeal, where record fails to show sale.

2. Appeal and error ⚷544(2).
Appeal on judgment roll alone is limited to determination whether complaint is sufficient, whether findings are within issues, whether judgment is supported thereby, and whether reversible error concerning matter of law appears on record.

3. Appeal and error ⚷544(3).
Appellate court is limited to errors appearing on face of judgment roll, where appeal is prosecuted on judgment roll alone.

4. Appeal and error ⚷101(2).
Order denying motion to discharge receiver and pay over money in receiver's hands is not appealable (Code Civ. Proc. § 963).

5. Appeal and error ⚷900.
Every intendment and presumption not inconsistent with record must be indulged in favor of orders of superior courts.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by the Hammond Lumber Company and another against O. Timourian. From a judgment for plaintiffs, and from an order denying defendant's motion to discharge a receiver and pay over to defendant money in receiver's hands, defendant appeals.

Affirmed.

Y. B. Arsen, of Los Angeles, for appellant.

R. L. Horton, of Los Angeles, for respondents.

JAMISON, Justice pro tem.

This action was brought to foreclose a chattel mortgage. Judgment was rendered for plaintiff, and, from this judgment, defendant has appealed.

This appeal is brought up on the judgment roll alone, and is from the judgment and from the order of the trial court denying defendant's motion to discharge the receiver and pay over to defendant money in the hands of the receiver.

The amended complaint is in the usual form for the foreclosure of chattel mortgages. Appellant answered the amended complaint, denying that plaintiff was the owner of the promissory note or the chattel mortgage securing same, or that said note was unpaid, and also set up other alleged defenses.

The court found that all the allegations of the amended complaint were true, and that all the denials and special defenses set forth in appellant's answer to said amended complaint were untrue, and that respondent was entitled to judgment foreclosing the said chattel mortgage.

[1] Appellant contends that the sale of the real estate under the deed of trust exhausted respondent's rights, and a successive action to foreclose the chattel mortgage will not lie.

There is nothing in the record before the court indicating that any real estate was sold under a deed of trust. Therefore this contention cannot be considered on this appeal.

His next contention is that no sufficient showing was made by affidavits or otherwise, to warrant the appointment of a receiver in this action.

[2] This appeal being on the judgment roll alone, we are limited in our review to a determination of the question, Do the findings support the judgment? (1) That is to say, does the complaint state a cause of action? (2) Are the findings within the issues? (3) Is the judgment supported by the findings? (4) Does reversible error concerning a matter of law appear on the face of the record? Macowsky v. Irvine, 71 Cal. App. 77, 234 P. 839; Norton v. Newerf, 45 Cal. App. 10, 187 P. 57.

[3] Where an appeal from a judgment is prosecuted on the judgment roll alone, the appellate court is confined to a consideration of the alleged errors appearing on the face of the judgment roll. Marr v. Southern Calif. Gas Co., 198 Cal. 278, 245 P. 178; Neale v. Morrow, 174 Cal. 49, 161 P. 1165. There is nothing in this record showing or

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

tending to show upon what facts or affidavits the court appointed a receiver in this case. The presumption must be, in the absence of such showing, that the court was justified in making such appointment.

[4] Appellant next contends that the court erred in denying appellant's motion to discharge the receiver and pay over money held by him to appellant. This order of the court is not appealable. Section 963, Code Civ. Proc. Moreover, there is nothing in the record showing the grounds for this motion, nor the facts upon which it is based.

[5] It is a well-settled principle that every intendment and presumption not contradicted by or inconsistent with the record on appeal must be indulged in favor of the orders and judgments of superior courts. 2 Cal. Jur. 852.

The judgment is affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

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122 Cal.App. 296

BRODER v. BRODER.

Civ. 8258.

District Court of Appeal, First District,
Division 2, California.
April 1, 1932.

1. Divorce 🔑327.

Facts showed that husband was not bona fide resident of Nevada when obtaining divorce from nonresident wife.

> Facts disclosed that California resident obtained an interlocutory decree of divorce against his wife in California, which was set aside because of fraud in procuring order for publication of summons, that he dismissed the action, and thereafter went to Nevada and started divorce proceedings, stayed there a month or so, and then returned to California, where he engaged in business and only returned to Nevada to procure the decree about two months later, and that he returned to California two days thereafter, and has never subsequently gone back to Nevada.

2. Divorce 🔑327.

Nevada divorce obtained by husband, not bona fide resident, on substituted service of nonresident wife, *held* invalid.

3. Husband and wife 🔑283(2).

That husband had venereal disease justified wife's refusal to cohabitate with him, warranting separate maintenance on his subsequently deserting her (Civ. Code, § 96).

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Gertrude Broder against Gustave K. Broder for separate maintenance. From an adverse judgment, defendant appeals.

Affirmed.

Charles G. Young and Walter A. Ham, both of Los Angeles, for appellant.

I. B. Kornblum, of Los Angeles, for respondent.

DOOLING, Justice pro tem.

This is an appeal from a decree for separate maintenance granted respondent, a resident of the state of New York, against appellant, a resident of this state.

[1, 2] Appellant had secured a decree of divorce from respondent in Nevada on June 30, 1928, upon substituted service. In the case now on appeal the trial court found that the Nevada decree was invalid, for the reason, among others, that appellant herein was not a bona fide resident of Nevada when he commenced the action in which that decree was obtained. The evidence amply sustains this finding. In this behalf it shows that on December 21, 1926, appellant secured an interlocutory decree of divorce from respondent in Los Angeles county, Cal., upon service by publication; and that this interlocutory decree was set aside on motion of respondent on July 12, 1927, upon the ground that the order for publication of summons had been procured by fraud. At that time appellant was allowed ten days to file an amended complaint, but instead dismissed the action. Thereafter he went to Nevada, about the end of October, 1927, started the divorce proceedings there on February 8, 1928, secured an order for publication of summons on the same day, returned to Los Angeles in April, 1928, and engaged there in business, and only returned to Nevada in June, 1928, at the solicitation of his attorney to procure the decree of divorce; returned to Los Angeles two days after the decree was granted and never thereafter went back to Nevada. The mere recital of these facts is sufficient to show that the trial court in the case here on appeal committed no abuse of discretion in finding that appellant was not a bona fide resident of Nevada, and as a consequence the decree of divorce obtained on substituted service was invalid. 9 Cal. Jur. p. 816.

[3] The trial court found that appellant deserted respondent in New York in October, 1924. Appellant claims that respondent deserted him by refusing to cohabit with him for one and one-half years previous to that date. Respondent admitted the refusal to cohabit for that period of time, but stated that it was because appellant had a venereal

disease. This justified the refusal. Civ. Code, § 96. The fact that appellant denied having such disease merely created a conflict which was resolved in respondent's favor by the trial court. Appellant left New York for California while respondent was away from home. The evidence is in conflict as to whether respondent left their home with appellant's consent, and on this point too the conflict was resolved in respondent's favor.

Judgment affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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122 Cal.App. 391

SUN LUMBER CO. v. BRADFIELD et al.

Civ. 8241.

District Court of Appeal, First District, Division 2, California.

April 7, 1932.

1. Appeal and error 🔑761.

Court rule requiring appellant to present each point separately under appropriate heading applies to all briefs, regardless of length (Supreme Court and District Courts of Appeal Rule 8).

2. Pleading 🔑8(12).

In action to quiet title, defendant could in answer set forth nature of claim of lien and allege ultimate fact that claim of lien was valid and subsisting lien and a prior claim to that of plaintiff.

3. Quieting title 🔑47(2).

Findings, following allegations, that defendant had valid materialman's lien prior to plaintiff's claim, *held* sufficient as findings of ultimate fact.

4. Quieting title 🔑47(2).

Findings that defendants had prior claim on property consisting of valid materialman's lien supported decree that defendants had valid materialmen's lien prior to plaintiff's claim.

5. Mortgages 🔑186(6).

Findings respecting date trust deed was recorded, dates deed to trustors was acknowledged and recorded, and date materialmen commenced furnishing materials, *held* not in conflict with finding that materialman's lien was prior to trust deed (Code Civ. Proc. § 1186).

> Court found that deed of trust was recorded on December 3, 1926, that deed by which trustors acquired title was dated November 26, 1926, was acknowledged December 6, 1926, but was not recorded until December 31, 1926, and that materialmen commenced to furnish materials on December 7, 1926. Code Civ. Proc. § 1186, provides that mechanics' liens are preferred to any lien, mortgage, or other incumbrance which may have attached, subsequent to time when improvement was commenced, work done, or materials were commenced to be furnished.

6. Mortgages 🔑151(3).

Deed of trust *held* "lien" or "incumbrance," within statute respecting priority of mechanics' liens (Code Civ. Proc. § 1186).

[Ed. Note.—For other definitions of "Incumber; Incumbrance" and "Lien," see Words and Phrases.]

7. Mortgages 🔑151(3).

Trust deed does not "attach" within statute respecting mechanics' liens until trustor has acquired title (Code Civ. Proc. § 1186).

[Ed. Note.—For other definitions of "Attach," see Words and Phrases.]

8. Mechanics' liens 🔑198.

Word "attached," as used in mechanics' lien statute regarding priority of liens, has no relation to recordation of instrument creating lien or incumbrance (Code Civ. Proc. § 1186).

9. Deeds 🔑194(3).

Presumption that deed to trustors was executed and delivered on date it bore *held* disputable.

10. Appeal and error 🔑900.

Every intendment and presumption not contradicted by, or inconsistent with, record on appeal, must be indulged in favor of judgment.

11. Appeal and error 🔑907(2).

Where evidence was not brought up, appellate court must presume that evidence showed facts supporting decree.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by the Sun Lumber Company against Herman C. Bradfield and another. From a decree for defendants, plaintiff appeals.

Affirmed.

Glen Behymer, of Los Angeles, for appellant.

John F. Poole, of Los Angeles, for respondents.

SPENCE, J.

In this action to quiet title, the trial court entered its decree quieting the title of plaintiff and appellant against defendants, with the exception of respondents herein, and as to said respondents it decreed that they had a valid materialman's lien upon the premises which was prior to the claim of said appellant. This appeal is taken upon the judgment roll.

The property involved in this action is known as lot 237 of tract 5980 as per map thereof recorded in the records of Los Angeles county. Appellant claims as the purchaser on a foreclosure sale under the hereinafter mentioned deed of trust. Respondents claim a materialmen's lien for materials used in the construction of the building on the premises. There is no controversy concerning either the regularity of the sale under the deed of trust or the regularity of the steps taken to perfect the materialmen's lien.

[1] Before discussing the merits of this appeal, we deem it appropriate to state that appellant has failed to observe the requirements of rule 8 of the Rules of the Supreme Court and District Courts of Appeal. Appellant has made no attempt whatever to "present each point separately, under an appropriate heading, showing the nature of the question to be presented." This rule applies to all briefs, regardless of length or number of points involved, and, under the provisions of the rule, failure to comply therewith may result in a dismissal of the appeal. This rule has been in effect for many years, and has been called to the attention of the bar in numerous opinions. Dismissals may be required to compel its observance. In the present case, however, we are not inclined to take such drastic action, as appellant's briefs are short, and apparently raise the sole question of priority as between the deed of trust and the materialmen's lien.

As the record on appeal embodies only the judgment roll, we assume that it is appellant's contention that the findings of fact do not support the judgment. There is no merit in this contention. The trial court made findings to the effect that appellant "is the owner" of the premises, that the defendants other than respondents "have no right, title, interest or claim whatsoever" therein, and that respondents "have a claim on said real property prior and senior to the claim" of appellant "consisting of a valid and subsisting materialmen's lien." There were further findings, among which were findings following the allegations of the answer relating to the nature and amount of said lien.

[2-4] Appellant seems to ignore the trial court's findings regarding the validity and priority of respondents' lien, and probably does so on the theory that such findings are mere conclusions of law. These findings, although they are conclusions of law in the strict sense, may not be ignored. Under our system of pleading, there are many instances in which certain conclusions of law may be pleaded as ultimate facts. The present action to quiet title is a typical example. In the complaint appellant alleged that it was "the owner," and that respondents had "no right, title or interest" in the premises. These are conclusions of law in the fullest sense, but no one would have the temerity to challenge their sufficiency as allegations of ultimate facts. In our opinion, it was proper for respondents in their answer to set forth as they did the nature of their claim of lien, and to allege as an ultimate fact "that said claim of lien is now a valid and subsisting lien on said real property and a prior claim to that of plaintiff herein." The issues were thus defined, and the trial court's findings were responsive to all of the issues made by the pleadings. If the allegations referred to were sufficient as allegations of ultimate facts, it follows that the findings following the language of such allegations were sufficient as findings of ultimate facts. It has been held, in an action to quiet title involving a defendant's claim of a judgment lien upon the premises, that findings that defendant had "no lien" and that the judgment "is not now and never has been a lien" are sufficient as findings of fact. Dam v. Zink, 112 Cal. 91, 44 P. 331. In that case the court points out at page 93 of 112 Cal., 44 P. 331, 332 that the only purpose of findings is to respond to the issues made by the pleadings, and, "if facts are stated in the findings in the same way in which they are stated in the pleadings, they are sufficient." See, also, Kohner v. National Surety Co., 105 Cal. App. 430, 440, 287 P. 510; Chaban v. Pittler, 105 Cal. App. 205, 207, 287 P. 151. Similarly, a finding that plaintiff "has no prescriptive right" has been declared to be one of fact. Weidenmueller v. Stearns, etc., Co., 128 Cal. 623, 61 P. 374. It is our conclusion that the findings in the present case relating to the validity and priority of respondents' claim of lien were sufficient as findings of ultimate facts, and, if we are correct in this conclusion, these findings support the decree. If appellant was of the opinion that the evidence was insufficient to support these findings, the evidence should have been brought up as a basis for challenging them. Weidenmueller v. Stearns, etc., Co., supra, page 626, of 128 Cal., 61 P. 374.

[5-8] We now come to a consideration of the findings to which appellant does make reference. These findings involve certain dates, none of which were set forth in the pleadings. The trial court found that the deed of trust was recorded on December 3, 1926, and further found that the deed by which the trustors acquired title was dated November 26, 1926, was acknowledged December 6, 1926, but was not recorded until December 31, 1926. It is conceded, as found by the trial court, that respondents commenced to furnish the materials on December 7, 1926. In other words, these findings show that the deed of trust was recorded before respondents furnished the materials,

but further show that the deed by which the trustors acquired title was not recorded for some time thereafter. It does not appear when this deed was delivered to the trustors. We find no conflict between these findings and the findings relating to priority of respondents' lien, as it does not appear from these findings that the deed of trust attached prior to the time that respondents' lien attached.

Section 1186 of the Code of Civil Procedure provides: "The liens provided for in this chapter are preferred to any lien, mortgage, or other encumbrance which may have attached subsequent to the time when the building, improvement, or structure was commenced, work done, or materials were commenced to be furnished; also, to any lien, mortgage, or other encumbrance of which the lienholder had no notice, and which was unrecorded at the time the building, improvement, or structure was commenced, work done, or the materials were commenced to be furnished." A deed of trust is treated as a lien or incumbrance within the meaning of said section. Williams v. Santa Clara Mining Association, 66 Cal. 193, 200, 5 P. 85; 25 Cal. Jur. 13.

It is conceded that respondents' lien attached when they commenced to furnish materials on December 7, 1926. Sax v. Clark, 180 Cal. 287, 290, 180 P. 821. It is obvious that said section 1186 was intended to give materialmen's liens priority in all cases over other liens and incumbrances which may have attached subsequently, and also to give priority under certain circumstances over those which may have attached previously. Unless the findings referred to by appellant show the deed of trust attached previously and not subsequently, they cannot be said to be in conflict with the finding of priority of the materialmen's lien over the deed of trust.

The word "attached" has been variously defined, but it cannot be said that a deed of trust or mortgage has attached until the trustor or mortgagor has acquired title to the property. If the trustor or mortgagor never acquires title, the deed of trust or mortgage never attaches, but, in case of after-acquired title, the deed of trust or mortgage attaches at the time that title is acquired. 17 Cal. Jur. 854, § 142. The word "attached," as used in the first portion of the above section, has no relation to the recordation of the instrument creating the lien or incumbrance. An unrecorded deed of trust or mortgage duly executed and delivered by one having title may be said to have attached, but a recorded deed of trust or mortgage cannot be said to have attached if the trustor never acquires any title to the property. It may be observed that it has been held that no constructive notice is given by the recordation of such an instrument executed by a stranger to the record title. Bothin v. California Title Insurance & Trust Company, 153 Cal. 718, 723, 96 P. 500, Ann. Cas. 1914D, 634.

[9-11] Appellant apparently concedes these propositions, but contends that there is a presumption that the deed to the trustors was executed and delivered on the date which it bore, citing Williams v. Belling, 76 Cal. App. 610, at page 615, 245 P. 455. Such presumption is disputable, and, from aught that appears in the record on appeal, the evidence in the case may have been to the contrary. Here appellant is seeking to invoke a presumption to defeat the decree, but an appellate court will not indulge in presumptions for that purpose. It is well settled that every intendment and presumption not contradicted by or inconsistent with the record on appeal must be indulged in favor of the judgment of the trial court. 2 Cal. Jur. 852. Appellant has failed to bring up a record showing the evidence before the trial court, and it must be presumed in support of the decree that the evidence showed that the deed to the trustors was not delivered until after respondents commenced to furnish materials, and that therefore the deed of trust did not attach previously but subsequently. This presumption is not contradicted by, or inconsistent with anything found in the record, and is entirely in accord with the trial court's finding of priority of respondents' lien.

The decree is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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122 Cal.App. 783

SUN LUMBER COMPANY (a Corporation), Plaintiff and Appellant, v. Herman C. BRADFIELD et al., Defendants and Respondents.

Civ. 8242.

District Court of Appeal, First District,
Division 2, California.
April 7, 1932.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Glen Behymer, of Los Angeles, for appellant.

John F. Poole, of Los Angeles, for respondents.

SPENCE, J.

In this action to quiet title, the trial court entered its decree quieting the title of plain-

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

tiff and appellant against defendants with the exception of respondents herein, and as to said respondents it decreed that they had a valid mechanics' lien upon the premises which was prior to the claim of said appellant. This appeal is taken on the judgment roll.

The property here involved is known as lots 16 and 17 in tract 3131 as per map thereof recorded in the records of Los Angeles county. The facts herein present precisely the same questions as those presented on the appeal in Sun Lumber Co. v. Bradfield et al. (Cal. App.) 10 P.(2d) 183. The opinion in said last-named appeal has been this day filed, and, for the reasons therein stated, the decree herein is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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122 Cal.App. 421

KAYE v. JACOBS et al.

Civ. 738.

District Court of Appeal, Fourth District, California.

April 8, 1932.

Rehearing Denied April 30, 1932. Hearing Denied by Supreme Court June 4, 1932.

1. Assignments for benefit of creditors 🔑51.

Evidence justified finding that assignor's assignment as president of jewelry company of all interest in his business was not corporate, but personal, assignment for creditors, enabling assignor's creditor to recover trust funds in assignee's hands.

> Facts disclosed assignor, as president of jewelry company, executed instrument reading: "I hereby assign all interest in my business known as the Christie Jewelry Co., to H. A. J., with the understanding that H. A. J. is to act for all the creditors," and that assignor was owner of practically all stock in jewelry company, that corporation was entirely under his control, and that assignor had moved business to another city and adopted new name without any pretense of corporate action.

2. Assignments for benefit of creditors 🔑53, 81, 170.

Corporation president's assignment of business for benefit of creditors not made to sheriff with listing of creditors nor acknowledged or recorded *held* void as to nonconsenting creditor (Civ. Code, §§ 3449, 3458, 3459).

3. Fraudulent conveyances 🔑47.

Assignment of stock in trade for benefit of certain class of creditors without prior notice of intended transfer as provided in statute was conclusively presumed fraudulent and void against nonconsenting creditor (Civ. Code, §§ 3440, 3459).

4. Appeal and error 🔑1010(1).

Whether delivery and change of possession accompanied transfer of stock in trade is fact question for trial court, whose decision is conclusive when supported by substantial evidence.

5. Assignments for benefit of creditors 🔑51.

Evidence sustained finding that transfer of stock in trade for benefit of creditors was not accompanied by immediate delivery or continued change of possession and therefore presumably fraudulent (Civ. Code, §§ 3440, 3459).

6. Assignments for benefit of creditors 🔑138.

Evidence supported finding that grantor in absolute deed to realty assigned property for benefit of only mercantile creditors, making assignment void as to nonassenting creditor excluded from participation (Civ. Code, §§ 3440, 3459).

7. Appeal and error 🔑931(4).

Where court made no express finding on issue of laches, appellate court must presume in support of judgment issue was decided favorably to party prevailing below.

8. Assignments for benefit of creditors 🔑347.

Whether claim of creditor suing to recover trust funds in hands of debtor's assignee was barred by laches is within chancellor's discretion.

9. Equity 🔑72(1).

Delay alone does not constitute laches, unless accompanied by circumstances resulting in prejudice to some party.

10. Assignments for benefit of creditors 🔑347.

22 months' delay in bringing suit to recover trust funds in assignee's hands after date of assignment for creditors did not constitute laches, barring suit, where no prejudice was shown.

Appeal from Superior Court, Kern County; William D. Dehy, Judge.

Action by W. W. Kaye against Henry A. Jacobs and another. From judgment for plaintiff, named defendant appeals.

Affirmed.

Jacobs, Blanckenburg & May, of San Francisco, for appellant.

Siemon & Garber, of Bakersfield, for respondent.

JENNINGS, J.

The action herein was instituted by plaintiff to recover from defendant Jacobs certain trust funds in the latter's possession, being the proceeds of a sale of personal property transferred to Jacobs by M. M. Lichtenstein and for the purpose of impressing a lien upon and of subjecting to execution sale certain real estate transferred to defendant Jacobs by the owner, M. M. Lichtenstein. From a judgment rendered in favor of plaintiff, defendant Jacobs appeals.

The record presents the following facts: On July 1, 1916, articles of incorporation of the Lichtenstein Company were executed by three incorporators. Among the purposes for which the corporation was stated to be formed was that of buying, selling, and dealing in jewelry. The place where the principal business of the corporation would be transacted was stated to be San Francisco, Cal. The articles of incorporation were filed in the office of the county clerk of the city and county of San Francisco and in the office of the secretary of state during the month of July, 1916. They appear also to have been filed in the office of the county clerk of Kern county on September 17, 1921. On September 8, 1921, a resolution was unanimously passed at a regular meeting of the corporation, changing the principal place of business from the city and county of San Francisco to the city of Bakersfield, Kern county. The removal of the place of business of the corporation from San Francisco to Bakersfield evidently took place during the year 1921. At the time the resolution changing the place of business was adopted, M. M. Lichtenstein was the president of the corporation. During the time that the corporation operated in Bakersfield, Lichtenstein was its president and general manager. On May 1, 1924, the plaintiff, Kaye, and M. M. Lichtenstein were indebted to the Security Trust Company of Bakersfield in the sum of $4,000. This indebtedness was evidenced by their joint and several promissory note for the amount specified, made payable to the trust company. On August 13, 1926, Kaye brought suit in the superior court of Kern county against M. M. Lichtenstein for the recovery of the amount of the note with interest. The complaint in this action alleged the execution of the note by Kaye and Lichtenstein, and further alleged the execution of a contract of indemnity on May 1, 1924, whereby Lichtenstein agreed, in consideration of the transfer to him by Kaye of certain shares of stock in the DeLuxe Onyx Company, to assume and pay all obligations of the DeLuxe Onyx Company, and in particular to pay and discharge the promissory note executed by Kaye and Lichtenstein in favor of the Security Trust Company, and that Kaye had duly performed all conditions required of him under the above-described agreement, but that Lichtenstein had failed and refused to discharge the promissory note made payable to the Security Trust Company as he had agreed to do. A writ of attachment issued in this action and was served upon Henry A. Jacobs, notifying him that all moneys, credits, debts, or other personal property in his possession or under his control belonging to Lichtenstein were attached and levied upon. A second writ of attachment was levied upon certain real property standing in the name of Henry A. Jacobs. M. M. Lichtenstein was duly served with process in the action thus instituted and made no appearance therein. His default was duly entered and on January 28, 1927, judgment was rendered against him in the amount of $4,693.34, together with interest and costs in favor of Kaye. Thereupon a writ of execution issued and was served upon Henry A. Jacobs, together with a written notice that any personal property in his possession or under his control belonging to Lichtenstein was attached and levied upon. In the meantime, and prior to October 6, 1924, M. M. Lichtenstein had become the owner of all stock of the Lichtenstein Company with the exception of two or three shares of stock issued to directors of the corporation to enable them to qualify as directors, and at some time prior to October 6, 1924, Lichtenstein moved the business of the Lichtenstein Company to Hollywood, Cal., and there conducted a retail jewelry business in the Hotel Christie under the name of the Christie Jewelry Company. On October 6, 1924, M. M. Lichtenstein executed the following instrument:

"Hollywood, Calif., Oct. 6, 1924.

"I hereby assign all interest in my business known as the Christie Jewelry Co., to Henry A. Jacobs, with the understanding that Mr. Jacobs is to act for all the creditors.

"M. M. Lichtenstein,
"Pres. Christie Jewelry Co."

On November 28, 1924, M. M. Lichtenstein executed deeds by which he conveyed to Henry A. Jacobs two parcels of real estate in Kern county. The deeds were recorded in the office of the county recorder of Kern county. The defendant Jacobs in due time sold the stock of jewelry in the Hollywood store and one parcel of real estate, and from the proceeds paid to creditors of the jewelry business a dividend upon their claims. At the time the action herein was instituted appellant had in his possession from the proceeds thus realized the sum of $1,469.23, and had not disposed of the second parcel of real estate.

[1] The question that first arises on the appeal from the judgment is whether the instrument executed by M. M. Lichtenstein on October 6, 1924, hereinabove set out, operated as an assignment by the Christie Jewelry Company of all of its assets to appellant, Jacobs, for the benefit of its creditors. It will be observed that the instrument was signed by Lichtenstein, and that there was appended to his signature the words, "Pres. Christie Jewelry Co." The body of the instrument

reads: "I hereby assign all interest in my business known as the Christie Jewelry Co., etc." The language thus used indicates that the signer was attempting to make a personal individual assignment of his assets for the benefit of his creditors. Manifestly it could not operate as an assignment of a corporation known as the Christie Jewelry Company, because, so far as is made to appear, the Christie Jewelry Company had no corporate existence. If, however, the name Christie Jewelry Company was a fictitious name adopted by Lichtenstein, who owned the whole stock of goods and fixtures, the instrument would operate, as its phraseology indicates, as an individual assignment by Lichtenstein. Nevertheless, appellant contends that, as the Lichtenstein Company had a corporate existence and the evidence shows that the business and assets of this corporation of which M. M. Lichtenstein was president and manager were moved to Hollywood, therefore the instrument operated as an assignment by the Lichtenstein Company for the benefit of its creditors. It is difficult to reconcile such a contention with the plain meaning of the language employed in the instrument of assignment. As heretofore noted, the language employed in the body of the instrument is language which indicates an intention on the part of the signer to make an individual assignment. The only language which in any respect indicates a different intention is that which is found in the phrase "known as the Christie Jewelry Co.," which occurs in the body of the instrument and the words "Pres. Christie Jewelry Co." which appear underneath the signature appended to the instrument. The phrase, "known as the Christie Jewelry Co.," obviously modifies the language immediately preceding it and is clearly descriptive of "my business." Equally clear is it that the words "Pres. Christie Jewelry Co." constitute merely descriptive phraseology. Under such circumstances the most that can be said in favor of appellant's contention is that by the use of the language indicated it was left in doubt whether M. M. Lichtenstein intended to make an assignment for the Lichtenstein Company, of which he was president, or whether he intended to make a purely personal assignment for the benefit of creditors, and that resort might be had to parol evidence to determine what his intention really was. S. P. Co. v. Von Schmidt Dredge Co., 118 Cal. 368, 50 P. 650. The trial court found that the instrument was intended to operate as an individual assignment by M. M. Lichtenstein for the benefit of a certain class of creditors. This finding is amply supported by the evidence produced at the trial. The finding is proper, even though the court may have concluded that the instrument was intended to operate as an assignment by Lichtenstein as president of the Lichtenstein Company, for the evidence clearly shows that on October 6, 1924, Lichtenstein was the owner of all of the stock in the company except two or three shares issued to directors for the purpose of allowing them to qualify, and that in fact the corporation was so entirely under the control and domination of M. M. Lichtenstein that, when he decided to move the business from Bakersfield, in the language of appellant, testifying as a witness at the trial, "he packed everything up, bag and baggage and established the business in Hollywood," and, without any pretense of corporate action, adopted an entirely new and different name under which he thereafter operated the business. Under such circumstances the trial court was warranted in casting aside the legal fiction of distinct corporate existence and in finding that the instrument of assignment was in reality a personal individual assignment of M. M. Lichtenstein. Llewellyn Iron Works v. Abbott Kinney Co., 172 Cal. 210, 155 P. 986; Minifie v. Rowley, 187 Cal. 481, 202 P. 673; Wenban Estate, Inc., v. Hewlett, 193 Cal. 675, 227 P. 723. It remains to consider whether the assignment of the stock in trade was valid against respondent.

[2-5] It is clear that the instrument of October 6, 1924, could not operate as an assignment under the provisions of section 3449, Civil Code, since the instrument did not comply with the statutory requirements. It did not contain a list of the names of creditors of the assignor with the amounts of their respective demands, nor was the assignment made to the sheriff of the county wherein the assignor resided, as required by section 3449, Civil Code. Furthermore, it was not acknowledged, nor was it recorded, as required by section 3458, Civil Code. It was therefore void against respondent, a creditor who had not assented thereto (section 3459, Civ. Code). However, section 3432, Civil Code, expressly permits a debtor to pay to one creditor or to give to one creditor security for the payment of his demand in preference to another, and section 3451, Civil Code, declares that the provisions of the title relating to assignments for the benefit of creditors shall not affect the power of an insolvent debtor to transfer property in good faith to a particular creditor, or creditors, or to some other person in trust for such particular creditor or creditors for the purpose of paying or securing the whole or part of a debt owing to such creditor or creditors. It has been held that the provisions of sections 3432 and 3451, Civil Code, expressly authorize a conveyance for the purpose of paying or securing certain creditors. Heath v. Wilson, 139 Cal. 362, 73 P. 182. In the decision cited, it is said that sections 3432 and 3451, Civil Code, amount to no more than a declaration of the rule of the common law that the owner of property, even though insolvent. when there is no bankrupt or insolvent law

making a different disposition of it, may lawfully transfer it to the payment of any creditor or creditors, to the exclusion of others. Since, however, the assignment which was attempted to be made by the instrument of October 6, 1924, was an assignment of a stock in trade, it must be considered with reference to the provisions of section 3440, Civil Code. This section expressly provides that the sale, transfer, or assignment of a stock in trade, in bulk, will be conclusively presumed to be fraudulent and void as against the existing creditors of the vendor, transferor, or assignor unless the notice required by the statute shall be given. Assignments for the benefit of creditors generally are expressly exempted from the requirements of the statute. It is not contended that the assignment attempted to be made by the instrument under consideration was intended as an assignment for the benefit of creditors generally, but it is conceded that it was intended to operate as an assignment of a stock in trade for the benefit of a certain class of creditors, viz., the mercantile creditors or creditors of the jewelry business. It was not, therefore, under the circumstances disclosed, an assignment exempted from the provisions of section 3440, Civil Code. Jarvis v. Webber, 196 Cal. 86, 236 P. 138. The court found that no notice of the intended sale or transfer was given in any manner prior to the transfer. This finding is supported by the testimony of appellant that notice was not given and no attack is made upon it. The court further found that the transfer from Lichtenstein to appellant was not accompanied by immediate delivery or followed by actual or continued change of possession. Inasmuch as the transfer was clearly a transfer of a stock in trade in bulk, it is at least doubtful whether the finding with reference to delivery or actual or continued change of possession was necessary. If so, it was a question of fact to be determined by the trial court upon a consideration of all of the evidence, and the finding is conclusive on appeal, unless, reading the evidence in the light and with the inferences most favorable to the conclusion reached by the trial court, it shall be said that the finding is without substantial support in the record. Hassell v. Bunge, 167 Cal. 365, 139 P. 800; Jarvis v. Webber, supra; McCaffey C. Co., Inc., v. Bank of America, 109 Cal. App. 415, 294 P. 45. The testimony of appellant himself amply sustains the court's finding in this regard, for, while he testified that he immediately placed a representative in charge of the business, he also testified that, during the sixty-day period when he operated the store, it was operated under the name of Christie Jewelry Company, that Lichtenstein continued to remain in the store as a paid salesman, that the same clerks who had theretofore been employed in the store were retained, and that there was nothing in the situation that constituted notice to the general public that there had been a change of ownership. These circumstances were amply sufficient to justify the court in finding that there was not an open, visible, unequivocal change of possession, manifested by such substantial outward signs as to make it evident to the world that the control of the owner had wholly ceased, and that another was openly exercising exclusive dominion over the property. McCaffey C. Co. v. Bank of America, supra.

[6] The trial court also found that the transfer of the real property from Lichtenstein to appellant, upon which respondent sought by this action to impress a lien, was made without consideration, and that the transfer was accomplished by a deed absolute and unconditional under an oral agreement between appellant and Lichenstein that appellant should sell the land and use the proceeds obtained from such sale in paying claims of one class of creditors of Lichtenstein pro rata to the exclusion of other creditors, and not to his creditors generally, upon condition that each and all of said creditors should release Lichtenstein from further demands, but that none of such conditions were expressed in the deed of conveyance and respondent was not one of the class of creditors for whose benefit the transfer was made. This finding is attacked by appellant on the ground that the evidence shows that the transfer of the real property was made for a good and sufficient consideration, and that it was not subject to objection by respondent. The finding is not vulnerable to the attack made upon it. The evidence is ample to sustain the finding. The transfer of the real property to appellant was made by deed absolute in form and unconditional, but upon the parol understanding between Lichtenstein and appellant that the land should be sold and the proceeds distributed ratably among the creditors of the Christie Jewelry Company. Appellant further testified that he agreed with Lichtenstein that, in consideration of the execution by the grantor of the deeds conveying the real property, he would insist upon all creditors giving him a release of any further demands upon Lichtenstein. It is apparent that the transfer of the real property amounted to an assignment by the grantor of all interest that he had in the real property, and that it was an assignment for the benefit of one class of the grantor's creditors, the mercantile creditors or creditors of the jewelry business, to the exclusion of other creditors. Respondent being excluded from participation in the proceeds to be derived from the sale of the real property, and not having assented to the assignment, was entitled to object to it, and the court properly sustained his objection. Sabichi v. Chase, 108 Cal. 81, 41 P. 29; Jarvis v. Webber, supra.

[7-10] One further point remains to be considered. Appellant by his answer raised the issue of laches. While no express finding was made by the court upon this issue, it must be assumed in support of the judgment that it was decided adversely to appellant. It is now contended that, as the evidence showed that there was a definite lapse of 22 months between the date of the assignment by Lichtenstein to appellant and the institution of the action by respondent to recover from Lichtenstein under the indemnity agreement and still further delay by respondent in directly attacking the assignment to appellant, the court's denial of the claim of laches is not justified. It is perhaps a sufficient answer to this contention to point out that this is a matter which reposes in the sound discretion of the chancellor. 10 Cal. Jur., p. 526, § 64. Furthermore, while lapse of time is an important element in determining laches, it is not conclusive. Delay alone does not constitute laches unless it is accompanied by circumstances from which prejudice may result to the person complaining of it or to some other person. McGibbon v. Schmidt, 172 Cal. 70, 74, 155 P. 460. The judgment rendered affects only the balance of the funds remaining in appellant's hands and the real property which stood in his name at the time the writ of attachment in the suit by respondent against Lichtenstein was levied. No attempt was made to charge appellant with funds disbursed by him prior to levy of the attachment writ. It is apparent, therefore, that no injury or disadvantage resulted to appellant by reason of the delay.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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122 Cal.App. 366

ZEH v. ALAMEDA COMMUNITY HOTEL CORPORATION.

Civ. 8403.

District Court of Appeal, First District, Division 2, California.

April 6, 1932.

1. Corporations 🔑80(5).

Statements to induce subscription of corporation stock regarding future earnings are matters of opinion, falsity of which furnishes no ground for rescinding subscription.

2. Corporations 🔑80(5).

Representations that preferred hotel stock paid and would pay 7 per cent. interest did not constitute actionable fraud, enabling subscriber to rescind subscription contract.

Representations that preferred stock of hotel corporation provided for payment of, paid, and would pay to owners, interest at 7 per cent., and that subscriber of stock would be paid interest upon her investment at that rate, did not constitute actionable fraud because every allegation referred to the future in express terms, except word "paid," and that word was simply repetition in different language of allegation "provided for payment of" and was not equivalent to allegation "is now paying."

3. Corporations 🔑80(1).

Representation that corporation paid specified interest on preferred stock *held* misrepresentation of law, precluding subscriber, in absence of relation of trust or confidence, from rescinding subscription on such ground (Civ. Code, § 309).

4. Evidence 🔑65.

Law is presumed to be equally within knowledge of all parties.

5. Pleading 🔑254.

Sustaining demurrer to second amended complaint without leave to amend *held* not abuse of discretion, where there was no showing proposed allegation of facts, if inserted, would change legal effect of complaint.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Anna P. Zeh against the Alameda Community Hotel Corporation. From a judgment for defendant, plaintiff appeals. Affirmed.

Garton D. Keyston, of San Francisco, for appellant.

S. C. Wright, of San Francisco, for respondent.

TUTTLE, Justice pro tem.

This is an action brought to cancel a subscription for shares of capital stock and recover the amount paid for the same. A demurrer to the second amended complaint therein was sustained without leave to amend, and judgment rendered for defendant. This appeal is taken from the judgment so entered.

From the allegations of the complaint, it appears that plaintiff subscribed for thirty shares of preferred stock in defendant corporation, and paid the sum of $3,000 for the same. This sale was made through an agent of the defendant, and plaintiff seeks to set aside the transaction upon the following alleged false and fraudulent representations made by said agent in inducing plaintiff to make the purchase:

"A. That the preferred stock of said Alameda Community Hotel Corporation then and there, and to-wit, in the said City of Alameda, County of Alameda, and State of California, on the said 11th day of April, 1928, provided for the payment of and paid and would pay to the owners of the said preferred stock interest at the rate of seven per cent (7%) per annum; and

"B. That if the said plaintiff herein would invest three thousand dollars ($3,000.00) in the purchase of the said preferred stock the said Alameda Community Hotel Corporation would pay to the said plaintiff herein interest upon her such investment at the rate of seven per cent (7%) per annum."

[1] Do the foregoing allegations constitute actionable fraud? The law applicable to this situation is well expressed in Black on Rescission and Cancellation, volume 2, at page 957, in the following language: "As a general rule, statements made to persons to induce them to subscribe for stock in a corporation, having relation to its future earnings, expected profits or dividends, or the successful conduct of its business, are merely matters of opinion, on which the subscribers have no right to rely, and though they prove to have been false when made, or even to have been made with no expectation of their ever being realized, still they furnish no ground for rescinding the contract of subscription." This is the rule in California. 12 Cal. Jur. p. 729. It is based upon the fundamental principle that predictions as to future events are ordinarily regarded as nonactionable expressions of opinion. 26 Cor. Jur., p. 1087. "No man stands condemned in the law because hope springs in his breast or because out of the fullness of his heart his mouth speaketh in that regard. Therefore the law does not interdict prophesying the expression of sanguine business hopes and beliefs in events to come." Ray County Sav. Bank v. Hutton, 224 Mo. 42, 123 S. W. 47, 54.

[2] We do not believe that the representations quoted above measure up to the requirements of the law, and hold that they must be construed as promissory in character and effect. The only possible ground for a contrary construction arises from the use of the word "paid" in paragraph A. Every other allegation refers to the future in express terms. Construing paragraphs A and B together it is quite obvious that if the word were used as applying strictly to the present, there is an apparent contradiction in that the representation in B is "would pay" and not "would continue to pay." Construing the entire complaint, we believe that the word "paid" is simply a repetition in different language of the allegation "provided for the payment of" which immediately precedes it, and that it is not equivalent to the allegation "is now paying." Considerable stress is laid by appellant upon the use of the term "interest" instead of "dividends." We see no logical distinction between them, so far as the application of the foregoing principles of law are concerned. Whether the promise was to pay interest or dividends, if it was made as to the future, it was not actionable.

[3, 4] The complaint is also vulnerable in another particular. The laws of California did not authorize the payment of "interest" upon preferred stock. Only dividends could be paid thereon, and these must be paid out of surplus profits. Section 309, Civ. Code, as it read in 1928. Any statements made as to payment of interest upon this stock, and the provisions of the stock certificates in this respect were misrepresentations of law. It is well settled that such misrepresentations at least where there is no relation of trust or confidence between the parties do not amount to fraud and will not furnish ground for the rescission of a contract. Haviland v. Southern Calif. Edison Co., 172 Cal. 601, 608, 158 P. 328. The general public has evinced such a keen interest in corporate stock during the past several years that it is difficult to conceive how a person of ordinary intelligence could be deceived in the manner claimed by plaintiff. The foregoing rule has been applied to misrepresentations made by an agent as to stockholder's liability in the case of Upton, Assignee, v. Tribilcock, 91 U. S. 45, 51, 23 L. Ed. 205, where it is said: "If ignorance of law was admitted as a ground of exemption, the court would be involved in questions which it were scarcely possible to solve, and which would render the administration of justice next to impossible; for in almost every case ignorance of law would be alleged, and the court would, for the purpose of determining this point, be often compelled to enter upon questions of fact insoluble and interminable." The allegation of the complaint in the instant case that "the plaintiff is a woman unfamiliar with the difference between interest and dividends" shows clearly that the gravamen of her complaint is ignorance of the law, upon which she had no right to rely. The truth or falsity of such representations could have been tested by ordinary vigilance and attention. The law is presumed to be equally within the knowledge of all parties. There is no allegation of any confidential or fiduciary relations between the parties hereto.

[5] It is contended that the court abused its discretion in sustaining the demurrer to the second amended complaint without leave to amend. The record does not show an abuse of discretion in this respect. There is nothing to show that there was presented

to the court any proposed allegation of facts which, if inserted in the complaint, would in any respect change its legal effect. Stewart v. Douglass, 148 Cal. 511, 83 P. 699.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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122 Cal.App. 511

FOSS v. DOTY.

Civ. 3825.

District Court of Appeal, Third District, California.

April 12, 1932.

Landlord and tenant ⚷103(1).

Where lease required lessor to furnish water to irrigate premises, that lessor shut off water following lessee's failure to perform covenants in lease *held* not to affect lessor's right to have lease canceled for lessee's breach thereof.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by Maria Foss against C. E. Doty. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

Rich & Weis, of Marysville, for appellant.

A. H. Hewitt and Loyd E. Hewitt, both of Yuba City, for respondent.

Mr. Justice PLUMMER.

The plaintiff had judgment terminating a certain lease entered into between the plaintiff and defendant on the 8th day of November, 1926, and also recovered judgment for damages on account of alleged failure of the defendant to keep and perform the covenants contained in said lease. From this judgment the defendant appeals.

The record shows that on the date above mentioned the plaintiff and the defendant entered into an agreement of lease, whereby the plaintiff leased to the defendant the tract of land described in said lease, for the purposes of rice culture, and the defendant covenanted and agreed that he would, at his own cost and expense, cultivate and farm the demised premises in a farmerlike manner; would properly, reasonably, and adequately, as soon as weather conditions permitted, and as the soil of the premises would permit, prepare the same, or so much of the premises as were adaptable for rice culture, for planting and seeding, and would, in due and proper time, plant all of the premises adapted to rice culture, in rice, using good, clean, and well-matured seed for such purposes.

The instrument of lease contained further covenants and agreements to be kept and performed by the lessee, and also provided that the lessor should sink a sufficient number of wells, equip the same with pipes, pumps, motors, etc., with which to irrigate the premises, having a capacity sufficient to furnish water for irrigating the leased premises, devoted to rice culture.

The lease further provided that if the lessee should fail to keep and perform all of the covenants and agreements on his part to be performed, the lease should become void if the lessee fail to comply with such provisions, after notice in writing given by the lessor, and in the event of a failure to comply, it should be lawful for the lessor to re-enter said premises and take possession thereof.

No point is made upon this appeal that the findings of the court are not supported by the testimony. A cursory review of the testimony shows, however, that the findings of failure on the part of the defendant to keep and observe the covenants of the lease, as to caring for the premises, farming the same in a farmerlike manner, seeding the same to rice in the proper season, properly preparing the ground for the seeding of rice, properly irrigating the same, or harvesting the same, is amply supported.

The record also shows that the plaintiff in this action, in furnishing water with which the defendant was to irrigate the premises described in the lease, was incurring an expenditure of $25 a day in the purchase of power. That on or about the 20th day of June, 1928, the second season included within said lease, it became apparent that no crop of rice would be raised on the leased premises, owing to the fact that the same had not been properly prepared for seeding, had not been seeded at the proper time, and had not been cared for thereafter in a farmerlike manner by the defendant, the plaintiff shut off the power by removing the fuses from the motors furnishing power for the operation of the pumping plants theretofore installed by the plaintiff, and thereafter, and on or about the 3d day of July, 1928, notified the defendant of his failure to keep and perform the covenants contained in the lease and by him agreed to be kept and performed, and requested the defendant to surrender possession of the leased premises. Possession not having been surrendered by the defendant to the plaintiff, of the premises covered by the lease, this action was begun.

The findings of the court are in substance as follows: That the plaintiff leased to the defendant the premises described in the instrument of lease for rice culture, for the years 1927, 1928, and 1929. That the plaintiff caused to be drilled five wells, equipped the same with pipes, pumps, motors, and electric current sufficient to furnish an adequate supply of water for the irrigation of said lands and premises when devoted to rice culture. The findings as to the covenants to be performed by the defendant, and his failure to do so, are in substance as follows: That although sufficient water was at all times available for irrigating the rice crop for the year 1927, the defendant did not irrigate the same properly, and did not apply sufficient water to the premises to grow the rice crop. That owing to the failure of the defendant to properly farm and irrigate the demised premises during the year 1927, instead of raising a crop of 6,000 sacks of rice, the average production of said premises, only 2,300 sacks of rice were produced.

The court further found that during the year 1928, owing to the unfarmerlike manner which the defendant was pursuing in relation to the demised premises, that the rice crop that would be produced thereon would not pay the cost of running of motors and pumping water, which amounted to the sum of $25 per day, and that no damage resulted from the turning off of the power, but that the plaintiff was saved an expense of $2,100.

The court also found what the value of the crop would have been in 1928 had the lands been properly plowed and cultivated before seeding, had the seeding been done at the proper time, and had the lands been properly irrigated. Judgment went in favor of the plaintiff for the cancellation of the lease, and damages in the sum of $4,368 for failure of the defendant to comply with the terms of the lease.

The only point made upon this appeal is that the shutting off of the water by removing certain fuses from the motors furnishing power to the pumping plants amounted to a reentry upon the premises by the plaintiff, and that such re-entry was without notice, and therefore not sufficient upon which to base a judgment of cancellation.

The record, however, discloses that the judgment of the court does not rest upon any such foundation. As herein stated, notice was given to the defendant to surrender the premises, and thereafter, upon the failure of the defendant to surrender the possession of the premises to the plaintiff, this action was begun.

There being no contention upon this appeal that the testimony is not sufficient to support the findings of the court as to the failure of the defendant to keep and perform the covenants agreed to be kept and performed by him, and his failure to farm the premises in the proper manner, gave the plaintiff the right to institute this action for the cancellation of the lease. In fact, we find nothing in the record which indicates that the appellant questions the findings of the court, save and except as to the act of the plaintiff in removing the fuses from the motors furnishing power to the pumping plants. If it be admitted that the defendant was damaged in any particular by this act of the plaintiff, it does not appear that the right of the plaintiff to have the lease canceled by reason of the continued failure of the defendant to comply with the terms and conditions thereof, is in any wise affected.

The judgment is affirmed.

We concur: Mr. Presiding Justice PRESTON; Mr. Justice R. L. THOMPSON.

122 Cal.App. 248

MOSESIAN et al. v. CROWN CLEANERS & DYERS, Inc., et al.

Civ. 324.

District Court of Appeal, Fourth District, California.

March 30, 1932.

Rehearing Denied April 21, 1932. Hearing Denied by Supreme Court May 26, 1932.

1. Municipal corporations 🔑703(4).

Street intersection, corner of which was inclosed by 8-foot tight board fence built approximately on property line bordering two streets, *held* "obstructed intersection" within statute limiting speed of vehicles approaching such intersections (St. 1923, p. 553, § 113, as amended by St. 1927, p. 1436, § 30).

[Ed. Note.—For other definitions of "Obstruct; Obstruction," see Words and Phrases.]

2. Trial 🔑296(4, 5).

In action for death of one killed in automobile collision while riding with son, erroneous instruction regarding joint enterpriser's negligence, preventing recovery, *held* cured by correct instruction thereon.

> Facts disclosed that the court modified the instruction proposed by plaintiffs, rendering uncertain the meaning of the portion thereof to the effect that plaintiffs should recover if defendant's negligence proximately caused decedent's death regardless of whether "some one else's negligence other than negligence of" deceased contributed to the accident; but that such uncertainty was cured by correct instruction that plaintiffs could not recover if the father and son were engaged in a joint enterprise and son's negligence proximately contributed to the accident, such instruction correctly limiting the

phrase, "some one else's negligence other than the negligence of" deceased, to the negligence of the son so that the jury were not misled.

3. Automobiles ⚿244(11).

In action for death of decedent killed in automobile collision at view-obstructed street intersection, verdict for defendants *held* sustained by evidence (St. 1923, p. 553, § 113, as amended by St. 1927, p. 1436, § 30).

4. Trial ⚿295(1).

That one instruction incorrectly states law is no ground for reversal, where instructions as whole do not mislead.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by Twodi P. Mosesian and another, as executrices of the estate of Paul A. Mosesian, deceased, against the Crown Cleaners & Dyers, Inc., and another. From the judgment for defendants, plaintiffs appeal.

Affirmed.

Barbour, Kellas & Backlund and Ray W. Hays, all of Fresno, for appellants.

Christian Hoeppner and Wakefield & Hansen, all of Fresno, for respondents.

MARKS, J.

This is an action for damages resulting from the death of Paul A. Mosesian and instituted by the executrices of his last will and testament on behalf of his heirs under the provisions of section 377 of the Code of Civil Procedure. At the trial, one son, Suren P. Mosesian, waived all claims for damages on his behalf.

The Crown Cleaners & Dyers, Inc., is a California corporation having its principal place of business in the city of Fresno. At the time of the accident involved here, Joseph A. Gallant was driving one of its delivery trucks as its employee and upon its business.

[1] Butler and Chance avenues are public highways in the county of Fresno which intersect each other at right angles. Butler avenue runs in an easterly and westerly direction. At the northeast corner of the intersection the city of Fresno maintains its fair grounds, which are inclosed by a tight board fence about eight feet in height and built approximately upon the property lines bordering the two streets. The intersection is an obstructed intersection as defined by the provisions of the California Vehicle Act, and motor vehicles traversing it from either the north or the east are limited, by subdivision 2 of section 113 of this act (St. 1923, p. 553, as amended by St. 1927, p. 1436, § 30) to a speed of fifteen miles an hour.

On the evening of April 6, 1929, deceased and his son Suren P. Mosesian were traveling in a Chrysler sedan, which was being driven by Suren, on Butler avenue approaching the intersection from the east. At the same time Gallant was approaching the intersection from the north in a small model "T" Ford delivery truck. The two cars came into collision three or four feet westerly from the center of the intersection. A disinterested witness described the action of the Mosesian car as follows:

"The next time I looked the cars apparently had collided, or something had happened, because the Chrysler seemed to be sort of standing right on its nose, right on the radiator.

"Q. With the rear wheels up in the air? A. With the rear wheels up in the air, yes.

"Q. When you saw it the Chrysler was nose down with the rear end up in the air? A. Yes.

"Q. What course did it take after that? A. The rear end sort of dropped over to my right, or to its left, that is, towards Chance, and it seemed to roll over sideways a couple of times.

"Q. Where did it come to rest? A. Well, when I got up there and stopped it was about the fourth tree down."

There was a row of fig trees on the south side of Butler avenue which were about twenty-four feet apart.

According to the testimony of Gallant, he brought his automobile to a stop, or nearly to a stop, about ten feet north of the intersection line, and proceeded into the intersection at a speed of not more than fourteen miles per hour. He saw the Mosesian car approaching from his left at a high rate of speed which he estimated at not less than forty-five miles per hour. He brought his delivery truck to a complete stop with its front wheels at the northerly edge of the macadamized surface of the road approximately ten feet from the center line of Butler avenue. The Mosesian car proceeded into the intersection at a high rate of speed, swerved to its right and came into contact with his left front wheel, breaking it off, rolled over, and came to rest sixty or more feet westerly from the intersection. Gallant further testified that the impact brought his arm into contact with the hand throttle, threw his foot from his clutch, so that the Ford under its own power proceeded southerly across Butler avenue, where it came to rest.

Suren Mosesian testified that he approached the intersection at about twenty-five miles per hour, and, when a short distance east from it, took his foot off the throttle and coasted into the intersection at a speed of approximately eighteen miles per hour. When he was within about ten feet of the easterly intersection line, he saw Gallant proceeding southerly in his Ford about one hundred fifty feet northerly on Chance avenue. He paid no further attention to the Ford until his father gave an alarm of danger. He then saw the Ford, which was within a few feet of the rear of the Chrysler, and crashed into it, causing the accident. This testimony is flatly contradicted by the testimony of Gallant and the disinterested witness to whom we have referred. This witness placed the speed of the Mosesian car at not less than forty miles per hour. Paul A. Mosesian was thrown from the car and died as a result of the accident.

The jury returned a verdict in favor of respondents, from which appellants have prosecuted this appeal. The sole ground urged as furnishing a reason for reversal of the judgment is a modification by the trial court of an instruction proposed by appellants. This instruction, with the modifying clause in italics, follows: "If you find from the evidence in this case, guided by the instruction of the court, that Paul A. Mosesian died as the direct result of the injuries received by him in a collision between the automobile of the defendant Crown Cleaners and Dyers, Inc., and the automobile driven by Suren P. Mosesian —and it is an admitted fact in the case that Paul A. Mosesian did die as a direct result of the injuries received in the collision—and if you so find from the evidence, as explained by these instructions, that the automobile of the defendant, Crown Cleaners and Dyers, Inc., was being driven and operated in a negligent manner by the said Joseph A. Gallant, and that said injury and death were proximately and directly caused by such negligent operation of said automobile, then the plaintiffs are entitled to a verdict against said Crown Cleaners and Dyers, Inc., and said Joseph A. Gallant, notwithstanding that some one else's negligence, other than the negligence of Paul A. Mosesian himself, may or may not have contributed to the collision, *unless you find that said Paul A. Mosesian and Suren Mosesian were, at the time of the accident, engaged in a joint enterprise as defined in these instructions.*"

[2, 3] It must be admitted that the instruction, as modified, is not a model of correctness. The meaning of the last phrase of the instruction as it was proposed by appellants is rendered somewhat uncertain by the portion added by the trial court. However, we believe that this uncertainty was entirely removed by other instructions which the court gave to the jury.

The court fully and correctly instructed the jury upon the questions of negligence, contributory negligence, proximate cause, and joint enterprise. It instructed the jury that, if it were found that the two Mosesians were engaged in a joint enterprise, the negligence of one joint enterpriser would bar a recovery by the other, or his heirs or personal representatives, and that, if they were engaged in a joint enterprise, and the evidence satisfied the jury that Suren P. Mosesian was guilty of negligence which proximately contributed to the happening of the accident and injury to his father, such contributory negligence of Suren P. Mosesian would bar appellants' right to a recovery in this case. We have concluded that these instructions correctly limited the phrase "some one else's negligence, other than the negligence of Paul A. Mosesian himself," in the instruction complained of, to the negligence of Suren P. Mosesian and to no other person, removing the main objection to this instruction. We are of the opinion that, taken as a whole, the instructions did not mislead the jury, and that the verdict was in accordance with the weight of the evidence.

[4] Because one instruction of itself is not a true and correct statement of the law furnishes no ground for a reversal of the judgment, where the instructions taken as a whole do not mislead the jury on the law of the case. In Douglas v. Southern Pacific Co., 203 Cal. 390, 264 P. 237, 239, it was said: "Jurors are presumed to be persons of common intelligence and capable of comprehending the ordinary use of language as applied to the particular proposition under consideration and in reference to which it is employed. We will not assume that they may not have understood the charge as we understand it. The instructions must be considered in their entirety, and if, as so considered, they state the law of the case fairly and clearly, then they are, as a whole, unobjectionable, even though by selecting isolated passages from single instructions they may in some respects be amenable to just criticism."

The language of the Supreme Court in the case of Callet v. Alioto, 210 Cal. 65, 290 P. 438, 441, furnishes us sufficient grounds for an affirmance of the judgment in the instant case: "Appellant makes no contention that the evidence is not sufficient to sustain the verdict, but contends that certain instructions were erroneous. In this connection, appellant objects to parts of seven different instructions. It would add nothing to this opinion to quote the instructions of which complaint is made. It is sufficient to say that several of them use some unfortunate language and are rather incomplete and that several sentences are open to just criticism. However, we do not find any error sufficient to warrant a reversal. It must be remembered that the trial court is not required to state all the law applicable to a case in one instruction. All of the instructions must be read as a whole, that is, each instruction should be considered in connection with all of the other instructions, and if the charge harmonizes as a whole, and fairly and accurately states the law, a reversal may not be had because of verbal inaccuracies, or because isolated phrases or sentences are open to just criticism. Since the charge must be considered as a whole, an error in an instruction is cured if, when the whole charge is taken together, the law is accurately stated."

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

122 Cal.App. 455

PEOPLE v. BLAIR.

Cr. 2168.

District Court of Appeal, Second District, Division 1, California.

April 11, 1932.

1. Burglary ⚷41(1).

Evidence *held* sufficient to sustain conviction for burglary.

2. Criminal law ⚷1159(2).

Where record in burglary prosecution presents some evidence showing criminal intent in entering premises, reviewing court cannot disturb conviction.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Martin Blair was convicted of burglary, and he appeals.

Affirmed.

Joseph W. Ryan, and Frank J. Ryan, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

TAPPAAN, Justice pro tem.

Appellant, together with one Stalker, was charged with the crime of burglary. The information, which was in two counts, charged that appellant and Stalker entered a store upon two separate occasions, and took therefrom certain automobile accessories. Stalker pleaded guilty to one of the counts in the information, and appellant entered a plea of not guilty to both counts and was placed on trial. A verdict of guilty upon both counts was found by the jury. Appellant's motion for a new trial was denied, and he appeals from the judgment entered against him and from the order denying his motion for a new trial.

From the evidence it appears that appellant was a special police officer in the city of Glendale, and was employed by a so-called merchants' patrol system in that city in the protection of stores and other places of business. Appellant's codefendant Stalker was a police officer of the city of Glendale. There was, within the territory assigned to the defendants to patrol, a store for the sale of automobile accessories. There is no question that upon two occasions, in the nighttime, and while defendants were patroling their assigned territory, they entered this store. The complaining witness, the owner of the store, testified that on both such occasions, on closing the store, the night before the alleged burglaries, he securely locked the store, and on the mornings after the burglaries he found the store likewise locked. He further testified that on both such occasions he examined the lock upon the front door in the morning and found that it had the appearance of having been tampered with during the night. His testimony also showed that on both occasions personal property, which was in the store at the time he locked it the night before, was missing in the morning after he unlocked the store. Some of the property which he identified as so missing was afterwards found in the possession of appellant, and appellant admitted that on one of the occasions he took from the store an automobile horn.

Both appellant and Stalker testified that on both of the occasions when they entered the store they found the door to the store open and unlocked, and that they never saw the other take any property from the store. But they both admitted taking property from the store, but were uncertain as to which time they entered the store that they took the property. There was some conversation had between them in which appellant intimated that he would like to have the horn, which he later admitted he took, and that, if he took it then, he would return and pay for it or get it as a gift.

[1, 2] Appellant attacks the judgment and ruling of the court on the ground that the evidence is insufficient to support the jury's verdict. Appellant urges that the evidence was insufficient to justify the verdict, in that the prosecution did not prove that appellant entered the store with the intent to commit larceny. The jury were entitled to infer from the evidence as presented to them, both direct and circumstantial, that the entry to the store was made with a felonious intent. The evidence is merely conflicting on this question, and is not subject to review before this court. The jury believed the story of the complaining witness, and refused to place credence in that of the defense. "In other words, the record presents some evidence showing the intent with which the defendant entered the premises, and the implied finding of the jury was that he had entered the building with

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

an unlawful intention. Under these circumstances, this court may not disturb the judgment based on that verdict. We think the conclusion which we have reached is supported by, rather than questioned by, the authorities cited by the defendant, and that it is further supported by People v. Brittain, 142 Cal. 8, 100 Am. St. Rep. 95, 75 P. 314, and People v. King, 4 Cal. App. 213, 87 P. 400." People v. Westwood, 88 Cal. App. 505, 507, 263 P. 856, 857.

The fact that the court refused to instruct the jury to return a verdict of not guilty was not error under the circumstances present here. As has been pointed out, the evidence was sufficient to support the verdict. The other assignments of error, that the verdict is contrary to the evidence and that the court erred in denying appellant's motion for a new trial, are both answered by our discussion of the sufficiency of the evidence.

The judgment and order appealed from are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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122 Cal.App. 443

DOWLING v. SUPERIOR COURT IN AND FOR MARIN COUNTY et al.

Civ. 8430.

District Court of Appeal, First District, Division 2, California.

April 9, 1932.

Rehearing Denied May 9, 1932. Hearing Denied by Supreme Court June 4, 1932.

Dismissal and nonsuit ⚷63.

Defendant could have action not tried within five years after filing of answer dismissed as to him, notwithstanding another stipulated for extension (Code Civ. Proc. § 583).

Application for writ of mandate to Superior Court, Marin County; Edward I. Butler, Judge.

Original proceeding for a writ of mandate by J. A. Dowling against the Superior Court of the State of California, in and for the County of Marin, and Honorable Edward I. Butler, judge thereof, to require respondents to dismiss an action against petitioner entitled Rose Le Mar against J. A. Dowling and others.

Writ granted.

Horace W. B. Smith and Theodore Tamba, both of San Francisco, for petitioner.

George H. Harlan, of San Rafael, for respondents.

NOURSE, P. J.

This is an original proceeding for a writ of mandate requiring the respondent court to dismiss as against the petitioner herein an action pending before said court entitled Rose Le Mar v. J. A. Dowling et al. The ground upon which the petition herein is based is that said cause was not brought to trial within five years after the filing of petitioner's answer therein, and that the dismissal prayed for is therefore mandatory under the provisions of section 583, Code of Civil Procedure.

The action entitled Rose Le Mar v. J. A. Dowling et al. was commenced in the superior court in the county of Marin on October 16, 1926. The complaint prayed for damages for personal injuries alleged to have been sustained by reason of a fall into a concrete sump constructed by Dowling in the course of the performance of a contract between Dowling and the town of Sausalito covering improvements to a public street in that town. The town of Sausalito and the American Indemnity Company (the surety upon Dowling's contract) were joined as defendants in the action. The answer of Dowling was filed December 13, 1926; the answer of the American Indemnity Company was filed April 9, 1927. On July 11, 1927, the town of Sausalito filed its answer and a cross-complaint against Rose Le Mar alone, in which it was alleged that the town, assuming that it had been in part liable for the injuries to the plaintiff, had compromised with her and had agreed to pay her $1,000, $700 of which had been paid. The cross-complaint then alleged that the town learned that the street work performed by Dowling had not been done according to the contract; that for this reason the town deemed itself not liable for any injuries suffered by the plaintiff; and, because of these facts, the town sought recovery from the plaintiff of the $700 paid to her under the agreement of compromise. Rose Le Mar filed her answer to this cross-complaint on January 29, 1932, after the petitioner herein had filed with the county clerk his motion to dismiss the action as to him for want of prosecution. In defense to that motion, the plaintiff in the original action pleaded that she had agreed and stipulated with the town of Sausalito that the rights and liabilities arising between Dowling and said town could not be determined in that action until such rights had been adjudicated in another action brought by a taxpayer to determine the validity of the acceptance of the street work performed by Dowling under the contract with the town of Sausalito. Under this stipulation, the plaintiff Le Mar was given until the final settlement of the other case and until the final settlement of the dispute between the town of Sausalito and Dowling as to the cost of said street work to reply to said cross-complaint of the town of Sausalito. It does not appear, however, that this stipulation was at any time brought to the knowledge of the petitioner herein. The trial court denied the motion to dismiss, and counsel for plaintiff Le Mar appearing herein for the respondents rests his case upon the same grounds which were urged in opposition to the motion.

The writ of mandate must issue because the rights of a party to a dismissal of an action not brought to trial within five years after answer filed are determined by section 583, Code of Civil Procedure, and in this respect the duty of a trial court to dismiss under those circumstances is mandatory. The portion of that section applicable here reads: "Any action heretofore or hereafter commenced shall be dismissed by the court * * * unless such action is brought to trial within five years after the defendant has filed his answer, except where the parties have stipulated in writing that the time may be extended." That the language of this section is mandatory permits of no doubt. Cruse v. Superior Court, 102 Cal. App. 290, 294, 283 P. 73; Larkin v. Superior Court, 171 Cal. 719, 721, 722, 154 P. 841, Ann. Cas. 1917D, 670; Ravn v. Planz, 37 Cal. App. 735, 736, 174 P. 690.

The only suggestion made by respondents that the case presented here is different from those cited is that we have here a single defendant demanding the dismissal of the action as to him in a case where other defendants had answered within the five-year period, and where one of the other defendants had stipulated in writing for an extension of the time of trial. To our minds the language of the section is clear and does not support the argument presented by respondents. The word "defendant" was manifestly used in the singular to tie the right of dismissal to each defendant filing his answer prior to the five-year period. This purpose is further indicated by the use of the plural in the clause immediately following this, where an exception is made where "the parties" have stipulated for an extension of the time. Thus the reasonable construction of the Code section is that when any defendant has filed his answer and has not stipulated for an extension of the time of trial he is entitled to a dismissal of the action as to him if the cause is not brought to trial within five years after the filing of his answer.

We are convinced that such was the intention of the Legislature in the enactment of section 583. The general purpose of the section was to force the plaintiff to exercise diligence in the prosecution of an action, and to prevent unreasonable delays to harass a defendant. The members of the Legislature must have known the general practice of joining nominal as well as fictitious defendants, and if it had been the legislative intention to delay the running of the statute until all these defendants had answered, or to stop its running if any one of them should stipulate for the postponement of the trial, it would have used language expressive of that intention; language which is not found in the section as enacted.

Let a writ issue as prayed.

We concur: STURTEVANT, J.; SPENCE, J.

122 Cal.App. 197

WHITE et al. v. KRETZ BROS. et al.

Civ. 920.

District Court of Appeal, Fourth District, California.

March 28, 1932.

1. Automobiles 🔑**244(10, 42).**

Evidence in collision between automobile on right side of highway and trailer to truck on wrong side showed truck driver's negligence and autoist's lack of contributory negligence.

2. Appeal and error 🔑**987(1), 1122(2), 1175 (2).**

Appellate court cannot review weight of evidence, make findings, and enter judgment for appellee, even if jury trial was improper (Code Civ. Proc. § 956a).

3. Damages 🔑**96.**
New trial 🔑**76(4).**

In personal injury action, amount of damages is first for jury's sound discretion, then for judge's discretion to vacate or reduce unjust verdict.

4. Appeal and error 🔑**1004(1).**

Appellate court cannot vacate judgment for damages as excessive, unless excessiveness plainly suggests passion, prejudice, or corruption of jury.

5. Damages 🔑**130(1).**

$20,060 *held* not excessive where husband's breastbone was fractured, and wife suffered painful fractured jaw permanently injuring it.

6. Jury 🔑**25(4).**

Plaintiffs *held* not precluded from jury trial, where court on own motion first set case for trial, and parties were not notified (Code Civ. Proc. § 631, subd. 4).

> Code Civ. Proc. § 631, subd. 4, provided that a jury trial might be waived by failing to announce that a jury was required, when the case was first set upon the trial calendar, if set upon notice or

stipulation, or within five days after notice, if set without notice or stipulation.

7. Jury 🔑**26.**

Consent, effective to waive jury trial, was not shown by not seasonably depositing fees, where court itself without parties' knowledge set case for trial (Const. art. 1, § 7; Code Civ. Proc. § 631, subd. 5).

Const. art. 1, § 7, provided that the right to jury trial shall remain inviolate, but in civil actions might be waived by consent of parties, signified as prescribed by law. Code Civ. Proc. § 631, subd. 5, provided that a jury trial might be waived by failing to deposit fees with clerk ten days prior to trial date. Case was pending in one county and was set for trial by the court on its own motion, but the parties and their attorneys, residing in another county, had no notice thereof.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by R. E. White and another against Kretz Brothers and others. From an adverse judgment, defendants appeal.

Affirmed.

Hickcox & Trude, of El Centro, for appellants.

Swing & Swing, of San Bernardino, for respondents.

MARKS, J.

Respondents recovered judgment in the sum of $20,060 for damages suffered by both of them in an automobile collision which occurred on June 30, 1929, in Imperial county on the Ocean-to-Ocean highway connecting the cities of Brawley and Los Angeles. Appellants made a motion for new trial which was denied. They have prosecuted this appeal from the judgment entered upon the verdict of the jury.

Appellants urge the following grounds upon which they rely for a reversal of the judgment: First, that the evidence was insufficient to justify the verdict; second, that the damages awarded are excessive; third, that the trial court erred in submitting the case to a jury at the request of respondents and over the objection of appellants.

[1] The evidence offered for the respondents discloses that they were husband and wife, both forty-eight years of age at the time of the trial; that with their daughter, Freda, they were traveling easterly on the Ocean-to-Ocean highway in a Hupmobile sedan which was being driven by R. E. White at a speed of about thirty-five miles per hour and upon his right-hand side of the road which traversed rolling ground at the place of the accident. As respondents were ascending a slight rise in the road they met a truck and trailer belonging to the appellants which was being driven by Henry Kretz acting for himself and the other appellants. Instead of being on his own right-hand side of the road, Henry Kretz was in the center of it with his left wheels not more than three feet northerly from the southerly edge of the pavement. White turned his car sharply to his right to avoid a collision with the truck. At the time of the impact the right wheels of his car were about three feet south of the southerly edge of the pavement and the left wheels were on the pavement about a foot northerly from its southerly edge. Kretz swerved his truck to its right and the trailer whipped further to the southerly edge of the road, its rear axle catching the left front end of the frame of the White automobile causing the collision in which both respondents were injured. A statement of these facts is sufficient to demonstrate the negligence of appellants, which was the proximate cause of the accident, and the lack of contributory negligence on the part of respondents.

[2] Appellants maintain that the case was improperly tried before a jury, and that this court can review the evidence and weigh it under the provisions of section 956a of the Code of Civil Procedure, make findings, and enter judgment in their favor. This contention was decided adversely to them in the cases of Tupman v. Haberkern, 208 Cal. 256, 280 P. 970; Davis v. Chipman (Cal. Sup.) 293 P. 40; and Isenberg v. Sherman (Cal. Sup.) 298 P. 1004.

[3-5] Both respondents were injured in the collision. R. E. White had his breastbone fractured and was bruised and shaken up and suffered pain and could not work for some time. Mrs. White was very seriously injured as is shown by the following quotation from a summary of the testimony of one of her attending physicians printed in the supplement to the appellants' brief:

"I know the plaintiff Levar White. She came to me July 8, 1929. She was very highly swelled and it was practically impossible for her to sleep. I examined her mouth and found on the right side the mandible was fractured, that would be about the location of the first or second molar teeth had there been any present. She also had a fracture on the left side. It was what you would call a compound multiple fracture. You could touch the bone where it was protruding through. She at that time was suffering excruciating pain. I had an X-ray that shows the fractures. There were no teeth in her mouth. It was an 'edentulous' case, but there was one unerupted tooth. The treatment in cases in which there are no teeth is a problem in itself because you have no teeth in the mouth for guidance, nor have you anything to anchor to; so that the problem resolved itself into some means of support for the portion that would drop and some means of pressure for that part that would leave its normal position and rise to a point where it would not make a union; and, so, in order to handle this, it was necessary that a head cap, with projecting wires, with a hammock to carry the broken chin—the mandible forms the chin, and this chin support is placed under with screw buckles was gently brought into place until the ridge inside the mouth felt even; and the next day, upon the same apparatus, was added a wire with what we call a 'stent,' which is a plastic, flexible material when hot and very rigid when cold; and with the stent, on wiring, pressure was made against the ramus of the jaw, the ramus being the perpendicular part but in fracture of this type is pulled upward and forward out of place. This pressure then was made upon the ramus to hold backwards and downwards. The reason that an apparatus of this kind is used upon a multiple fracture in a case of no teeth in the mouth is because the only other alternative is to cut down on the bone and bore holes in it and set wires through it, and then you have to splint that. I removed that splint August 28th; and on September 6th I did the plastic operation on her neck. On the right side, where there was an open wound which had been closed in the skin, and the muscles had been allowed to pull apart so that it had a very ugly scar, and I removed the scarred area and lifted up the skin and went in and joined the muscles of the neck together and then replaced the skin over them to make her neck smoother. While she was taking treatment she stayed at the Mission hotel, across the street from the office, so I could have her close to adjust this splint. In adjusting a fracture of that kind that has gone for days, which you see there, she had adhesions and a certain union will take place that has to be readjusted, and it is a very, very painful thing. This woman was not in any condition to take a general anaesthetic; and if she had taken one she would have been nauseated and thrown the jaw out of position. Consequently I had her go to that little hotel so that I would have her two or three times a day. They would bring her back and forth and I would set the screws up and work on it until I got it in as straight a position as possible then I let her go home.

"Mr. Eckhardt: I will state for the record and for the information of counsel that we expect to show that since the accident Mrs. White has not been able to wear false teeth.

"Q. Doctor, assuming that the proof is made that I have just indicated in my statement, what would you say with reference to the injury as being or not being a cause of Mrs. White's not being able to wear false teeth.

"Mr. Hickcox: Object to that on the ground it is not proper hypothetical question and it is not laying a sufficient foundation for the question.

"The Court: Objection overruled.

"A. Well, I think there is no question but that the injury is the cause of that condition, because in the breaking of the mandible, particularly at the point that this has occurred on the right, there is nearly always some overlapping of the ramus with the mandible. There is a great deal of tenderness left, and with a fracture in an edentulous case it has been my experience that the movements of the jaw are not as free or as normal as were the movements before the fracture; it makes a permanent change because there is a definite change of alignment of the part of the jaw. She will never have the same use of the jaw that she would have had had it not been fractured. The fracture on the right is a permanent injury because of the fact that the jaw is slightly shortened at that point. My charges to her were $1,000.00."

In a case of this kind the amount of damages to be awarded is first left to the sound discretion of the trial jury. It is next left to the discretion of the trial judge who may consider the evidence, review the facts, and set aside or reduce the verdict if it is unjust. An appellate court cannot set aside a judgment as excessive unless it is "so plainly and outrageously excessive as to suggest, at the first blush, passion or prejudice or corruption on the part of the jury." Lahti v. McMenamin, 204 Cal. 415, 268 P. 644, 645. In view of the injuries to R. E. White and his consequent suffering and loss of earning power, and the very serious injuries suffered by Mrs. White, we cannot say as a matter of law that the verdict and judgment are excessive.

[6] By a notice, filed October 29, 1929, the attorneys for respondents notified the then attorney for appellants "that on the 4th day of November, 1929, the undersigned will have said cause placed on the waiting trial list." No action seems to have been taken on this notice, as the record contains no mention of anything done in the case on November 4, 1929.

Under the heading "Minute Entry" Friday, November 1, 1929, the following appears: "At this day it is ordered by the court that the above entitled cause be and hereby is set for trial on January 15th, 1930." This order of November 1st, setting the case for trial does not seem to have been initiated by either party, whose attorneys do not appear to have been in court on that date. We must conclude that this order was made by the court on its own motion. The record contains no notice to the attorneys for either party of this setting.

On January 7, 1930, the attorneys for respondents filed a written demand for a trial by jury and paid the jury fee. The record is silent as to what happened on January 15, 1930, the day the case had been set for trial by the court, but counsel for appellants state in their brief that "the case could not be tried on January 15."

The trial court minutes of January 17, 1930, contain the following entry: "At this day it is ordered by the Court that the above entitled cause be and hereby is set for trial on March 25, 1930. The defendant's objection to a jury is noted." On January 17, 1930, the clerk of the trial court sent counsel for both parties the following notice: "Please take notice that the above entitled cause was set for trial March 25th, 1930." On January 21, 1930, the following notice by the attorneys for respondents was filed: "Notice is hereby given that the plaintiffs hereby demand a trial by jury in the above entitled action. Jury fees were heretofore sent you."

The record contains a copy of a minute order of March 21, 1930, whereby the trial date was fixed for May 21, 1930, and another minute order of February 6, 1931, setting the trial for March 2, 1931, on which date the trial was begun before a jury. Appellants strenuously urged then, and maintain here, that a trial by jury had been waived by respondents, and that error was committed in submitting the case to a jury.

Appellants maintain that respondents waived a trial by jury under the provisions of subdivisions 4 and 5 of section 631 of the Code of Civil Procedure in effect at the time, which provided as follows: "Trial by jury may be waived by the several parties to an issue of fact in manner following: * * * 4. By failing to announce that a jury is required, at the time the cause is first set upon the trial calendar if it be set upon notice or stipulation, or within five days after notice of setting if it be set without notice or stipulation. 5. By failing to deposit with the clerk, within ten days prior to the date set for trial, a sum equal to the amount of one (1) day's jury fees payable under the law." These provisions have been considered in recent decisions. Stern v. Hillman (Cal. App.) 300 P. 972; Harmon v. Hopkins (Cal. App.) 2 P.(2d) 540, 542; Chapman v. Cramer (Cal. App.) 4 P.(2d) 970; Dunham v. Reichlin (Cal. App.) 8 P.(2d) 922. We do not believe the facts of this case necessarily bring it within the rules announced in these decisions.

The waiver of a trial by jury under the provisions of subdivision 4, § 631, Code of Civil Procedure, where the case is not set upon motion or by stipulation, is based upon a failure to demand a jury within five days after notice of setting the case for trial. As the case was first set by the court on its own motion, and as respondents received no notice of this setting, it is obvious that they would not be precluded from a jury trial by the provisions of this subdivision.

[7] Subdivision 5 of section 631 of the Code of Civil Procedure contains no such saving clause, but provides that a jury trial may be waived by the failure of a party to deposit one day's jury fees with the clerk ten days prior to the date set for the trial. This case was pending in Imperial county. Respondents and their counsel were residents of San Bernardino county. They had no notice of the setting of the cause for trial or of the trial date. Article 1, § 7 of the Constitution provides that the right of jury trial shall be secured to all and shall remain inviolate; that in civil actions it may be waived "by the consent of the parties, signified in such manner as may be prescribed by law." We are not prepared to hold under the facts here disclosed that the failure of respondents to deposit the jury fees by January 5, 1930, should be held a "consent" on their part to a trial by the court without a jury where they had neither actual nor constructive notice of the setting order nor of the trial date, knowledge of which should be necessary to fix consent upon them. Neither party then had the five days' notice of trial required by section 594 of the Code of Civil Procedure. Where, as here, the trial court set the case for trial upon its own motion without the knowledge of either party and without any notice to them of either the order of setting or the date fixed for the trial, we cannot hold that either party waived a jury trial by failure to deposit the required jury fees ten days before the date so fixed for trial by the court.

In the case of Harmon v. Hopkins, supra, the following appears, part of which is dicta: "It is probably true that the court had the right, notwithstanding such waiver, to submit the case to trial by jury, if he had chosen to do so (Doll v. Anderson, 27 Cal. 249), but the court has a discretion in the matter, and its order refusing to submit the case to a jury will not be disturbed, when no gross abuse of discretion appears (Ferrea v. Chabot, 121 Cal. 233, 53 P. 689, 1092). Appellants have not attempted to point out wherein they have suffered any injury or prejudice by reason of the trial by the court instead of the jury. Their only complaint on this appeal is 'the trial court erred in denying plaintiffs a jury trial.' Prejudice will not be presumed as a consequence of the issues of fact, in a case being tried by the court instead of the jury. On the contrary, the presumption is that the appellants have enjoyed the benefit of a fair and impartial trial, according to the usual modes of procedure under the Constitution and laws of this state. Clearly, the appellants have failed to show any prejudice or other error on the part of the court which would justify a reversal of the case."

Judgment affirmed.

We concur: BARNARD, P. J.; THOMSON, Justice pro tem.

122 Cal.App. 460

ZAGOREN v. HALL, County Clerk.

Civ. 4649.

District Court of Appeal, Third District, California.

April 11, 1932.

Rehearing Denied May 11, 1932. Hearing Denied by Supreme Court June 9, 1932.

1. Mandamus 🔑16(1).

Attorney for estate *held* not entitled to mandamus to compel county clerk to issue execution on order allowing fees, where assets of estate were exhausted (Probate Code, § 1230; Code Civ. Proc. § 1616).

2. Mandamus 🔑16(1).

Mandamus will be denied when it is useless, unenforceable, or unavailing.

3. Judgment 🔑767.

Recording of judgment or order, and not recording of mere opinion or decision, is necessary to create lien upon real property (Code Civ. Proc. § 674).

4. Judgment 🔑767.

Recording of mere decision or opinion directing entry of order allowing attorney's fees against estate *held* not to create lien against realty (Code Civ. Proc. § 674).

> In proceedings on petition for allowance of attorney's fees against estate, the court filed a written opinion reciting certain facts and citing authorities, and concluded as follows: "Let an order be entered allowing petitioner, against and out of said estate and in payment of legal services rendered therein, the sum of $2,000 for ordinary services, and the sum of $2,000 for extraordinary services." Certified copy of foregoing opinion was recorded with the county recorder pursuant to Code Civ. Proc. § 674, but subsequent minute order allowing the attorney's fees as directed by the court was not recorded.

5. Courts 🔑202(4).

Statute authorizing execution to enforce judgment in probate proceedings should be confined to formal trials where issues are joined (Probate Code, § 1230).

6. Executors and administrators 🔑268.

Allowance of attorney's fees against estate merely recognizes attorney as creditor, entitling him to payment from assets in course of administration (Probate Code, § 911).

7. Executors and administrators 🔑268.

Attorney, under order allowing attorney's fees against estate, *held* not entitled to execution against assets to detriment of other creditors (Probate Code, §§ 911, 950, 1230; Code Civ. Proc. § 1616).

8. Executors and administrators 🔑268.

Statute providing for payment of attorney's fees against estate "forthwith" requires prompt payment when there are available funds from which obligation may be satisfied (Probate Code, § 911).

[Ed. Note.—For other definitions of "Forthwith," see Words and Phrases.]

9. Executors and administrators 🔑283.

Where estate possesses funds available to pay attorney's fees allowed, and compliance with order is refused, adequate remedy exists either by citation or against executor or administrator personally (Probate Code, §§ 911, 954).

10. Judgment 🔑564(1).

Judgment quashing execution issued on order allowing attorney's fees against estate, in absence of appeal, *held* res judicata in subsequent mandamus proceeding to compel issuance of execution (Probate Code, §§ 911, 1230).

Original application by H. W. Zagoren for a writ of mandamus prayed to be directed to Harry W. Hall, County Clerk of Sacramento County, to compel the issuance of a writ of execution for attorney's fees pursuant to Probate Code, § 1230.

Peremptory writ of mandamus denied.

James F. Gaffney and H. W. Zagoren, in pro. per., both of Sacramento, for petitioner.

Neil McAllister and Devlin & Devlin & Diepenbrock, all of Sacramento, for respondent.

Mr. Presiding Justice PRESTON.

This is a petition for a writ of mandamus to require the county clerk of Sacramento county to issue an execution under the provisions of section 1230 of the Probate Code, to satisfy an order for the payment of attorney's fees which were allowed for his services in behalf of an estate.

The respondent is county clerk of Sacramento county. The petitioner was an attorney for the estate of Louis W. Myers, deceased. This estate, which was appraised at over $1,000,000, is now in process of probating. The petitioner was paid from the estate the sum of $5,250 on account of his fees for legal services performed. June 4, 1929, before the completion of the probating of the estate, the petitioner's relationship as attorney for the estate was terminated. In January, 1931, he petitioned the court for a further allowance of attorney's fees under the provisions of section 1616 of the Code of Civil Procedure, as it existed before the adoption of the Probate Code. March 18th the court made an order for the further allowance of $4,000 as attorney's fees. No part of this sum has been paid. The estate was greatly incumbered. The assets of the estate are exhausted. April 2d the petitioner procured the issuance of an execution to satisfy the order for attorney's fees last mentioned. Upon motion that execution was quashed by the superior court. No appeal was taken from the order recalling the execution. A subsequent demand for execution was refused by the respondent. A peremptory writ of mandamus is sought in this proceeding to compel the respondent to issue an execution in the matter of the estate of Myers, deceased, to satisfy the order for payment of attorney's fees.

A former petition for a writ of mandamus to require the issuance of an execution to satisfy this order for $4,000 attorney's fees against the administrator of the Myers' estate, personally, was denied. Zagoren v. Superior Court (Cal. App.) 4 P.(2d) 279. The facts upon which this petition is based are related in that opinion in greater detail.

[1, 2] The petition for a writ of mandamus must be denied in the present proceeding for the reason that there is no property in the estate of Myers against which the writ may be levied. It is conceded that there is no property in the estate which is subject to execution, unless the petitioner holds a prior lien on certain real property which was sold upon the foreclosure of a trust deed. It is futile to direct the issuing of an execution unless there is property against which it may be levied. Under the facts of this case it would become an idle act to issue an alternative writ of mandamus. It is the invariable rule that a court of equity will refuse to issue a writ of mandamus when it is useless, unenforceable, or unavailing. Spotton v. Superior Court, 177 Cal. 719, 171 P. 801; George v. Beaty, 85 Cal. App. 525, 260 P. 386; Voinich v. Poe, 52 Cal. App. 597, 199 P. 74; Gay v. Torrance, 145 Cal. 144, 78 P. 540; 38 C. J. 551, § 23.

[3, 4] In spite of the present depleted condition of the estate, petitioner contends that he holds a valid subsisting lien upon certain real property belonging to the estate against which an execution will operate. He asserts this lien was created by recording pursuant to section 674 of the Code of Civil Procedure, in the office of the county recorder of Sacramento county, on April 30, 1931, a certified copy of the order of the court for the payment of the sum of $4,000 as attorney's fees. With relation to this feature of the transaction, the facts appear as follows: The petition for attorney's fees was presented to the court in January, 1931. It was submitted and taken under advisement by the court. March 18th the court filed its written opinion in that matter, reciting certain facts and citing authorities. This opinion concluded with the following language: "*Let an order be entered* allowing petitioner, against and out of said estate and in payment of legal services rendered therein, the sum of $2,000 for ordinary services, and the sum of $2,000 for extraordinary services." A certified copy of this opinion was recorded with the county recorder April 30th, on the assumption that this document constituted the order and judgment of the court. It is the recording of this document which the petitioner claims established a lien upon the land in question. Following the directions of the court above quoted, and on the same date, the customary minute order was duly entered in the clerk's minutes of court allowing the petitioner said sum of $4,000 as attorney's fees as directed by the court. A copy of this order was not recorded in the office of the county recorder.

As security for an obligation due from the estate of Myers to the California Trust & Savings Bank, of Sacramento, a trust deed upon specific real property was duly executed to the bank as beneficiary thereof to secure the payment of a promissory note in the sum of $167,000. For default of the terms of the trust deed, it was subsequently duly foreclosed and the bank became the purchaser of the property. The petitioner in this mandamus proceeding claims this real property was purchased by the bank subject to his prior lien which was acquired by virtue of recording the court order for attorney's fees pursuant to section 674, supra. This statute provides, "An abstract of the *judgment or decree* of any court of record of this state, * * * certified by the clerk of the court where such judgment or decree was rendered, may be filed with the recorder of any county and from such filing the judgment or decree becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in such county, owned by him at the time. * * *"

The recording of the *judgment or order* of the court, and not a mere opinion or decision of the court, is required to create a lien upon real property. It seems clear that the petitioner in the present case recorded a mere certified copy of the opinion directing the entry of an order for counsel fees. The document which was recorded is in the usual form of an opinion, which reviews the facts, cites authorities and then directs that an order be entered accordingly. The language quoted above does not state that the court presently orders an allowance of fees. It says: "Let an order be entered," etc. It clearly directs and contemplates that an order will be subsequently entered in accordance with the directions therein contained. The most that can be said of this document is that it may constitute a decision allowing attorney's fees. Evidently it is not the judgment or order of the court, the recording of which creates a lien upon real property. For this reason we are impelled to hold a lien was not created against the property which was purchased by the bank.

It is conceded there is no other property belonging to the estate against which an execution may be levied.

[5-9] The petitioner contends that the order of court allowing attorney's fees for legal services in the probating of an estate is a judgment in contemplation of section 1616 of the Code of Civil Procedure, which section provides that "such payment shall be forthwith made," so as to entitle him to an execution under the provisions of section 1230 of the Probate Code, formerly section 1716 of the Code of Civil Procedure, to satisfy the judgment. It is doubtful whether an order for attorney's fees which is procured in an estate pursuant to section 911 of the Probate Code constitutes a judgment which authorizes the issuance of an execution for its satisfaction under section 1230 of that Code. The last-mentioned section which authorizes the issuance of an execution to enforce the judgment should be confined to formal trials where issues are joined, and which require the adoption of formal findings of facts or a trial by jury. A petition for the allowance of attorney's fees under secfion 911, Probate Code, is in the nature of an ex parte application and does not possess the characteristics of such formal trial. The allowance of attorney's fees for services in probating an estate merely recognizes the attorney as a creditor of the estate entitling him to be paid from the assets of the estate in the course of administration. To be sure his claim is classified by the provisions of section 950 of the Probate Code under the heading of "expense of administration" among the first obligations which are entitled to be paid. This does not mean he may take out an execution and sacrifice the assets of an estate to the detriment of all other creditors. The final provisions of section 911 of the Probate Code that "such payment [for attorney's fees] shall be made forthwith," should be construed to mean that prompt payment shall be made when there are available funds in the estate from which the obligation may be satisfied. When an estate possesses available funds with which to pay attorney's fees which have been allowed, and the administrator or executor fails or refuses to comply with the order, adequate remedy exists either by citation or by resorting to the provisions of section 954 of the Probate Code. Zagoren v. Superior Court (Cal. App.) 4 P.(2d) 279. There is no finding in the present proceedings that the estate contained available funds with which to pay the claim. In fact, it is conceded available funds did not exist in the estate.

[10] Finally, it appears that an execution was formally issued in the matter of the estate of Myers, at the request of this petitioner, to enforce this same claim of attorney's fees. Upon proceedings duly had in the superior court of Sacramento county, that execution was recalled and quashed. That proceeding clearly involved the legal authority to levy an execution against the property in the estate of said deceased for the satisfaction of this order for attorney's fees. This petitioner failed to appeal from the order quashing the execution. He thereby waived his speedy and adequate remedy on appeal to determine the asserted right to levy an execution against the assets of the estate, which is the exact question involved in this proceeding. The doctrine of res judicata therefore precludes the right to maintain this proceeding for a writ of mandamus. Creditors' Adjustment Co. v. Newman, 185 Cal. 509, 513, 197 P. 334.

The petition for a peremptory writ of mandamus is denied.

I concur: Mr. Justice R. L. THOMPSON.

Mr. Justice PLUMMER, deeming himself disqualified, did not participate in this decision.

122 Cal.App.(Supp.) 790

PEOPLE v. SCHUSTER.

Cr. 761.

Appellate Department, Superior Court, Los Angeles County, California.

March 25, 1932.

1. Physicians and surgeons 🔑6(9).

Allegation that unlicensed defendant used prefix "Dr." stated no violation of Medical Practice Act prohibiting use of prefix in sign or advertisement by unlicensed person (St. 1913, p. 734, § 17, as amended by St. 1929, p. 435).

2. Physicians and surgeons 🔑3.

Chiropractic act fully regulating use of prefix "Dr." by licensed chiropractors *held* to repeal original medical act so far as applicable to licensed chiropractors (St. 1913, p. 734, § 17, as amended by St. 1929, p. 435; St. 1923, p. lxxxviii, §§ 7, 15, 18).

> St. 1923, p. lxxxviii, §§ 7, 15, 18, repeals, in the particulars above indicated, St. 1913, p. 734, § 17, because it is not only later in point of time and prescribes different rules with respect to use of prefix "Dr." by licensed chiropractors, but expressly repeals Medical Practice Act so far as it conflicts with the chiropractic act.

3. Physicians and surgeons 🔑3.

Amendment of Medical Practice Act *held* not to affect chiropractic act because of paramount authority of initiative law, which is not subject to amendment or repeal by Legislature unless it so provides (St. 1913, p. 734, § 17, as amended by St. 1929, p. 435; St. 1923, p. lxxxviii, §§ 7, 15, 18; Const. art. 4, § 1).

4. Physicians and surgeons 🔑6(1).

Use of prefix "Dr." by licensed chiropractor is not punishable under Medical Practice Act (St. 1913, p. 734, § 17, as amended by St. 1929, p. 435; St. 1923, p. lxxxviii, §§ 7, 15, 18).

5. Criminal law 🔑881(2).

Licensed chiropractor cannot be charged with violation of Medical Practice Act and be convicted for violation of chiropractic act in respect of use of prefix "Dr." (St. 1913, p. 734, § 17, as amended by St. 1929, p. 435; St. 1923, p. lxxxviii, §§ 7, 15, 18).

6. Physicians and surgeons 🔑6(1).

Licensed chiropractor does not violate Medical Practice Act by practicing or holding himself out as a practicing chiropractor (St. 1913, p. 734, § 17, as amended by St. 1929, p. 435; St. 1923, p. lxxxviii, §§ 7, 15, 18).

7. Physicians and surgeons 🔑6(10).

In prosecution of licensed chiropractor for violation of Medical Practice Act, excluding proof that treatments offered were taught in chiropractic schools as part of chiropractic *held* error (St. 1913, p. 734, § 17, as amended by St. 1929, p. 435; St. 1923, p. lxxxviii, §§ 7, 15, 18).

> Exclusion of such proof was error because licensed chiropractor needs no other license to practice chiropractic as taught in chiropractic schools and colleges.

Appeal from Municipal Court, City of Los Angeles; Ellis A. Eagan, Judge.

W. I. Schuster was convicted of violation of the Medical Practice Act, and he appeals.

Reversed and remanded.

Thomas Morris and Kelly, Stuart & Hendrick, all of Los Angeles, for appellant.

Charles P. Johnson, City Prosecutor, John L. Bland, and Joe Matherly, Deputy City Prosecutors, all of Los Angeles, for the People.

SHAW, J.

The complaint against appellant, although containing formally but one count, in reality charges him with two offenses, which require separate consideration, and which we distinguish in the following quotation by inserted numbers. The allegation is that in violation of section 17 of the state Medical Practice Act defendant "did wilfully and unlawfully (1) use the prefix 'Dr.' (2) advertise and hold himself out as practicing a system and mode of treating the sick and afflicted without then and there having a valid unrevoked certificate of license from the Board of Medical Examiners of the State of California so to do."

The Medical Practice Act was enacted in 1913 (St. 1913, p. 722), and has been amended at various times since. It provides for a board of medical examiners, who have power to examine applicants and issue certificates authorizing the holder to practice medicine and also certificates authorizing the practice of other systems of treating the sick. Section 17 of this act, as amended in 1929 (Stats. 1929, p. 435) provides that, "Any person who shall practice or attempt to practice, or who advertises or holds himself out as practicing, any system or mode of treating the sick or afflicted in this state, * * * without having at the time of so doing a valid unrevoked certificate as provided in this act, or who shall in any sign or in any advertisement use the word 'doctor,' the letters or prefix 'Dr.,' the letters 'M. D.,' or any other term or letters indicating or implying that he is a doctor, physician and surgeon, physician, surgeon or practitioner, under the terms of this or any other act, or that he is entitled to practice hereunder, or under any other law, * * * without having at the time of so doing a valid unrevoked certificate as provided for in this act, shall be guilty of a misdemeanor. * * *"

[1] The part of the complaint which we have designated as (1) does not state a violation of this section, because it fails to charge that the prefix was used in any sign or advertisement. The evidence, however, shows that it was so used, and if nothing further were to be considered there would be a serious question whether section 4½, art. 6, of the Constitution cured this defect in the complaint. See People v. Ball, 204 Cal. 241, 267 P. 701. But this case presents also the question whether defendant is amenable to prosecution under the Medical Practice Act. Defendant admitted at the trial that he "did not have a valid unrevoked certificate of license from the Board of Medical Examiners," and it was also stipulated that he "was at the time of the commission of the alleged offense a chiropractor, duly licensed as such under the laws of the State of California."

When the Medical Practice Act was adopted in 1913, it was the only act regulating the practice of the healing arts. It applied to chiropractors, and required them to have certificates issued by the board of medical examiners. But in 1922 an act regulating the practice of chiropractic was adopted as an initiative measure. Stats. 1923, p. lxxxviii. It provides for a state board of chiropractic examiners and empowers them to examine those desiring to practice chiropractic and issue certificates authorizing them so to do. Section 15 of this act provides that, "any licensee under this act who uses the word 'doctor' or the prefix 'Dr.' without the word 'chiropractor,' or 'D. C.' immediately following his name,

* * * or any other letters, prefixes or suffixes, the use of which would indicate that he or she was practicing a profession for which he held no license from the state of California, * * * shall be guilty of a misdemeanor * * *." Section 18 provides that, "Nothing herein shall be construed as repealing the 'medical practice act' of June 2, 1913, or any subsequent amendments thereof, except in so far as that act or said amendments may conflict with the provisions of this act as applied to persons licensed under this act, to which extent any and all acts or parts of acts in conflict herewith are hereby repealed."

[2, 3] Section 15 of the Chiropractic Act obviously attempts to regulate fully and completely the use by licensed chiropractors of the prefix "Dr.," as well as other prefixes and suffixes, and therefore it would be clear even without section 18 that by implication it repealed the original Medical Practice Act so far as the latter might in this respect be applicable to licensed chiropractors. Where two statutory provisions are in irreconcilable conflict, the one latest in point of time will control. Crooks v. People's Finance & Thrift Co. (Cal. Super.) 292 P. 1065; Spreckels v. Graham, 194 Cal. 516, 527, 228 P. 1040; Patchett v. Webber, 198 Cal. 440, 447, 245 P. 422. In addition to this rule, we have here an express declaration of the repeal of conflicting portions of the Medical Practice Act. Where two legislative enactments punish exactly the same act, they are in conflict. Ex parte Stephen, 114 Cal. 278, 282, 46 P. 86; In re Murphy, 190 Cal. 286, 290, 212 P. 30; In re Mingo, 190 Cal. 769, 771, 214 P. 850. The later amendment of the Medical Practice Act by the Legislature can have no effect as to chiropractors because of the paramount authority of an initiative law, which is not subject to amendment or repeal by the Legislature unless it so provides. Const. art. 4, § 1. In this case there is no such provision.

[4, 5] We conclude that appellant, being a licensed chiropractor, could not be prosecuted under the Medical Practice Act for any misuse of the prefix "Dr.," but must be prosecuted therefor under the Chiropractic Act, if at all. The evidence shows a violation of the Chiropractic Act in that respect, but no such violation was charged, and no attempt was made to charge one. A defendant charged with one offense cannot be tried for or convicted of another. People v. Cook, 148 Cal. 334, 340, 83 P. 43; People v. Radich (Cal. Super.) 294 P. 1. There is good reason for the application of this rule to this case, for here the two acts differ in the penalties imposed, that prescribed by the Medical Practice Act having the greater maximum and minimum, both as to fine and imprisonment. The fine imposed is the minimum imposed by that act, but we cannot say that it would not have been less had the defendant been convicted under the Chiropractic Act.

[6] The part of the complaint which we have designated as (2) states an offense under section 17 of the Medical Practice Act. Referring again to the Chiropractic Act, we find that the state board of chiropractic examiners have power to issue a certificate designated as a license, "which license shall authorize the holder thereof to practice chiropractic in the state of California as taught in chiropractic schools or colleges; and, also, to use all necessary mechanical, and hygienic and sanitary measures incident to the care of the body, but shall not authorize the practice of medicine, surgery, osteopathy, dentistry or optometry, nor the use of any drug or medicine now or hereafter included in materia medica." Section 7. The act also declares: "Any person who shall practice or attempt to practice chiropractic, * * * or who shall use the title 'chiropractor' or 'D. C.' or any word or title to induce, or tending to induce belief that he is engaged in the practice of chiropractic, without first complying with the provisions of this act; * * * shall be guilty of a misdemeanor. * * *" Section 15. Applying to these provisions the rules already stated, it is clear that one who has a license as a chiropractor does not violate the Medical Practice Act by practicing or holding himself out as practicing chiropractic.

[7] This part of the complaint does not state or attempt to state an offense under the Chiropractic Act. The charge is under the Medical Practice Act only. It is stipulated that defendant was a licensed chiropractor. Hence, he could establish a defense by showing that the treatments he offered to give were a part of the practice of chiropractic. The criterion established by the Chiropractic Act in this matter, except as to the use of medicine and other acts expressly excluded from the scope of chiropractic, is the teaching in chiropractic schools and colleges. Section 7. It was therefore error to reject defendant's offer to prove that the treatments offered by him were taught in chiropractic schools and colleges as a part of chiropractic.

The instructions given by the court, which authorized the jury to find the defendant guilty upon the showing which we have already stated, were erroneous.

The judgment is reversed, and the case is remanded to the municipal court for a new trial.

We concur: McLUCAS, P. J.; BISHOP, J.

215 Cal. 378

LAWSON v. GUILD.

L. A. 13523.

Supreme Court of California.

April 12, 1932.

1. New trial 🔑116(2).

New trial proceedings were seasonably commenced by plaintiff more than sixty days after entry of judgment, where defendant had not served notice of judgment entry (Code Civ. Proc. § 659).

2. Appeal and error 🔑356.

Supreme Court is unauthorized to review appeal from judgment not seasonably taken (Code Civ. Proc. § 939).

3. Appeal and error 🔑345(1).

If time to appeal from judgment expires before seasonable commencement of new trial proceedings, privilege of reviewing judgment terminates (Code Civ. Proc. § 939).

4. Appeal and error 🔑345(1).

If time to appeal from judgment expires before seasonable commencement of new trial proceedings, privilege of reviewing order denying new trial terminates (Code Civ. Proc. §§ 939, 963).

5. Appeal and error 🔑348(1).

Service of notice of entry of judgment is unnecessary to start time for appeal running (Code Civ. Proc. § 939).

6. Appeal and error 🔑113(2).

Appeal is unauthorized from order refusing to vacate final judgment, where grounds of appeal existed before judgment entry and were available on appeal from judgment.

7. Appeal and error 🔑113(2).

In action to quiet title, question whether cross-complaint was void because not containing description of property was reviewable on appeal from judgment, and therefore afforded no ground for appeal from order refusing to set aside judgment.

8. Appeal and error 🔑801(3).

Supreme Court, in dismissing tardy appeal, need not consider whether judgment is void because of omitted allegation in cross-complaint.

9. Appeal and error 🔑797(2).

Motion to dismiss tardy appeal *held* not premature, notwithstanding proceedings for appeal record were pending below.

In Bank.

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Action by Valentine B. Lawson against Mary Montague Guild, in which defendant filed a cross-complaint. From an adverse judgment, order denying new trial and refusing to vacate the judgment, plaintiff appeals, and defendant moves to dismiss the appeal.

Appeals dismissed.

Edwin J. Miller, of Los Angeles, for appellant.

Chambers & Lyman, of Los Angeles, for respondent.

WASTE, C. J.

Motion to dismiss appeal.

[1, 2] Plaintiff brought this action to quiet his title to certain real property. On June 25, 1931, judgment was entered quieting the defendant's title. No notice of entry of judgment was ever served. On September 30, 1931, more than sixty days after the entry of judgment, the plaintiff filed his notice of intention to move for a new trial. Defendant having failed to serve notice of the entry of judgment, the new trial proceedings were seasonably instituted. Section 659, Code Civ. Proc.; Gross v. Hazeltine, 206 Cal. 130, 132, 273 P. 550. The motion for new trial was denied November 25, 1931. Plaintiff filed his notice of appeal on December 5, 1931, which was more than sixty days after the entry of judgment, but within thirty days of the denial of the motion for new trial.

Section 939 of the Code of Civil Procedure provides that an appeal, to be timely, must be taken within sixty days after entry of the judgment or order which it is sought to have reviewed. The statute limiting the time in which an appeal may be taken is jurisdictional and mandatory. If the appeal is not taken within the time allowed by law, an appellate court has no power to entertain it. Bley v. Board of Dental Examiners, 101 Cal. App. 666, 669, 282 P. 19. In the instant case the judgment was entered approximately five and one-half months prior to the filing of the notice of appeal. The appeal was taken too late and must therefore be dismissed.

[3-5] The new trial proceedings, though seasonably instituted, did not serve to extend the time for appeal. It is now settled that the language, "if proceedings on motion for a new trial are pending, the time for appeal from the judgment shall not expire until thirty days after entry in the trial court of the order determining such motion for a new trial, or other termination in the trial court of the proceedings upon such motion" (section 939, Code Civ. Proc.), refers exclusively to such new trial proceedings as are pending within the period of sixty days from the entry of judgment. That is to say, if, at the expiration of the sixty-day period within which an appeal might be taken, no notice of intention to move for a new trial has been given, the time to appeal from the judgment elapses, and the privilege of appealing from the judgment

or of having an order denying a new trial reviewed on appeal terminates. Ransome-Crummey Co. v. Beggs, 185 Cal. 279, 196 P. 487; Bates v. Ransome-Crummey Co., 42 Cal. App. 699, 702, 703, 184 P. 39; Pacific Light & Power Corp. v. Kauffman, 39 Cal. App. 496, 500, 501, 179 P. 452. Service of notice of entry of judgment is not necessary to start the time running within which an appeal may be taken. Schainman v. Kierce, 199 Cal. 249, 251, 248 P. 905. It necessarily follows that the appeal from the judgment must be dismissed.

The purported appeal from the order denying a new trial must also be dismissed for such an order is not now appealable. Section 963, Code Civ. Proc.; Pacific Light & Power Corp. v. Kauffman, supra.

[6, 7] Appellant asserts that his motion for new trial included a motion to set aside the judgment. The record now before us fails to disclose an order denying a motion to vacate the judgment. The only order entered by the trial court was the one denying the motion for new trial, which order, as we have shown, is nonappealable. However, even if the trial court had made an order denying the asserted motion to vacate, it would not be appealable. An appeal will not lie from an order refusing to vacate a final judgment if the grounds upon which the party sought to have the same vacated existed before the entry of judgment and were available on appeal from the judgment. Barry v. Learner (Cal. App.) 299 P. 82. Appellant's asserted motion to vacate was apparently grounded upon the claim that the judgment quieting respondent's title is void because her cross-complaint failed to contain a description of the property. This is a matter reviewable upon appeal from the judgment, and an order refusing to set aside the judgment on this ground is not, therefore, an appealable order.

[8] Nor do we find it necessary to consider appellant's contention that the judgment is void because of the failure of the cross-complaint to describe the property. The appeal from the judgment having been taken too late, and therefore being subject to dismissal for want of jurisdiction, there is nothing pending here that would warrant us reviewing this contention. If the judgment is void on its face, as the appellant asserts, a point upon which we express no opinion, there are ample remedies still available to him, even though his appeal has proved abortive, by which he might have this issue judicially determined.

[9] We find no merit in appellant's final contention that the motion to dismiss is premature because proceedings for a record to be used on the appeal are still pending in the court below. While the pendency of proceedings for a record constitutes a good defense to a motion to dismiss for failure to file the record within time (section 1, rule I), it does not furnish a defense to a motion to dismiss an appeal taken after the time limited by law.

The appeal from the judgment and the purported appeals from the order denying a new trial and the "order" refusing to vacate the judgment are, and each is, hereby dismissed.

We concur: SEAWELL, J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; TYLER, Justice pro tem.

215 Cal. 382

JOHNSON v. SUN REALTY CO. et al.

L. A. 13407.

Supreme Court of California.

April 12, 1932.

Appeal and error 🔑801(4).

Appellate court will not consider merits of appeal upon motion to dismiss.

In Bank.

Appeal from Superior Court, Los Angeles County; J. C. Needham and Isaac Pacht, Judges.

Action by George C. Johnson against the Sun Realty Company and another. From the judgment for named defendant, plaintiff appeals.

Motion to dismiss appeal denied.

George C. Johnson, of Los Angeles, in pro. per.

Louis M. Lissner, of Los Angeles, for respondent.

WASTE, C. J.

Plaintiff instituted this action in the superior court in and for the county of Los Angeles to reform a written instrument and to enjoin the prosecution of an action then pending between the same parties in the municipal court of that county. The defendant Sun Realty Company demurred generally and upon the further ground that the complaint on its face showed that jurisdiction had attached in the municipal court to the exclusion of the superior court. This demurrer was sustained without leave to amend, and the plaintiff appealed. Since the taking of the appeal, the municipal court action terminated with the entry of a judgment against the appellant herein.

The defendant and respondent Sun Realty Company now moves to dismiss the appeal, urging that, by reason of the termination of the municipal court action in a manner adverse to the appellant herein, the present appeal is now moot.

Examination of the complaint satisfies us that it is good as against general demurrer. The court below in sustaining the demurrer thereto without leave to amend must, therefore, have concluded that the issues involved in the municipal court action were analogous to or identical with the issues involved in this action. By the prosecution of the present appeal, the plaintiff has necessarily questioned the propriety of the trial court's conclusion in this particular and the ruling based thereon. To grant respondent's motion and dismiss the present appeal, on the ground that the termination of the municipal court action had made the subject-matter hereof moot, would be to decide that the issues raised in this action were involved in and determined by the municipal court proceeding. To so decide would be to pass on the merits of the appeal. We have repeatedly declined to investigate and consider the merits of an appeal upon a motion to dismiss. Christin v. Story, 211 Cal. 381, 382, 295 P. 515; U. S. v. Ackerman, 208 Cal. 99, 101, 280 P. 359.

The motion to dismiss the appeal is denied.

We concur: SEAWELL, J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; TYLER, Justice pro tem.

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215 Cal. 441

O'TOOLE v. O'TOOLE.

S. F. 13974.

Supreme Court of California.
April 22, 1932.

1. Husband and wife ⚷299(3).

Changed conditions justify modification or revocation of separate maintenance award.

2. Husband and wife ⚷299(3).

In separate maintenance action, whether to modify or revoke temporary allowance to wife is within trial court's sound discretion.

3. Husband and wife ⚷299(3).

In separate maintenance action, temporary allowance to wife to rehabilitate herself vocationally *held* properly revoked, wife having become gainfully employed and not dependent.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Action for separate maintenance by Elizabeth Legna O'Toole against Frederick P. O'Toole, in which defendant filed cross-complaint for divorce. Divorce was denied to defendant and temporary allowance made to plaintiff. Defendant moved to revoke the order for separate maintenance, and from the order of revocation plaintiff appeals.

Affirmed.

John L. McVey, of Oakland, for appellant.

Julian D. Brewer, of San Francisco, for respondent.

WASTE, C. J.

Appeal from an order revoking an order theretofore entered in a separate maintenance action directing the respondent husband to pay to the appellant $50 a month for her maintenance and support until the further order of the court.

The parties intermarried in 1908 and separated in 1924, since which time they have not lived together. They have no children. In 1928 appellant filed an action for separate maintenance and support, alleging desertion and cruelty, and asking for an equitable division of the community property and assets of the parties, $125 a month for her maintenance, counsel fees, and costs. The respondent answered and cross-complained, seeking a judgment of divorce on the ground of alleged cruelty. Upon a motion for temporary allowance the superior court directed that the respondent pay to the appellant $50 a month until further order so that she might rehabilitate herself vocationally, it appearing that she was capable of and fitted by training to secure gainful employment. Upon the trial of the cause a division of the community property rights and assets of the parties was decreed, and the monthly allowance of $50 continued until the further order of court. This sum was paid regularly to the appellant for two years. A divorce was denied to the respondent on his cross-complaint.

In 1930, the respondent filed a motion supported by affidavit to revoke the order for separate maintenance on the ground that the same was made merely to assist the appellant to return to gainful employment, respondent urging that the appellant was gainfully employed and therefore no longer dependent upon him for support and maintenance. The appellant controverted this. The motion came on for hearing upon conflicting affidavits and the oral testimony of the appellant. The motion was granted and the allowance order revoked until further order, the court ruling that the appellant was "mentally, physically and vocationally qualified to earn her own livelihood; that said plaintiff [appellant] is now engaged in gainful employment and that she is not dependent on this defendant for maintenance and support." From this latter order the wife prosecutes this appeal.

While conceding the power of the court below to alter or revoke the provisions of its decree awarding to her separate maintenance and support, appellant contends that such power may only be properly exercised where changed conditions appear. She then urges that there has not been such a change in the condition or position of the parties hereto as to warrant the making of the order appealed from.

Respondent, on the other hand, urges that the whole matter is one addressed to the sound discretion of the trial court whose conclusion will not be disturbed on appeal in the absence of a clear showing of abuse in the exercise of such discretion.

[1-3] The contention of respondent is sound. Proper grounds may always be presented for the purpose of modifying or revoking an award of separate maintenance. Changed conditions of the parties will justify such action. 1 Cal. Jur. 1037, 1038; 30 Corp. Jur. 1095, 1096. Upon conflicting evidence the court below has decided that the appellant has been returned to gainful employment and is no longer dependent upon the respondent for her support and maintenance. We perceive no abuse of the trial court's discretion.

The order is therefore affirmed.

We concur: SHENK, J.; CURTIS, J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.; TYLER, Justice pro tem.

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215 Cal. 439

In re SMEAD'S ESTATE.

SMEAD v. COATES et al.

L. A. 13402.

Supreme Court of California.

April 21, 1932.

1. Appeal and error ⚷417(1).

Notices of appeal are not strictly construed.

2. Appeal and error ⚷422.

An appeal will not be dismissed because of a misdescription of judgment or order, unless it appears that respondent was misled thereby.

3. Appeal and error ⚷419(1).

Notice of appeal indicating appeal is from certain parts of order and concluding "and from the whole and every part thereof" *held* to indicate appeal is taken from each and every part of court's ruling.

4. Executors and administrators ⚷510(2).

Order denying petition for settlement of first and final account and for discharge of executor *held* appealable (Probate Code, § 1240).

In Bank.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Petition by Chester R. Smead, executor of the estate of Lillian C. Smead, deceased, for the approval of his first and final account and for his discharge as executor, opposed by Della F. Coates and others, in which contestants filed a petition for the removal of plaintiff as executor. From an order denying the petition for approval of the first and final account and discharge of the executor, and directing that plaintiff continue as executor, he appeals. On motion to dismiss appeal.

Motion denied.

Richard Hartley and Freston & Files, all of Los Angeles, for appellant.

M. C. Spicer, of Los Angeles, for respondents.

WASTE, C. J.

Appellant, as executor of his deceased wife's will, filed his first and final account and petition for discharge, in which he alleged that, after diligent search and inquiry, he had failed to uncover any assets belonging to the estate. The respondents, as legatees under the will, filed their exceptions thereto and a petition for the removal of appellant as executor. By an order bearing date October 7, 1931, the court below directed the appellant to account to the estate for the proceeds derived from the sale of two parcels of real property; denied the petition for approval of the account and discharge of the executor; and directed that appellant continue as executor. The executor appealed.

Contending that the executor has appealed only from that portion of the order which directs him to account for the moneys of the estate, respondents move to dismiss upon the ground that such an order is interlocutory, and therefore nonappealable.

The notice states that the appeal is taken from "that certain order or judgment of the above entitled court in favor of Della F. Coates, May Horton and Charles Devendorf, as petitioners, and against said Chester R. Smead, as executor, ordering such executor to account for the proceeds of two pieces of real property deeded to decedent during her lifetime by John R. Charnock, which said order was expressed from the bench by the judge of said court on the 10th day of September, 1931, and minute order thereof entered September 16, 1931, and upon which there were further formal findings and order made and filed by the said court on October 7, 1931, *and from the whole and every part thereof.*"

[1-4] While the notice of appeal is somewhat confusing and is possibly open to the construction contended for by the respondents, we do not favor so restricting its operation. Notices of appeal are not strictly construed, and an appeal will not be dismissed because of a misdescription of the judgment or order to which it relates, unless it appears that the respondent has been misled by such misdescription. Harrelson v. Miller & Lux, 182 Cal. 408, 414, 188 P. 800. The italicized portion of the notice here involved tends to indicate that the appeal is taken from each and every part of the lower court's ruling. The order of October 7, 1931, is compound in nature. By the second paragraph thereof the probate court denied the petition for settlement of the first and final account and for discharge of the executor. Such an order is appealable under section 1240 of the Probate Code, which section antedates the filing of the notice of appeal herein. This being so, the motion to dismiss must be denied, even if we assume, without deciding, that some other portion of the order is nonappealable.

The motion is denied.

We concur: SEAWELL, J.; SHENK, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.; TYLER, Justice pro tem.

215 Cal. 444

HILL-DAVIS CO., Limited, v. ATWELL.

Sac. 4504.

Supreme Court of California.
April 22, 1932.

1. Corporations 🔑632.

Whether foreign association is corporation depends upon powers conferred upon it by state of its creation, regardless of its status there.

2. Corporations 🔑632.

Michigan association, although designated in Michigan as limited partnership association, *held* foreign corporation, as regards right to compel acceptance of deed in firm name (Comp. Laws Mich. 1929, § 9918).

While association, engaging in business in California as a foreign corporation, was organized under Comp. Laws Mich. 1915, § 7950 et seq., which indicates that such an association is called a "partnership association, limited," it possesses, in fact, all of the powers and attributes of a corporation; it has an entity entirely distinct from its members, is organized under a general law by the filing of articles of association, pays to the state for the privilege of organizing and continuing to exist exactly the same fees and taxes as are exacted from corporations in Michigan, is permitted to sue and be sued in the firm name, to contract in the firm name, to make and enforce by-laws, and it has common seals, perpetual succession stockholders whose interests are declared by statute to be personal property and, by the provisions of Comp. Laws Mich. 1929, § 9918, is required to hold and own and convey realty in the association name.

In Bank.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Action by Hill-Davis Company, Limited, against Richard W. Atwell. Judgment for plaintiff, and defendant appeals.

Affirmed.

J. F. Coonan, of Eureka, for appellant.

H. C. Nelson and Nelson & Ricks, all of Eureka, for respondent.

PER CURIAM.

The principles determinative of this appeal are well settled. Respondent company, on May 1, 1930, contracted with appellant to sell, and appellant agreed to buy, certain real property owned by respondent in Humboldt county, Cal. Within the time provided for in the contract respondent tendered a deed to the premises. This deed named as grantor "Hill-Davis Company, Limited, an association organized and existing under and by virtue of the laws of the state of Michigan, licensed and admitted to do business in the state of California." This deed appellant refused to accept solely on the ground that respondent is in fact a partnership, and as such has no power or capacity to hold or convey title to real property in its firm name. It should be here mentioned that it is conceded that if respondent is in fact a partnership it had no power to hold or convey title to real property in its firm name. 20 Cal. Jur. 722, § 39. The property involved herein was acquired over a period of time antedating the adoption in this state in 1929 of the Uniform Partnership Act (Civ. Code, § 2395 et seq.), by the express terms of which real property may be acquired in the partnership name and "title so acquired can be conveyed only in the partnership name." Section 2402, Civ. Code. We do not find it necessary to determine whether that section is retroactive for the reason that we are of the opinion that re-

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

spondent, as far as its power to hold or convey real property is concerned, is not a partnership but is a corporation.

The present controversy was submitted to the trial court upon an agreed statement of facts, under the provisions of section 1138 of the Code of Civil Procedure. That court determined that respondent has the power to hold and convey title to its California properties in its firm name, and based on this determination decreed that respondent was entitled to specific performance.

From the stipulated facts it appears that respondent was organized in 1906 under and by virtue of the laws of the state of Michigan; that the act under which it was organized is entitled, "An Act authorizing the formation of partnership associations, in which the capital subscribed shall alone be responsible for the debts of the association, except under certain circumstances" (Public Acts of Michigan, 1877, Act No. 191, as amended, Compiled Laws of Michigan [1915], § 7950, et seq.); that respondent has complied with all of the requirements of that act; that in 1906 respondent came to California and engaged in business in this state as a foreign corporation; that at the time of entering this state and ever since it has complied with all of the laws thereof applicable to foreign corporations; that while engaged in business in this state it purchased in the firm name the real properties involved.

An examination of the act under which respondent was organized indicates that, while associations such as respondent are called "partnership associations, limited," they possess, in fact, all of the powers and attributes of a corporation. Such an association has a separate and distinct entity entirely distinct from its members; it is organized under a general law by the filing of articles of association with the secretary of state and county clerk; it pays to the state for the privilege of organizing and continuing to exist exactly the same fees and taxes as are exacted from corporations in that state; it is permitted to sue and be sued in the firm name; it may contract in the firm name; it may make and enforce by-laws; it has a common seal; it has stockholders as does a corporation, and the interest of these stockholders is by statute declared to be personal property; the stock may be sold or transferred, and the transferee becomes entitled to the same rights as existing members possess; stockholders, except under certain circumstances, are not personally liable for the debts of the association; the association has perpetual succession; the death of a member does not dissolve the association; the association is governed by managers with powers similar to directors of corporations, and these managers are elected in precisely the same fashion as are directors of corporations. Section 10 of the act (Comp. Laws Mich. 1929, § 9918) under which respondent is organized provides that "all real estate owned or purchased by any association, created under and by virtue of this act, shall be held and owned and conveyance thereof shall be made in the association name."

In spite of the fact that these powers have been conferred on respondent by Michigan law, appellant argues that, because organizations such as respondent are called "partnership associations, limited," this state must treat them as partnerships regardless of the powers they possess. This is not the law even in the state of Michigan, where respondent was organized. That state holds that associations organized under the act in question are to be considered as corporations or quasi corporations. Whitney Realty Co., Limited, v. Deland, 228 Mich. 96, 199 N. W. 669; Staver & Abbott Mfg. Co. v. Blake, 111 Mich. 282, 69 N. W. 508, 38 L. R. A. 798; Armstrong v. Stearns, 156 Mich. 597, 121 N. W. 312.

[1] However, even if Michigan did not treat such associations as corporations, and in fact, even if that state treated such associations as common-law partnerships, this state would not be bound by such designation. It is elementary law that, when the question arises in one state as to whether a particular association organized under the laws of a sister state is a corporation or merely an unincorporated association, the question will be determined by considering the nature of the association as indicated by the powers and faculties conferred upon it by the state of its creation. If the powers and faculties conferred upon it are such as to make it essentially a corporation, it will be held to be such, regardless of what or how the state of its creation calls or treats it. In the leading case on the subject, it appeared that the English parliament in creating an association, expressly declared in the statute creating it that it was not to be considered a corporation. That association desired to do business in Massachusetts without complying with the laws applicable to foreign corporations. The United States Supreme Court held that any state or country where that association desired to do business could inquire into its essential character, and could determine that it was in fact a corporation regardless of how it was considered in the country of its origin. Liverpool Ins. Co. v. Massachusetts, 10 Wall. (77 U. S.) 566, 19 L. Ed. 1029, affirming Oliver v. Liverpool & London Life & Fire Ins. Co., 100 Mass. 531. The test to be applied in such a situation is to determine the nature of the association as evidenced by the powers and attributes bestowed upon it. Edgeworth v. Wood, 58 N. J. Law, 463, 33 A. 940; Fletcher, Cyclopedia of Corporations, vol. 8, p. 9283, § 570. In Tide Water Pipe Co., Ltd., v. Assessors, 57 N. J. Law, 516, 31 A. 220, 221, 27 L. R. A. 684, an associa-

ganized under a statute of Pennsylvania substantially similar to the Michigan act under consideration, desired to do business in New Jersey. The Pennsylvania courts had held that such associations were not corporations. The New Jersey court held that "even if this view be entertained in the domestic forum, it is not conclusive upon foreign jurisdictions; and, if the association is invested, by the laws under which it came into being, with the essential characteristics of a corporation, it may be treated as one in other states. * * *" The New Jersey court held it to be a corporation.

[2] Tested by the above rules, and considering the powers and attributes of respondent, we have no hesitancy in holding that in California respondent is and should be treated as a foreign corporation, at least as far as its power to hold and convey real property in its firm name is concerned.

The judgment appealed from is affirmed.

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215 Cal. 435

McMILLAN v. McMILLAN.

S. F. 13950.

Supreme Court of California.
April 21, 1932.

Rehearing Denied May 19, 1932.

1. Divorce ⚿306.

Code provisions regarding custody of minors during divorce action or thereafter must be liberally applied when dealing with their support (Civ. Code, § 138).

2. Appeal and error ⚿1010(1).

Supreme Court is bound by finding supported by substantial evidence that order regarding child's custody and support had not been modified.

3. Divorce ⚿263, 311.

Superior Court *held* authorized to enforce by execution defaulted payments under order for alimony and support for child, where order was not shown to have been modified (Civ. Code, § 137).

In Bank.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Suit by William J. McMillan against Mathilda McMillan. For an order denying motion to quash writ of execution, plaintiff appeals.

Affirmed.

Noel A. Troy, of San Francisco, for appellant.

J. H. McKnight, of Oakland, for respondent.

PER CURIAM.

Appeal from an order denying a motion to quash a writ of execution issued by the superior court in and for the county of Alameda upon petition of defendant and respondent after default by the appellant in the payment of $100 monthly to respondent in conformity with the terms of a community property settlement agreement that was to be "a final, full and complete settlement and division of all the community property rights or property interest between the parties." The agreement was introduced in evidence in the divorce action and was approved and made a part of the interlocutory decree "as fully and completely as if the same were herein set forth." The agreement provided for the payment of $100 a month to respondent for the support of herself and the minor child of the parties. In the event of respondent's marriage the payments were to be "reduced to the sum of thirty-five (35) dollars per month until the minor child of the parties hereto shall have reached the age of 25," or become married. The final decree of divorce was entered on November 19, 1921.

In August of 1928, the appellant noticed a motion to modify the interlocutory decree by changing the custody of the child, then thirteen years of age. After hearing upon the motion, the parties being present and represented by their attorneys, the trial court entered an order on August 17, 1928, directing that the child reside with a Mrs. Leila Feeley. The custody of the child was not changed, however, but remained in the respondent. With the entry of this order the appellant ceased making payments to the respondent as required by the property settlement agreement and the interlocutory decree. In June of 1929, the appellant, then being in default in his payments to the extent of $1,050, was cited to show cause why he should not be adjudged in contempt. At the conclusion of the hearing on the charge of contempt the court, on June 21, 1929, made an order awarding the temporary custody of the minor to the appellant, and directing further that during such period the expense of the support and maintenance of the child should be deducted from the $100 a month provided to be paid to respondent in the property settlement agreement and interlocutory decree.

At the same time, the court directed a correction of the minutes of the order of August 17, 1928, so that the same should read additionally: "And all sums paid toward the support and maintenance of the said minor shall be deducted from the sum heretofore awarded to defendant," as expressing the order intended to be made on that date. This change of the minutes and order was made some ten months after the entry of the order of August 17, 1928, and without notice to the respondent.

On September 30, 1929, the respondent set forth in an affidavit that there was then due and unpaid under said property settlement agreement of the parties, as set forth and entered in the interlocutory decree, the sum of $1,450, and asked that the superior court issue its writ of execution in favor of respondent and against the property of the appellant. The writ was issued and levy made and return filed.

The appellant moved to quash the writ of execution on the ground that said writ was not authorized by the interlocutory decree as modified by the orders made on August 17, 1928, and June 21, 1929, and that the same was in an excessive amount to the extent of $1,312.25, which latter sum appellant claims to have expended in the support and maintenance of said minor. This motion came regularly on for hearing. The counter affidavit of the respondent set forth affirmatively that that portion of the affidavit of the appellant on said motion reading: "That on the 17th day of August, 1928, the said court by an order duly and regularly made, modified the said judgment hithertofore granted and provided that the said minor child shall reside with Mrs. Leila Feeley and that the sums of money paid by defendant towards the support and maintenance of the said minor child shall be deducted from the sum heretofore awarded to defendant" was false and untrue.

The affidavits of the parties and oral evidence were introduced in evidence. At the conclusion of the hearing the court below found "that the record in this action entered August 17, 1926, in minute book 1085 at p. 250 is correct and is the order that * * * (the judge who presided at the hearing) directed to be entered," and thereupon made its order denying the motion to quash the writ of execution, from which order appellant has appealed.

The contention of appellant is that the modifying orders of August 17, 1928, and June 21, 1929, are valid orders. The respondent contends that the orders are, and each of them is, void as in excess of jurisdiction as to that portion which directs that the cost of the support and maintenance of said minor be charged against the $100 a month agreed to be paid to respondent by appellant under the property settlement agreement of the parties which was made a part of the interlocutory decree.

[1-3] It is not necessary to enter upon a consideration of the finality of interlocutory decrees dealing with property rights of parties to a divorce action after the time for appeal has passed, nor the question of jurisdiction of the subject-matter incidental thereto. Johnson v. Johnson, 104 Cal. App. 283, 288, 285 P. 902; Bancroft v. Bancroft, 178 Cal. 367, 173 P. 582. The provisions of section 138 of the Civil Code are broad and elastic and are to be so applied when dealing with the support and maintenance of the minor children of the parties to a divorce action. The appellant by his motion to quash execution undertook the burden of establishing that a lawful order has been made by a court of competent jurisdiction deducting the cost of the care and maintenance of the minor from the $100 payable to respondent each month. While it is true that the modifying order of August 17, 1928, in regard to where the child should reside as made and found to have been made by the lower court was within the jurisdiction of the superior court to make, and the court might properly have made an order, under section 138, supra, charging either or both parents with the expense of the support and maintenance of the minor, the precise question here involved is whether or not such an order had, in fact, been made. The court which heard the motion to quash the writ of execution found and concluded upon conflicting evidence that no such order was made. Upon an appeal therefrom we are bound by the trial court's finding in this regard, unless it can be said as matter of law there was no substantial evidence before the court to support such conclusion. A reading of the transcript convinces us there is ample evidence to support the lower court's finding against the validity of the attempted modification of June 21, 1929. This being so, and there having been no actual modification of the original order requiring the appellant to pay $100 a month to the respondent for the support and maintenance of herself and minor child, the superior court acted with propriety and within its jurisdiction when it extended its aid to the enforcement by execution of the payment of such amount as was in default under the interlocutory decree (section 137, Civ. Code) and refused to grant the motion to quash the execution.

The order is affirmed.

122 Cal.App. 740

DAVIS v. ALIOTO.

Civ. 8097.

District Court of Appeal, First District, Division 2, California.

April 21, 1932.

Rehearing Denied May 21, 1932. Hearing Denied by Supreme Court June 20, 1932.

1. Appeal and error 🔑607(1).

Trial court *held* not to have abused discretion in terminating proceedings to obtain reporter's transcript, where only partial transcript was delivered to clerk about three years after judgment without extension of time (Code Civ. Proc. § 953a).

2. Appeal and error 🔑553(2).

Appellant's remedy for incomplete transcript filed by reporter is bill of exceptions (Code Civ. Proc. § 953a).

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Ethel Davis against G. Alioto, in which judgment was entered for defendant. From an order terminating proceedings to obtain reporter's transcript, plaintiff appeals.

Affirmed.

Alfred C. Skaife, O. Huntington Jacobs, and Irene Bryan, all of San Francisco, for appellant.

Lasher B. Gallagher, of Los Angeles, for respondent.

NOURSE, P. J.

This is an appeal from an order terminating proceedings to obtain the reporter's transcript provided for by section 953a, Code of Civil Procedure.

In an action for personal injuries, verdict was rendered for defendant on June 17, 1926. Judgment was entered on the verdict on June 17, 1926. A notice of motion for new trial was given, but the motion was not pressed. Notice of appeal was given August 23, 1926, and on the same day plaintiff filed with the county clerk a notice to prepare the transcripts pursuant to section 953a, Code of Civil Procedure. On March 5, 1930, the reporter delivered to the county clerk a partial transcript of the proceedings. Thereupon defendant moved to terminate proceedings to obtain the transcript. The motion was granted after a full hearing, at which evidence both documentary and oral was taken.

[1] The appeal from this order presents the single question whether the trial court abused its discretion in terminating the proceedings. The Code section requires the filing of the reporter's transcript within twenty days after the notice to prepare is filed. The time taken here was approximately three years and was not extended by stipulation or order of court. The lack of diligence is apparent and is not excused by appellant. The power of the court to terminate the proceedings under such circumstances is settled. Smith v. Jaccard, 20 Cal. App. 280, 283, 128 P. 1023, 1026; Crocker v. Crocker, 76 Cal. App. 606, 609, 610, 245 P. 438; Specialty Oil Tool Co. v. Ames (Cal. App.) 3 P.(2d) 977; Western Concrete Pipe Co. v. Grabovich et al. (Cal. App.) 5 P.(2d) 71.

[2] That the transcript presented to the trial judge for certification was incomplete is conceded. Appellant's remedy for this situation was a bill of exceptions. Allen v. Conrey, 22 Cal. App. 409, 412, 134 P. 730. She took no steps for more than three years after the transcript was due. In resisting the motion to terminate the proceedings she did not show that she was able to present a complete transcript. For this reason the case is not similar to those where a motion to dismiss an appeal is made in an appellate court for failure to file a transcript within the prescribed time and the motion is denied because the transcript had been filed prior to the filing of the notice of motion. Here no transcript had been filed which the trial court could have certified to be a full, true, and correct transcript of the proceedings, and, so far as appears from this record, such a transcript is not as yet on file.

We are satisfied that the trial court exercised proper discretion in granting the motion under the authorities cited.

The order is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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122 Cal.App. 723

PEOPLE v. CHAMBERS et al.

Cr. 2163.

District Court of Appeal, Second District, Division 2, California.

April 20, 1932.

1. Criminal law 🔑973.

Under statute authorizing suspension of sentence to inquire into accused's sanity, insanity of accused at time of trial or before pronouncement of sentence is not ground for arrest of judgment (Pen. Code, §§ 1368, 1370).

2. Criminal law 🔑973.

Whether sentence shall be suspended for further determination of accused's sanity rests within trial court's discretion (Pen. Code, §§ 1368, 1370).

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Robert C. Chambers and Lawrence Fink were convicted of robbery, and Lawrence Fink appeals.

Affirmed.

Stanley Visel, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

IRA F. THOMPSON, J.

The defendants by an information filed by the district attorney of Los Angeles county were charged with the crime of robbery. Pursuant to an instruction directing it so to do, the jury acquitted the defendant Robinson, but found the other two defendants guilty. The defendant Fink, in addition to pleading "not guilty," entered a plea of "not guilty by reason of insanity," and upon that issue the jury determined that he was sane. The defendant Chambers gave notice of appeal, but since that time has filed a dismissal herein, leaving only for our consideration the appeal of Fink, which is from the judgment and from an order denying a motion to arrest judgment until the sanity of the defendant at the time set for pronouncing judgment might be inquired into.

The only point raised by appellant is that the court erred in refusing to grant his motion to arrest the judgment. He bases his argument upon those sections of the Penal Code (sections 1368 and 1370), which provide that, if at the time judgment is to be pronounced there is in the opinion of the court reasonable ground to believe the defendant insane, he may suspend the sentence until his sanity is determined.

[1] From a strictly legal standpoint, the insanity of a defendant at the time of trial or before pronouncement of sentence is not a ground for the motion in arrest of judgment. It was so decided in People v. Kirby, 15 Cal. App. 264–270, 114 P. 794.

[2] However, the trial court considered the motion in its larger sense as a suggestion of the then insanity of the defendant, and, after reviewing the affidavit of appellant's counsel and the testimony which he had heard for two days and observing the defendant for that length of time, concluded that there was no reason to inquire further into the matter. Such a question is one especially addressed to the sound and wise discretion of the trial judge. People v. Croce, 208 Cal. 125, 280 P. 526, and cases there cited. We find nothing to indicate any abuse of discretion.

Judgment and order affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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122 Cal.App. 708

BAKER v. BOUCHARD et al.

Civ. 755.

District Court of Appeal, Fourth District, California.

April 19, 1932.

1. Frauds, statute of 🔑103(1).

Simple invalid devise of real property without reference to any agreement *held* not sufficient memorandum of alleged oral agreement to devise property (Civ. Code, § 1624; Code Civ. Proc. § 1973).

2. Frauds, statute of 🔑129(3).

Equity is without power to decree specific performance of alleged oral agreement to devise property merely because of performance by survivor (Civ. Code, §§ 1624, 1741; Code Civ. Proc. § 1973).

3. Frauds, statute of 🔑129(12).

Acts relied on as taking agreement out of operation of statute of frauds must be unequivocally referable to agreement (Civ. Code, §§ 1624, 1741; Code Civ. Proc. § 1973).

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Isabel Baker against Ella Bouchard, as administratrix of the estate of Robert Price, deceased, and Lois Price. From judgment for defendants, plaintiff appeals.

Affirmed.

Calvin H. Conron, Jr., Harry M. Conron, and Rowen Irwin, all of Bakersfield, for appellant.

M. G. Brittan, of Bakersfield, H. S. Millspaugh, of Lindsay, and J. O. Reavis, of Bakersfield, for respondents.

JENNINGS, J.

Appellant instituted her action in the superior court seeking to enforce an alleged trust in a certain parcel of land belonging to the estate of Robert Price, deceased. Respondent Ella Bouchard is the administratrix of said estate. Respondent Lois Price is the daughter and sole heir at law of decedent Robert Price.

The trust sought to be enforced is maintained to have arisen by virtue of an alleged oral contract between the decedent and appellant whereby decedent agreed, in consideration of appellant taking up her residence in decedent's home and furnishing to him necessary food and care during his declining years, that he would make a will devising to her the real property in question. It is contended that appellant fully performed on her part the agreement thus made. It appears that decedent attempted to make a will in which he devised the property to appellant, but that the will is invalid, since it fails to comply with the statutory provisions requiring that it be subscribed by witnesses, and, as it is not entirely in the handwriting of the testator, it cannot be upheld as an holographic will. In connection with this instrument, it is to be observed that it contains no reference to the alleged oral agreement.

Appellant complains of two findings of fact made by the trial court. By the first of these findings the court found that it was not true that the deceased agreed to will the property to appellant in consideration of appellant's agreement to provide and care for decedent for the remainder of his life, and by the second that it was not true that appellant, relying upon the good faith of decedent, provided necessary food, care, and attention for him up to the time of his death.

[1] Section 1624 of the Civil Code and section 1973 of the Code of Civil Procedure expressly provide that an agreement to devise or bequeath property or to make provision for any person by will is invalid unless the contract or some note or memorandum thereof is in writing and subscribed by the party charged or by his agent. It is not contended that there was any written memorandum of the alleged agreement other than the invalid will. This instrument contained a simple devise of the real property in question to appellant without reference to any agreement in respect thereto. It does not, therefore, constitute a sufficient memorandum of the alleged oral agreement to comply with the requirement of the above-mentioned statutes. Zellner v. Wassman, 184 Cal. 80, 193 P. 84.

[2, 3] It is, however, urged by appellant that she fully performed her part of the alleged oral agreement, and that she is therefore entitled to the relief sought by her on the ground that equity will decree specific performance of an oral agreement legally unenforceable because of the statute of frauds, where it clearly appears that the party seeking to enforce it has fully performed on his part relying upon the good faith of the other party to the agreement. The theory underlying the equitable doctrine which grants relief under the circumstances mentioned is that the statute of frauds has for its object the prevention of fraud and is not to be permitted to be used as an instrument for its perpetration. Arguello v. Edinger, 10 Cal. 150, 158. In this connection it is argued that, while section 1741 of the Civil Code, as this section read at all times pertinent to the present inquiry, expressly provided that the power of any court to compel specific performance of any agreement for the sale of real property in cases of partial performance should not be abridged, it is neither reasonable nor in accordance with established rules of construction to hold that, by the enactment of section 1741, the Legislature intended to deprive courts of equity of the power to decree specific performance of oral agreements other than those for the sale of real property. It is urged that the power of equity to decree specific performance of oral agreements in cases of partial performance is a power inherent in the very structure of equity, firmly established, of long standing, and well recognized, and that, if the Legislature had intended to take away from courts of equity so important a power, it would have expressly and unmistakably so declared. The obvious answer to the contention thus made is that section 1624 of the Civil Code, since its amendment in 1905, and section 1973, Code of Civil Procedure, since its amendment in 1907, expressly and unequivocally declare that agreements to devise or bequeath any property or to make any provision for any person by will shall be invalid unless there is some written memorandum thereof subscribed by the party sought to be charged. There is no ambiguity in the language employed. It is clear and direct. Section 1741 of the Civil Code did expressly recognize the power of a court of equity to decree specific performance of one class of oral agreements, viz., oral agreements for the sale of real property in cases of partial performance. If the legislative intent had been to make other exceptions to the statute of frauds, surely this was the place to indicate such intent. This was the reasoning of Justice Finlayson in Trout v. Ogilvie, 41 Cal. App. 167, 174, 182 P. 333. It may be conceded that the language of that portion of the opinion which is directly applicable to the point under consideration is dictum. This does not, however, detract from the cogency of the reasoning employed which is most pertinent to the problem herein presented. Furthermore, it is clear that, in order to take a contract out of the operation of the statute of frauds, the acts relied upon as establishing part performance must be unequivocally referable to the contract. If such acts, though in truth done in performance of a contract, admit of an explanation without supposing a contract, they do not generally constitute such part performance as to remove the case from the operation of the statute. The evidence presented to the trial court relative to the acts relied upon by appellant was of such character that the court was amply justified in believing that they were done, not in pursuance of the alleged agreement to devise the property to appellant, but in conformity with an arrangement between appellant and decedent whereby appellant was to furnish necessary food and care to decedent in return for which appellant was permitted to occupy decedent's home, rent free. The court's finding that the agreement relied upon by appellant was not entered into is not therefore lacking in evidentiary support. The same evidence which furnishes support to the finding that the alleged agreement was not made is sufficient

to sustain the second finding to which appellant objects. As heretofore suggested, the record discloses that evidence was produced tending to show that the agreement actually entered into between appellant and decedent was that appellant would furnish food and care and attention to decedent in return for which decedent would permit her to occupy his home without paying rent therefor. If this was in fact the arrangement, the acts of appellant were done, not in reliance upon the good faith of decedent that he would perform his promise to will her his property, but in return for his promise to permit her to occupy his home rent free.

The judgment is therefore affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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122 Cal.App. 533

SHELTON v. LOS ANGELES RY. CORPORATION et al.

Civ. 8224.

District Court of Appeal, First District, Division 2, California.

April 13, 1932.

1. Appeal and error 🔑1008(1).

Evidence of contributory negligence of passenger alighting from moving street car and street railroad's negligence *held* for trial court.

2. Appeal and error 🔑1011(1).

Trial court's finding on conflicting evidence is binding on appellate court.

3. Appeal and error 🔑1008(1).

Proximate cause of injuries to passenger when alighting from moving street car *held* for trial court.

4. Trial 🔑387(2).

That trial court did not decide personal injury case until four months after submission *held* not error.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Mrs. B. G. Shelton against the Los Angeles Railway Corporation and another. From a judgment for defendants, plaintiff appeals.

Affirmed.

Chandler, Wright & Ward, of Los Angeles, for appellant.

Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles (Malcolm Davis, of Los Angeles, of counsel), for respondent.

BURROUGHS, Justice pro tem.

This is an action for personal injuries alleged to have been sustained by the plaintiff through the negligent operation of a street car belonging to the defendant corporation. The cause was tried by the court sitting without a jury. Findings and judgment were entered in favor of the said defendant, and the plaintiff has appealed.

The appellant has argued three points, either one of which it is claimed constitutes reversible error. The first two attack the sufficiency of the evidence to sustain the findings of the court and will be considered together. It is alleged in the complaint that on or about the 12th day of March, 1926, the plaintiff was a passenger for hire on a street car owned and operated by the defendant corporation; that while she was in the act of getting off of said car, but still on the platform and steps thereof, and at the place where said car usually stopped to allow passengers to alight, and while said car had stopped, the defendant and its employees negligently and carelessly caused it to be suddenly and violently jerked and started in motion without allowing plaintiff sufficient time to alight therefrom; that in consequence of such negligence plaintiff was seriously injured by being thrown with great force from the car to the street, thereby causing certain specified injuries.

The answer of the defendant denied the allegations of negligence and as affirmative matter alleged that whatever damages plaintiff may have suffered were due to the sole negligence of the plaintiff and also sets up the plea of contributory negligence.

The court found that after the car had been started and while it was in motion the plaintiff went to the door of the car and negligently and voluntarily alighted from the car while it was in motion, thereby proximately causing the injuries complained of.

If this finding is sustained by the evidence, then there can be no question as to the correctness of the judgment. Mrs. J. E. Richardson testified that she was seated in an automobile with her mother and brother waiting for her husband to come and she was watching the cars very closely. She testified:

"When I first saw it, it was at the stop at Queen Anne place, which is a block east of Muirfield road, a rather short block. The car stopped at Queen Anne place and there were passengers discharged at that point, and then it moved on, and the conductor got off to pull the switch, and then it started moving again; and as it started moving, a young woman appeared at the door and jumped off; and an instant later I saw an elderly woman in the door. She hesitated and then jumped off. The car was moving very slowly at the time that the young lady jumped off. The car was moving at the time that the elderly lady stepped off. It was moving very slowly, between three and five miles an hour. At the time the elderly lady stepped off I think the conductor was up at the switch. I didn't pay any attention to him because I was watching these two ladies; so I didn't see the conductor. I do not think that the car had entered the switch at the time the elderly lady stepped off. I could not see any jerk of the car after the conductor got off."

"At the time that the conductor pulled the switch he was looking towards the motorman. He waved his hand for the motorman to come forward. There was no one on the step of the car when he did that. As I recall it the door was open and the steps are right there. There is one step below the main part of the car. I could have seen if anybody was on the steps I am sure. I am sure that I did not see any one on the step."

H. B. Hemborg, a brother of Mrs. Richardson, testified:

"Then the conductor went ahead to the switch where he pulled the switch chain out and then he waved the car ahead, and I was just looking at the car and after it had got into motion, I would say after it had traveled about one-third of the way to the switch, I noticed a lady come to the door and then I saw by the way she acted that she was going to step off. I saw the lady step off the car and she fell after she stepped off."

"When I first saw the lady she was facing out looking out, and then she stepped off. I didn't see her when the car started into motion. The car had gone about one-third of the way to the switch from the place where it started, about a car length, about sixty feet or something like that. I know that it had gone into motion, and then I noticed that she came to the door. I am not certain that anybody got off the car at this point ahead of the lady who fell."

Mr. Warren, the motorman, testified that after the conductor ran out and pulled the switch, he (the motorman) looked in the rear right mirror, saw that no one was in the act of alighting from the car, and then proceeded to operate the car over the switch.

Mr. Van Zandt, the conductor, testified that the car did not stop prior to the coming to the switch point, but was going about three or four miles an hour; that he jumped off and ran up and pulled the switch; and that the first he knew of the accident was just before the rear trucks struck the switch when he saw the plaintiff in the street. It is true that as against this evidence the plaintiff testified that when the car came to a stop before crossing over the switch and while it was stopped, she started to alight and it was then the car started violently and threw her to the ground, thus causing her injuries. The conductor further testified that at the time he reached the plaintiff just after the accident she said to him: "I should have known better than that. I saw the other lady get off the car, and thought I could make it." One week after the accident the plaintiff made a written statement as follows: "Just as I reached the entrance door the car started up in the usual manner. I attempted, however, to alight and was in the act of doing so when I fell from the steps to the ground." She further said: "This car started just as I reached the entrance way and it was moving very slowly when I reached the ground and fell." There was also introduced in evidence an ordinance of the city of Los Angeles making it unlawful for any person to board or alight from a street car while the same is in motion.

[1-3] In view of the foregoing evidence it can hardly be said that there is a substantial conflict; but conceding that there is, then the power to settle the conflict rested with the trial court (Wilson v. Pedersen, 204 Cal. 2, 266 P. 290), and having decided it adversely to appellant's contention, such decision is binding on the appellate court. Jacobus v. Brero, 190 Cal. 374, 212 P. 617. It is also the province of the trial court to determine the matter of proximate cause. Newman v. Overholtzer Sons' Co., 182 Cal. 778, 190 P. 175.

The finding of the court above referred to may be construed either as a finding of the sole negligence of the plaintiff as the cause of the accident or as the negligence of the defendant with acts of the plaintiff as a contributing cause. Conceding for the sake of argument that the defendant and its servants were negligent in the first instance, the contributory negligence of plaintiff bars a recovery, irrespective of the negligence of the defendants. Woodhead v. Wilkinson, 181 Cal. 599, 185 P. 851, 10 A. L. R. 291; Phillips v. Hobbs-Parsons Co., 67 Cal. App. 199, 227 P. 622. It is unnecessary to pursue the inquiry further.

[4] The third assignment of error argued by the appellant is to the effect that the trial court did not decide this cause until more than four months after its submission, and that after such a lapse of time the court could not have had in mind the demeanor or appearance of the several witnesses who testified during the trial of the cause. A mere statement of the proposition establishes that it is without merit.

The judgment is affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

KERSHAW v. HOGAN et al.*

SAME v. WARDEN et al.

Civ. 4558, 4559.

District Court of Appeal, Third District, California.

April 18, 1932.

Rehearing Granted May 18, 1932.

1. Dismissal and nonsuit ⚷19(3).

Order dismissing actions on plaintiff's motion before submission of cases *held* proper, in absence of cross-complaint, counterclaim, or demand for affirmative relief by defendant (Code Civ. Proc. § 581).

2. Dismissal and nonsuit ⚷7(1).

Plaintiff may dismiss case at any time before final submission, but not afterwards, unless order of submission is set aside (Code Civ. Proc. § 581).

The words "before trial," in Code Civ. Proc. § 581, subd. 1, authorizing dismissal of action by plaintiff at any time before trial on certain conditions, have been construed as meaning "before submission."

[Ed. Note.—For other definitions of "Before," see Words and Phrases.]

Appeals from Superior Court, Los Angeles County; Myron Westover, Judge.

Consolidated actions by Joseph A. Kershaw against Hugh Hogan and others and against Grace P. Warden and others. From an order dismissing the action on plaintiff's motion, defendants appeal.

Affirmed.

McKenna & McKenna, of Los Angeles, for appellants.

Charles T. Rippy and Claire T. Van Etten, of Los Angeles, for respondent.

Mr. Justice pro tem. TUTTLE delivered the opinion of the court.

These two actions were brought to quiet title to real property. In each case the plaintiff and the subject-matter is identical, the only difference being in the defendants. The actions were consolidated for trial before the court. Prior to the submission of the cases, the court, upon motion of the plaintiff, ordered each action dismissed without prejudice. The appeal is taken from said order.

[1, 2] Appellant complains of certain rulings of the court which were made during the trial. We do not deem it necessary to pass upon the questions thus raised, as we are satisfied that the order was properly made. Subdivision 1 of section 581 of the Code of Civil Procedure provides that an action may be dismissed "by the plaintiff, by written request to the clerk, filed with the papers in the case, at any time before the trial, upon payment of his costs, provided a counterclaim has not been set up, or affirmative relief sought by the cross-complaint or answer." No cross-complaint was filed in this case, nor was a counterclaim set up, or affirmative relief demanded. The words "before trial" have been construed as meaning "before submission." MacDermot v. Grant, 181 Cal. 332, 184 P. 396. A plaintiff, therefore, may dismiss his case at any time before its final submission, but not afterwards, unless the order of submission is set aside. 9 Cal. Jur., p. 510; Westbay v. Gray, 116 Cal. 660, 48 P. 800.

The order dismissing each of said actions is affirmed.

We concur: PRESTON, P. J.; R. L. THOMPSON, J.

122 Cal.App. 609

BARNETT et al. v. MARSILI.

Civ. 781.

District Court of Appeal, Fourth District, California.

April 16, 1932.

Appeal and error ⚷653(1).

Appellate court had authority to correct transcript of record, where official reporter filed affidavit stating he had incorrectly transcribed testimony and trial judge approved correction sought (Supreme and District Courts of Appeal Rule 14).

Appeal from Superior Court, Kern County; Allan B. Campbell, Judge.

Action by R. F. Barnett and George H. Barnett, copartners, transacting business under the fictitious name and style of the National Investment Company, against Doctor C. Marsili. Judgment for plaintiffs, and defendant appeals. On motion to correct reporter's transcript.

Motion granted.

Borton & Petrini, of Bakersfield, for appellant.

Conron & Conron, of Bakersfield, for respondents.

BARNARD, P. J.

This is an application to correct an alleged error in the reporter's transcript involving only one question and answer, which now read as follows:

"Q. By the terms of the loan transaction was it stipulated that you was to have possession of the car? A. No, sir."

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*For subsequent opinion see 15 P.2d 535.

It is sought to correct this to read as follows:

"Q. By the terms of the loan transaction was it stipulated that you was to have possession of the car upon demand? A. Yes, sir."

In support of the motion, there was filed the affidavit of the official court reporter to the effect that he took down the testimony of the witnesses at the trial in shorthand and thereafter transcribed the same; that in transcribing the question and answer above referred to, he incorrectly transcribed it as first above given; that the correct transcription of this question and answer is in accordance with the correction above set forth; and that in order for this transcript to correctly state the testimony given, the same must be amended and corrected as above indicated. In further support of the motion, there is presented the approval of the trial judge to the correction asked for.

In opposition to the motion, it is not denied that the transcript as filed fails to set forth correctly the testimony as given in the trial court, but it is urged that this court is without authority to correct such an error; that the respondent's only avenue of relief was to apply in seasonable time for such relief under section 473 of the Code of Civil Procedure; that having failed to make such application within the proper time, any objection to the transcript has been waived; and that rule 14 of the Rules of the Supreme Court and of the District Courts of Appeal permit diminution of the record only upon matters that have been properly certified by the trial judge.

In Dugan v. Forster, 101 Cal. App. 144, 281 P. 411, the court said:

"An appellate court, in the absence of statutory mandate or authoritative expression to the contrary (and in this state there is none), has, in the exercise of its jurisdiction power to direct and cause the correction of a record before it at any time during the pendency of the appeal, and this without reference to the provisions of section 473 of the Code of Civil Procedure.

"It has repeatedly been held that technical objections are not favored, and that a record may and will, when necessary, be corrected, unless a right of the adverse party is injuriously affected thereby. Appellate courts look with favor upon an amendment, the effect of which is to enable them to review the decision of the lower court, in view of all the facts which that court had before it when it made its decision. McMahon v. Hamilton, 202 Cal. 319, 325, 260 P. 793."

In speaking of the power of an appellate court to correct a record, the court in McMahon v. Hamilton, supra, said: "In such a case we are not confronted with a want of power or jurisdiction in the trial court, assuming the six months' period to have expired, but rather with the inherent power of an appellate court to cause the amendment of a record before it so that the same might speak the truth."

These considerations apply with special force to a case of mere clerical error in transcription. Under the authorities and under a reasonable interpretation of rule 14, such an error as here appears may be corrected by this court.

The motion to correct the transcript is granted.

We concur: MARKS, J.; JENNINGS, J.

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122 Cal.App. 612

HIATT v. SEYSTER et al.

Civ. 8271.

District Court of Appeal, First District, Division 1, California.

April 18, 1932.

1. **Husband and wife** ⚷264.

Evidence sustained finding that money received by wife from sister was gift, not loan, and therefore property in which wife invested money was wife's separate property (Civ. Code, § 162).

2. **Statutes** ⚷231.

Code sections defining separate and community property must be read together (Civ. Code, § 162, and § 164 as amended by St. 1923, p. 746).

3. **Husband and wife** ⚷262(1).

Where money invested by wife in land equity was obtained partly from sale of separate property and partly by gift from sister, there was no presumption that equity was community property (Civ. Code, § 162, and § 164 as amended by St. 1923, p. 746).

4. **Husband and wife** ⚷263.

That husband also executed deeds to wife *held* immaterial on question whether property conveyed to wife by stranger was wife's separate property, where husband never had interest therein (Civ. Code, § 162, and § 164 as amended by St. 1923, p. 746).

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Ada L. Hiatt against A. M. Seyster and others. From a judgment in favor of plaintiff, named defendant appeals.

Affirmed.

⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

W. W. Kaye, of Los Angeles, for appellant.

Bonelli & Miller, Maurice J. O'Brien, and Arthur E. Briggs, all of Los Angeles, for respondent.

KNIGHT, J.

During the year 1923 the respondent Ada L. Hiatt, a married woman, acquired by grant deed as her separate property certain premises which thereafter continued to stand of record in her name. In July, 1927, the appellant Seyster obtained a money judgment against respondent's husband and in July, 1928, levied upon and caused to be sold at execution sale the real property above mentioned; whereupon respondent brought this action to quiet title thereto. The determinative issue in the case was whether the property was separate or community property; and the trial court found that it was respondent's separate property. Judgment was entered accordingly in respondent's favor, from which Seyster appealed.

Appellant concedes that the evidence in the case is without dispute and that therefore the appeal involves merely the legal construction of the evidence. It appears therefrom that the property in question was conveyed to respondent in exchange for equities in two parcels of land which she was then purchasing in her name under two installment contracts entered into after marriage. The first contract was executed during the year 1921, and pursuant to its terms respondent made an initial payment thereon of $100. The second contract was entered into some time afterwards, and respondent made an initial payment thereon of $175. The total amount of the monthly installments called for by the two contracts was $60, and up to the time the exchange was consummated the installments were entirely taken care of out of the rentals received from the improvements on the properties, amounting to $75 a month. The $100 paid by respondent as the down payment on the first contract was admittedly her separate property, the same being part of the proceeds received by her from the sale of her separate property in Northampton, Mass.; and the $175 paid as the down payment on the second contract was admittedly received by respondent from her sister, Miss Loring; and the trial court found that it was a gift from Miss Loring to respondent. Section 162 of the Civil Code provides that, "All property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property"; and applying those Code provisions to the facts above set forth, the trial court held that the property in suit was acquired by respondent with her separate property, and therefore was her separate property.

[1] Appellant contends that the transaction involving the receipt of the $175 by respondent from her sister should be construed as a loan and not as a gift, and that therefore the interest acquired in the property in which that money was invested was a community interest. Schuyler v. Broughton, 70 Cal. 282, 11 P. 719; Moulton v. Moulton, 182 Cal. 185, 187 P. 421. But all of the testimony given upon that subject was to the contrary. Both respondent and Miss Loring testified that it was intended as and understood by them to be a gift and not a loan. In support of her claim in this regard Miss Loring stated that their mother died when they were quite young; that being the older she assumed a mother's attitude toward her sister; that after her sister married and became the mother of three children she was anxious that her sister "should have her own separate property;" that she (Miss Loring) had no home of her own, never expected to be married, and believed that as long as she lived she would make her home with her sister; that consequently when she gave the money to her sister she never expected her to return any part of it; that there "was a very strong bond of love" between them; that they were more like mother and daughter. She further stated that both before and after the payment of the $175 in question she has given to her sister at various times extending over a number of years other sums of money amounting in all to some $2,500. It is evident that the foregoing uncontradicted testimony is amply sufficient to sustain the trial court's conclusion that the $175 was intended as and constituted a gift and not a loan, and that therefore the interest acquired in the property in which the gift was invested was respondent's separate property. Civ. Code, § 162; Helm v. Martin, 59 Cal. 57.

The premises in suit contained a number of acres, and appellant calls attention to certain testimony showing that some time after the premises were conveyed to respondent she handed to her sister a memorandum to the effect that in the event the premises were subsequently sold her sister "was to have two acres, or its equivalent." But fairly construed the transaction mentioned cannot be said to be inconsistent with the theory of a gift for, as explained by Miss Loring, respondent gave her the memorandum "of her own volition," saying, as she did so, that she felt it was only right that she (Miss Loring) should have the equivalent of two acres, if the property were afterwards sold. In any event, the effect of the transaction was clearly a matter for the trial court to determine along with the other facts of the case.

[2, 3] Section 164 of the Civil Code as in force at the time these transactions took place read, in part, as follows: "All other property acquired after marriage by either husband or wife, or both, * * * is community property; but whenever any property is conveyed to a married woman by an instrument in writ-

ing, the presumption is that the title is thereby vested in her as her separate property." In connection therewith appellant cites the case of Peiser v. Bradbury, 138 Cal. 570, 72 P. 165, to the effect that the application of the presumption of separate property created by the latter clause of said Code section is restricted to property "conveyed" to a married woman and that it does not apply to property which she has merely contracted to purchase; and he argues, therefore, that despite the fact that the money invested in the properties covered by the two contracts of purchase may have been, as the trial court found, her separate property, the presumption of separate property declared by the latter clause of section 164 was not available in determining the title to the equities acquired under said contracts; and that such being the case, the contracts having been entered into during marriage, the equities in the properties acquired thereunder were presumed under the opening clause of section 164, to be community property, citing Davis v. Green, 122 Cal. 364, 55 P. 9. We find no merit in the point. Sections 162 and 164 must be read together; and it will be noted from the wording of the opening clause of section 164 upon which appellant relies that the presumption of community property arising therefrom relates to "all *other* property acquired after marriage" (italics ours), that is, to all property other than that acquired in the manner set forth in section 162 (and section 163, which applies to the husband's separate property); and in the present case, as already shown, the uncontradicted evidence proves and the trial court found that the equities in the property covered by the two contracts were acquired in the manner set forth in section 162, which necessarily excludes the same from the operation of the presumption arising out of the opening clause of section 164. Moreover and in any event, appellant concedes that the presumption of community property arising from the first clause of section 164 is a disputable one; and that being so it requires no discussion to demonstrate that the uncontradicted testimony above mentioned was amply sufficient to overcome any such presumption.

[4] The record further shows that the deed to the property in suit was dated August 14, 1923, and recorded August 18, 1923; that in July, 1923, respondent's husband made a grant deed, and in July, 1925, a quitclaim deed, of the property to respondent; and that approximately two years thereafter, to wit, in July, 1927, appellant obtained his judgment against respondent's husband. In view of these facts appellant contends that the deeds from Hiatt to his wife were made for the purpose of defrauding his creditors. In reply respondent asserts that they were made merely to facilitate the obtaining of loans on the property. The established fact is, however, that at no time did Hiatt ever have any interest in the property to convey; consequently the purpose of making said deeds is a matter of no consequence.

Nor do we find any merit in appellant's objection to the sufficiency of the findings, nor in his assignment of error relating to the ruling of the trial court on the admissibility of certain evidence. The essential facts upon which the trial court based its legal conclusion that the property in suit was separate property are specifically set forth in the findings; and the financial transactions which took place between Miss Loring and Hiatt were entirely foreign to any questions of title here involved.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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122 Cal.App. 589

HUNT v. JOHNSON.

Civ. 650.

District Court of Appeal, Fourth District, California.

April 15, 1932.

Appeal and error 🔑110.

Where trial was without jury, order granting new trial *held* not appealable (Code Civ. Proc. § 963).

Code Civ. Proc. § 963 provides that appeals may be taken from an order granting a new trial, where the trial was had before a jury.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by Julia Spencer Hunt against Olivia Johnson. From an order granting a new trial, defendant appeals. On plaintiff's motion to dismiss appeal.

Appeal dismissed.

Swing & Swing, of San Bernardino, for appellant.

L. G. Shelton, of Los Angeles, and Hert & Withington and Walter E. Byrne, all of San Bernardino, for respondent.

BARNARD, P. J.

Respondent has moved to dismiss this appeal upon the ground that it is taken from an order granting a new trial in an action which was tried by the court without a jury. It appears that the action was tried by the court, without a jury, and that this appeal is from an order granting a new trial. Under the circumstances named, the order in question was not appealable (section 963, Code Civ. Proc.).

The appeal is dismissed.

We concur: MARKS, J.; JENNINGS, J.

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122 Cal.App. 543

STEPHENSON v. BRAND et al.

Civ. 8405.

District Court of Appeal, First District, Division 2, California.

April 13, 1932.

1. Husband and wife 🔑263.

When property is acquired by husband and wife, presumption that part acquired by wife is taken as tenant in common is disputable by competent evidence respecting acquisition (Civ. Code, § 164).

2. Husband and wife 🔑270(9).

Whether presumption that wife takes interest as tenant in common in property acquired by husband and wife is controverted is "question of fact" (Civ. Code, § 164).

[Ed. Note.—For other definitions of "Question of Fact," see Words and Phrases.]

3. Appeal and error 🔑1010(1).

On appeal, trial court's conclusion whether presumption respecting wife's interest in property acquired by husband and wife was controverted *held* conclusive, unless manifestly unsupported (Civ. Code, § 164).

4. Husband and wife 🔑254.

Gift by husband *held* necessary to make property purchased with community funds wife's separate property (Civ. Code, § 164).

5. Husband and wife 🔑263.

Husband may testify respecting intention when acquiring property with community funds, as regards alleged gift thereof to wife (Civ. Code, § 164).

6. Appeal and error 🔑994(3).

Credibility of witness is exclusively for trial court.

7. Husband and wife 🔑264.

Husband's testimony of not intending to give wife property purchased with community funds supported finding against gift, notwithstanding his prior contradictory statements on deposition (Civ. Code, § 164; Code Civ. Proc. § 2052).

The husband, the only witness in the case, testified that he paid the full purchase price of the property from his earnings and paid all taxes; that he had no conversation with his wife when the property was acquired, and did not intend to give her the property or any interest therein. On a deposition taken before trial, he had answered affirmatively a question whether he intended his wife to have an interest in the property, and had also said: "As long as she lived."

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Edward Stephenson against Grace Brand and others. From an adverse judgment, named defendant appeals.

Affirmed.

Daniel R. Shoemaker, of San Francisco, for appellant.

Willard P. Smith, of San Francisco, for respondent.

TUTTLE, Justice pro tem.

This is an action brought to quiet title to real property, and the appeal is prosecuted from a judgment in favor of plaintiff.

Plaintiff is the surviving husband of Lucy C. Stephenson, deceased. During the married life of said parties, a parcel of real property in San Francisco was conveyed to both of said parties, and stood in their names upon the records. It is admitted that said property was purchased with community funds. Respondent contends that upon the death of his wife the title to said property vested absolutely in him. Appellant, who is the only child of Lucy C. Stephenson by a former marriage, claims that the title vested in the parties as tenants in common, and that she has an interest therein as the sole heir of her mother, who died intestate.

[1-5] Section 164 of the Civil Code provides that property, "if acquired by such married woman and her husband, or by her and any other person, the presumption is that she takes the part acquired by her, as tenant in common, unless a different intention is expressed in the instrument." This presumption is disputable in a case of this character (5 Cal. Jur. p. 321, and cases cited), and any competent evidence, oral or otherwise, touching the manner whereby the property was acquired, is admissible (Killian v. Killian, 10 Cal. App. 312, 101 P. 806). It is only where the presumption is not controverted that the court is bound to follow it. Whether or not it is so controverted is a question of fact for the trial court, and the conclusion of that tribunal is conclusive upon an appellate court, unless it is manifestly without sufficient support in the evidence. It being admitted that the property was pur-

chased with community funds, it was necessary, in order to make any of the property the separate property of the wife, that it should have been given to her by her husband. The intent to make it her separate property is a material factor in the case, and the husband may testify as to his intent when the property was acquired. Fanning v. Green, 156 Cal. 279, 104 P. 308.

[6, 7] Respondent was the only witness called in the case. He testified that he paid the full purchase price for the property from his earnings and during his married life, and paid all taxes thereon, that when the property was acquired he had no conversation with his wife about the transaction, and that he never intended to give her the property or any interest therein. For some unknown reason the deed was never introduced in evidence, or read into the record, although it appears that it was shown to this witness. No evidence was introduced by appellant. The court found that no gift of the property, or any interest therein, was made by respondent to his wife, and that appellant had no interest in the same.

Appellant contends that the findings are not supported by the evidence, in that the presumption mentioned is not controverted. In this connection he relies upon the following portion of his cross-examination of the husband:

"Q. Do you remember on the 26th day of September, of this year, when your deposition was taken? A. Oh, yes, yes.

"Q. Did you at that time make the following statement in answer to a question put by myself: 'Did you intend then, if you didn't have any conversation, that she should have one-half interest in the property? A. Yes.' A. As long as she lived."

Appellant argues that "the testimony is directly contradictory and the contradiction is out of the mouth of the same witness. We would say, and we feel that this court must agree with us, that unless the plaintiff has other and further evidence he has not presented any evidence to controvert the presumption." To this statement of the rule upon appeal we must register an emphatic disagreement. The foregoing proceeding was merely an attempt to impeach the witness by statements inconsistent with his present testimony (Code Civ. Proc. § 2052), and this is simply an effort to compel an appellate court to pass upon the credibility of the witness, a function which is exclusively committed by law to the trial court (Jennings v. Weibel, 204 Cal. 488, 268 P. 901), and which we are precluded from exercising. If, when the witness at the trial testified that he did not intend to make a gift, the trial court believed him and found accordingly, our inquiry ends there, and prior contradictory statements are of no consequence. Such evidence controverts the presumption, and will support the finding in question. The point, therefore, is without merit.

Judgment affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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122 Cal.App. 646

PEOPLE v. BORJA.

Cr. No. 138.

District Court of Appeal, Fourth District, California.

April 18, 1932.

1. **Homicide 🔑250.**

In homicide prosecution, evidence *held* to support conviction.

2. **Homicide 🔑142(1).**

Where defendant in homicide prosecution withdrew plea of not guilty by reason of insanity and went to trial on plea of not guilty, evidence as to his mental age *held* properly excluded.

3. **Criminal law 🔑1171(1).**

Where defendant in homicide prosecution was under 18, prosecutor's statement to effect law excluded death penalty and recommendation of life imprisonment was unnecessary *held* not prejudicial (Pen. Code, § 190).

> The prosecutor in his argument to the jury stated that it was not to consider the question of the death penalty, as the law had already taken care of that, and that a recommendation for life imprisonment was unnecessary; and Pen. Code, § 190, provides that a death penalty may be inflicted in prosecution for murder except where defendant is under 18 years of age at the time the murder was committed.

4. **Criminal law 🔑814(10).**

Requested instructions in homicide prosecution defining "moron" *held* properly refused, where there was nothing in evidence on which to base them.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Jesus Borja was convicted of murder, and he appeals from a judgment and order denying his motion for new trial.

Affirmed.

Tom Okawara, of Fresno, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

MARKS, J.

Appellant, a Mexican boy of fifteen years of age, was convicted of murder in the first degree, and sentenced to imprisonment for life in the state penitentiary. He has appealed from the judgment pronounced upon him and from the order denying his motion for new trial.

It appears from the record before us that appellant became enamoured of Rosa Guerrera, a Mexican girl who resided with her relatives, and in the same house with appellant. On the morning of August 30, 1931, Rosa was married to Pedro Garcia. The wedding party returned to the bride's home, where they had a wedding breakfast, the guests remaining until about 2:30 o'clock in the afternoon, when the bridal couple prepared to depart to the home of the groom. The bridegroom, appellant, and Raphael Huerrera were in a room together at the time of the murder. Appellant armed himself with a knife, and, without warning, stabbed the bridegroom in the heart, causing his instant death. Appellant then walked to a nearby service station, where he called the officers of the law, and submitted himself to arrest. On their arrival, a short time after the homicide, he made the following statement to them: "I am the man you are looking for. I killed a man." "He married my girl and he wasn't going to get away with it." In the evening of the same day appellant made a further statement to the officers, in which he admitted stabbing the deceased with the intention of killing him. Huerrera testified to all the circumstances of the killing except the actual striking of the death blow.

[1] Appellant maintains that this evidence is not sufficient to support the verdict and judgment. There is no merit in this contention. People v. Bellon, 180 Cal. 706, 182 P. 420; People v. Machuca, 158 Cal. 62, 109 P. 886; People v. Johnson, 203 Cal. 153, 263 P. 524.

[2] Appellant contends that he was of the mental age of approximately ten years, and that evidence of this fact should have been admitted under the theory that it would show his inability to entertain an intent to commit the crime of murder. Upon his arraignment appellant entered pleas of not guilty by reason of insanity, and not guilty, but subsequently withdrew the plea of not guilty by reason of insanity, and went to trial upon his plea of not guilty. Under this state of the record the evidence offered by appellant as to his mental age is clearly inadmissible under the rule announced in the case of People v. Phillips, 102 Cal. App. 705, 283 P. 821. See, also, People v. Keyes, 178 Cal. 794, 175 P. 6.

[3] Appellant further complains of a statement made by the deputy distict attorney in his argument to the jury, that it was not to consider the question of the death penalty as the law had already taken care of that, and that a recommendation for life imprisonment was unnecessary. We can see no prejudice in this statement. Appellant was under the age of eighteen years, and the death penalty could not be inflicted upon him. Section 190, Pen. Code.

[4] Appellant further complains of the refusal of the trial court to give certain instructions requested by him defining the term "moron" and setting forth the classes of persons capable of committing a crime. An examination of the proposed instructions shows that they were not based upon any evidence before the jury and were properly refused. An examination of the instructions given shows that the jury was properly instructed concerning the law of the case.

The judgment and the order denying the motion for new trial are affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

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122 Cal.App. 554

BANK OF AMERICA OF CALIFORNIA v. PACIFIC READY-CUT HOMES, Inc.

Civ. 326.

District Court of Appeal, Fourth District. California.

April 13, 1932.

Rehearing Denied May 11, 1932.

1. Set-off and counterclaim ⚷49(1).

Assignee takes subject to rights to set-off which other party to contract has against assignor before other party receives notice of assignment (Code Civ. Proc. § 368; Civ. Code, § 1459).

2. Estoppel ⚷52.

Elements essential to application of doctrine of "estoppel," stated (Code Civ. Proc. § 1962, subd. 3).

> Generally speaking, there are four elements essential to the application of the doctrine of estoppel: First, the party to be estopped must be apprised of the facts; second, he must intend that his conduct shall be acted upon, or his conduct must be such that the party asserting the estoppel had a right to believe that it was so intended; third, the party asserting the estoppel must be without knowledge, and without ready means of obtaining knowledge, of true state of facts; and, fourth, he must rely upon such conduct to his injury.
>
> [Ed. Note.—For other definitions of "Estoppel," see Words and Phrases.]

3. Set-off and counterclaim 🔑**60.**

Communications between bank and original contractor after bank's loan to subcontractor *held* to constitute mere promise that contractor would remit future balances as might become due subcontractor after making proper adjustments (Code Civ. Proc. § 1962, subd. 3; Civ. Code, §§ 2787, 2792).

> This was so since the loan by bank to subcontractor could not have been induced by anything said or done by the original contractor, as the communications between the bank and contractor did not take place until after bank had made loan to subcontractor, and furthermore the original contractor never received any consideration or benefit from the loan.

4. Estoppel 🔑**85.**

Generally, to work out estoppel by representations, representations must be as to facts either past or present.

5. Estoppel 🔑**85.**

Contractor's promise to remit to subcontractor's assignee future payments to become payable to subcontractor being without consideration, doctrine of estoppel by representations *held* inapplicable.

6. Estoppel 🔑**95.**

Estoppel from silence arises only where there is duty to speak and where party has opportunity to speak and knowing circumstances remains silent.

7. Set-off and counterclaim 🔑**60.**

Contractor's failure to make known to subcontractor's assignee subcontractor's indebtedness *held* not to create estoppel.

> No estoppel against contractor was created, since the assignee had means of acquiring knowledge of subcontractor's indebtedness but failed to use means available.

8. Assignments 🔑**102.**

Assignee of contract stands in no better position than assignor, although assignee takes for value and without notice of claim against assignor (Code Civ. Proc. § 368).

9. Set-off and counterclaim 🔑**49(3).**

Although contract between contractor and subcontractor comprised separate instruments, money paid by contractor after subcontractor's default on one instrument *held* proper set-off against amount claimed by subcontractor's assignee of other instrument, notwithstanding assignee did not know of first instrument (Code Civ. Proc. § 368).

10. Novation 🔑**1.**

Subcontractor's assignment of contract and contractor's promise to pay assignee *held* not to constitute novation as regards contractor's right to set-off (Civ. Code, § 1531, subd. 3).

> There was no novation, since subcontractor was not released from his obligation to complete buildings, and the assignee did not release the subcontractor from his obligation to pay the loan for which the contract was assigned as security.

Appeal from Superior Court, Kern County; E. F. Brittan, Judge.

Action by the Bank of America of California, a corporation, against the Pacific Ready-Cut Homes, Incorporated. Judgment for defendant, and plaintiff appeals.

Affirmed.

Harvey & Heard, of Bakersfield, for appellant.

Andrew J. Copp, Jr., of Los Angeles, for respondent.

THOMSON, Justice pro tem.

This is an action to recover a balance due under a contract. The trial court rendered judgment for the defendant, and plaintiff appeals from said judgment.

On April 2, 1928, respondent entered into a contract with the Southern California Edison Company by the terms of which respondent agreed to construct for said California Edison Company two houses and two garages at Vestal, Cal., and one house and one garage at Baileys, Cal. On April 9, 1928, E. R. Frey agreed with respondent to construct said buildings for respondent for a cash consideration, respondent to furnish the ready-cut materials. This agreement was in the form of two separate instruments, one relating to the work at Vestal and the other relating to the work at Baileys. Frey applied to appellant for a loan and a loan was made to him by appellant on June 12, 1928, appellant taking as security for the repayment of said loan, and any future loans, an assignment from Frey of said agreement relating to the construction work at Vestal. On June 25, 1928, this loan was paid and another loan of $1,000 was made by appellant to Frey, appellant keeping the same security. On July 31, 1928, this second loan was paid and a third loan of $1,000 was made by appellant to Frey. Said first and second loans were paid out of moneys which accrued under said Vestal contract. No notice of the second loan or the third loan was given to respondent. Frey did not complete the work at either Vestal or Baileys, having ceased to perform on September 10, 1928, and respondent completed said work on or about October 15, 1928. Frey failed to pay the third loan and appellant sued respondent for the moneys claimed to be due to appellant under said assigned contract. Respondent filed an answer containing 52 separate defenses, including 51 counterclaims. These counterclaims, for convenience, may be grouped generally under three heads: (1) Those relating to an indebtedness due from Frey to respondent at the time of the assignment of Frey's contract to appellant; (2) those relating to a claim against Frey for recoupment for moneys expended by respondent to complete Frey's contract on the Vestal property; and (3) those relating to a claim of recoupment for moneys expended by respondent to complete Frey's contract on the property at Baileys. Appellant was not notified of the claimed offset or recoupments until after said loans were made by appellant to Frey. Appellant and respondent had certain correspondence concerning the matter, consisting of five letters. The first letter, dated June 12, 1928, addressed to respondent by Samuel M. Crim, assistant vice president of appellant bank, reads as follows:

"Gentlemen:

"We beg to enclose herewith copy of assignment today executed by Mr. E. R. Frey, in our favor, covering his subcontract with your good institution for the construction of jobs No. 1999, 2000-1-2.

"Will you please acknowledge receipt of the assignment and advise if it will be quite agreeable to remitting us the payments as they mature under said contract.

"Very truly yours,
"Samuel M. Crim,
"Assistant Vice-President."

In reply to said letter respondent wrote the following letter to appellant on June 14, 1928:

"Gentlemen:

"In today's mail we are in receipt of your letter of June 12th enclosing assignment of subcontractor's agreement between E. R. Frey as sub-contractor and Pacific Ready-Cut Homes, Inc., Contractor, covering jobs 1999, 2000, 2001 and 2002. We note in your letter you ask us to acknowledge receipt of the assignment and advise if it will be agreeable for us to remit to you as the payments come due under our contract. The contract price of this job was $4,580.88 from which we have paid Mr. Frey $1,145.22 leaving a balance due him of $3,435.66. Is it Mr. Frey's intention to have all of this balance remitted to you or are we merely to protect you to the extent of the $1,000.00 mentioned in the assignment? There are no payments due at this time and we will protect you to the extent of $1,000.00 you ask until we can straighten out the point above mentioned. Will you please advise us at once so that we can make the proper notation on our records and remit the entire balance to you if this is Mr. Frey's desire.

"The assignment apparently covers the point we have taken up with you, and our only reason in going to this length is in order that there can be no possibility of a misunderstanding between Mr. Frey, yourselves and this Company as to the ultimate payment of the balance due Mr. Frey.

"Very truly yours,
"Pacific Ready Cut Homes, Inc.
"By H. F. Hopkins."

On June 15, 1928, appellant addressed to respondent the following letter:

"Gentlemen:

"We beg to acknowledge receipt of yours of the 14th inst., and to advise that we would appreciate your recognizing the assignment to us as an absolute assignment covering all future payments until such time as we advise that the said assignment has been duly cancelled. This would permit us to make future loans to Mr. Frey should he have occasion to call on us.

"Promptly that Mr. Frey has liquidated his loan and has advised us that he will need no further accommodations which are to be secured by the assignment in question, we will advise you to that effect and will then release such future payments as may be provided for in said sub-contract.

"Very truly yours,
"Samuel M. Crim,
"Assistant Vice-President."

On June 21, 1928, respondent addressed to appellant the following letter:

"Gentlemen:

"Acknowledging your letter of June 15th relative to the assignment given you by Mr. Frey upon the money due him on the Edison jobs, we have made a note on our records and will remit all future payments to you until notified otherwise.

"Very truly yours,
"Pacific Ready Cut Homes, Inc.
"By H. F. Hopkins."

The last of these five letters was addressed by respondent to appellant on September 7, 1928, and reads as follows:

"Gentlemen:

"Due to the fact that it takes considerable time for the Southern California Edison Company to pass their invoices for payment, and a lot more time before the vouchers are finally made up, we have not as yet received our final payment on the Vestal Jobs, and at present we are in communication with the Edison Company and with Mr. Frey over some additional cement work on these jobs, correct invoices for which must be in before final settlement is made.

"At this time we owe Mr. Frey approximately $1,158, a check for which amount will be mailed to you just as soon as we receive final settlement from the Edison Company.

"This letter is written you at the suggestion of Mr. Frey, evidently for the purpose of apprising you as to the reason for the apparent delay.

"Very truly yours,
"Pacific Ready Cut Homes, Inc.
"By H. F. Hopkins."

The contract which was assigned to appellant provided that in the event Frey abandoned the work at Vestal and respondent had to complete it, respondent had the right to charge the cost of such completion to Frey.

The right of respondent to recoupment of any moneys expended by it to complete the buildings at Vestal after Frey had abandoned the same is conceded by appellant, and the trial court has found that respondent did complete such buildings and found the reasonable amount expended for said work. We are therefore not concerned with that item of recoupment.

There remain to be considered the first and third offsets above mentioned. Appellant makes three general assignments of error: First, that respondent is estopped from asserting Frey's indebtedness to it as a defense to appellant's claim under assignment of the Vestal contract; second, that the money paid by respondent to complete the Baileys contract is not a proper offset, counterclaim, or recoupment against appellant's claim; and, third, that the facts show that a novation was created between appellant and respondent and that this novation bars respondent from asserting claims against Frey as a defense to appellant's claim under the assignment of the Vestal contract.

[1] With reference to appellant's first assignment of error, the general rule of law is that an assignee of moneys due under a contract takes an assignment of said contract subject to any and all rights to set-off and recoupment which the other party to the contract has against the assignor at the time or before such other party receives notice of said assignment. Code Civ. Proc. of Cal., § 368; Civ. Code of Cal., § 1459; 23 Cal. Jur., p. 265; Machado v. Borges, 170 Cal. 501, 502, 150 P. 351, 352; McKenney v. Ellsworth, 165 Cal. 326, 330, 132 P. 75. However, appellant contends that, notwithstanding this rule, the evidence in the instant case is sufficient to estop respondent from setting up the indebtedness of Frey in its favor, by reason of the letters sent by respondent to appellant above set out. Appellant refers particularly to the second letter, in which respondent said: "We will protect you to the extent of $1,000.00 you ask until we can straighten out the point above mentioned. Will you please advise us at once so that we can make the proper notation on our records and remit the entire balance to you if this is Mr. Frey's desire." And that portion of the third letter in which appellant requested respondent to recognize the assignment as an absolute assignment, as by so doing it would permit appellant to make future loans to Frey; also that part of the fourth letter in which respondent stated: "* * * we have made a note on our records and will remit all future payments to you until notified otherwise." Appellant also stresses the fact that at no time during the period covered by this correspondence did respondent inform appellant of any counterclaim, offset, or recoupment against Frey.

[2] We are of the opinion that the doctrine of estoppel should not be applied to respondent's conduct in this case. Generally speaking, there are four elements essential to the application of the doctrine of estoppel: First, the party to be estopped must be apprised of the facts; second, he must intend that his conduct shall be acted upon, or his conduct must be such that the party asserting the estoppel had a right to believe that it was so intended; third, the party asserting the estoppel must be without knowledge, and without ready means of obtaining knowledge, of the true state of facts; and, fourth, he must rely upon such conduct to his injury. 10 Cal. Jur., pp. 627, 637; Biddle Boggs v. Merced Mining Co., 14 Cal. 279, 376; Jones v. Coulter, 75 Cal. App. 540, 550, 243 P. 487; Robbins v. Law, 48 Cal. App. 555, 562, 192 P. 118. A similar rule in California is set forth in the statute as follows: "Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it." Code Civ. Proc. Cal. § 1962, subd. 3; Ghio v. Cline, 45 Cal. App. 262, 265, 187 P. 433.

[3] The original loan from appellant to Frey was made on June 12, 1928, before respondent had communicated with appellant in regard to the transaction and before respondent had any knowledge of the transaction. The making of this loan by appellant to Frey could not have been induced by anything said or done by respondent. On June 12, 1928, appellant wrote to respondent notifying it of the assignment. Respondent on June 14, 1928, wrote to appellant stating that the unpaid balance of the contract price under the terms of the assigned contract was $3,456.66 and that "there are no payments due at this time, and we will protect you to the extent of $1,000.00 you ask until we can straighten out the point above mentioned." This must have related to the original loan of $1,000, as neither of the other loans had been made at that time. Respondents did afterwards pay to appellant, out of the accrued credits arising from the assigned contract, a sufficient amount to pay off this loan and also the second loan made by appellant to Frey. Respondent's letter of June 21, 1928, stated, "We have made a note on our records and we will remit all future payments to you until notified otherwise." A reasonable interpretation of this statement under

the circumstances of the case, we believe, is that respondent would remit such future balances as might become legally due to Frey or his assignee, after making such adjustments and deductions as the law authorized. These letters could not be construed to be a guaranty by respondent to appellant to pay Frey's debt to appellant. The letters from respondent to appellant were not sent at the time the original obligation was incurred by Frey and were not a part of the transaction by which Frey borrowed the money from appellant, nor was there any consideration moving to respondent. The evidence shows that the original loan was made by appellant to Frey before the letters were sent, and without any knowledge on the part of respondent, and that respondent never received any consideration or benefit from it. The correspondence, therefore, could not be considered in the nature of a guaranty on the part of respondent to answer for the debt of Frey. Civ. Code Cal. §§ 2787 and 2792. The letter of September 7, 1928, addressed by respondent to appellant, was written several weeks after the third and last loan had been made by appellant to Frey, and, of course, could not have induced or influenced appellant to make such loan.

[4, 5] It is the general rule that, in order to work out estoppel by representations, the representations must be as to facts either past or present and not as to promises concerning the future. Promises as to future conduct or performance, if binding at all, must be binding as contracts. Rottman v. Hevener, 54 Cal. App. 474, 480, 202 P. 329; 10 Cal. Jur., p. 630; 21 Cor. Jur., p. 1142. In the instant case all of the representations of facts made by respondent to appellant are true, and the evidence shows that there was no fraud on the part of respondent, and that none of the representations or promises of respondent to appellant were made with any deliberate intent to induce or influence appellant to make any of the three loans made by appellant to Frey. With respect to respondent's promise to remit to appellant future payments to become payable on the Frey subcontract, under the rule last stated, the doctrine of estoppel by representations would not apply to such a promise for the reason that, as already pointed out, this promise could not be considered as a contract, there being no consideration therefor.

[6, 7] Appellant argues that it was the duty of respondent to make known to appellant the Frey indebtedness and the Baileys subcontract existing at the time of the assignment and that an estoppel may arise from silence, as well as from words and conduct. However, such an estoppel arises "only where there is a duty to speak, and where the party upon whom such duty rests has an opportunity to speak and knowing that the circumstances require him to speak remains silent." 10 Cal. Jur., p. 631. Appellant cites the case of Verdugo Canyon Water Co. v. Verdugo, 152 Cal. 655, 684, 93 P. 1021, 1033, in support of his point that it was the duty of respondent to inform appellant about the offsets and recoupments. However, that case is distinguishable from the case at bar for the reason that, in that case, the party against whom the estoppel was asserted had embarked on a common enterprise with the parties who claimed the estoppel, to use common property, for their common benefit, at their common expense, and the court held that, if he proposed or intended to reserve a part of that benefit to himself exclusively, then he owed a duty to his associates to inform them fully in regard to this reservation. As to the other question of estoppel determined in the Verdugo Canyon Water Co. Case, and cited particularly by appellant, the Supreme Court quoted with approval the rule laid down in Boggs v. Merced Mining Co., supra, which holds that "the other party must have been without knowledge, or the means of acquiring knowledge, of the true state of the title." In the instant case appellant had the means of acquiring knowledge of the Frey indebtedness by inquiring of Frey or of respondent, but it did not use such available means. The vice president of appellant bank, who made the loan to Frey, testified that he did not consider it essential to obtain this information and that he did not know at the time of making the loan that existing indebtedness from Frey to respondent could be offset against indebtedness from respondent to Frey or his assignee. It was the duty of appellant to use such convenient and ready means to ascertain whether there were any offsets. Stern v. Sunset Road Oil Co., 47 Cal. App. 334, 345, 190 P. 651; Robbins v. Law, 48 Cal. App. 555, 562, 192 P. 118; Smith v. Penny, 44 Cal. 161, 166.

[8, 9] Appellant next contends that the money paid by respondent to complete the Baileys contract is not a proper offset, counterclaim, or recoupment against appellant's claim, because appellant had no knowledge of the Baileys contract at the time of the assignment of the Vestal contract and also because this claim did not mature until after notice of the assignment had been given to respondent. Appellant's lack of knowledge will not act as a bar to respondent's right of setoff or recoupment, for an assignee of such a contract "stands in no better position than his assignor, although he took the assignment for value and without knowledge of plaintiff's claim. * * *" Code Civ. Proc. Cal., § 368; Machado v. Borges, supra; Haskins v. Jordan, 123 Cal. 157, 161, 55 P. 786. The trial court allowed the amount of money expended by respondent to complete Frey's contract at Baileys after Frey defaulted, as an additional offset or recoupment against appellant's claim under the Vestal contract. Frey ceased work on the Baileys contract on or about September 10, 1928, subsequent to the date of the assignment in controversy. Appellant contends from that fact that, at the time of said assignment, respondent had no claim against Frey under this Baileys contract and, therefore, there was no indebtedness against Frey in favor of respondent, arising out of the Baileys contract, existing at the time of or before notice of assignment, and that appellant therefore took the assignment free from any such claim.

However, the trial court found "that said contract between the defendant and said E. R. Frey was in writing bearing date the said 9th day of May, 1928, but the writing comprised two separate instruments, one relating to the two houses and two garages at Vestal, California, * * * and the other writing referring to the house and garage at Baileys, California; that the two instruments together comprise but a single contract * * * and that it was not intended by defendant and said E. R. Frey that said separate writings should constitute separate and divisible contracts between themselves." In view of this finding, although Frey assigned to appellant only that portion of the contract relating to the Vestal job, still that assignment would be subject to the recoupment arising out of the Baileys job, for we have then a case in which the appellant's cause of action on the assigned Vestal contract, and the right of respondent to recoup for the expense of completing the Baileys job, both grew out of the same subject matter and the same contract. Under such circumstances there could be no doubt of respondent's right of recoupment for expenses in completing the Baileys job. The appellant, as assignee, took subject to all equities and defenses between the original parties to the agreement existing at the time of the assignment. Those rights were not confined to those parts of the contract known to the assignee, but they included all equities and defenses covered by the entire contract. Stern v. Sunset Road Oil Co., supra.

[10] Appellant finally advances the theory that the assignment of the Vestal contract by Frey to appellant created a novation which bars respondent from asserting claims against Frey as a defense to appellant's claim on the assigned contract. Appellant argues that by virtue of the assignment by Frey to appellant of the moneys due under the Vestal contract and through the promise of respondent to pay such moneys to appellant, appellant was substituted as a creditor in place of Frey, thereby creating the kind of a novation provided for under subdivision 3 of section 1531 of the Civil Code of California, which provides that a novation may be made "by the substitution of a new creditor in place of the old one, with intent to transfer the rights of the latter to the former." We do not agree with appellant's contention. The transaction involved in this case has none of the characteristics of a novation. The only right which Frey had under the assigned contract was the right to collect money after he had completed certain construction work for respondent. It cannot be said that appellant bank intended to build the Vestal buildings. Frey was not released from his obligation to complete said buildings, nor did appellant release Frey from his obligation to pay the loan for which the contract was assigned as security. That appellant did not consider this assignment as a transfer of all of the rights of Frey under the contract is apparent because, in its letter of June 15, 1928, to respondent, it said that, as soon as Frey paid his loan and advised appellant he would need no further accommodations secured by the assignment, appellant would "release such future payments as may be provided for in said subcontract." These facts clearly lead to the conclusion that there was no novation and they distinguish the case at bar from the case of Sprague Canning Machinery Co. v. Western Ranching Corp., 29 Cal. App. 374, 155 P. 1017, cited by appellant, wherein the defendant was definitely accepted as the debtor and the assignor was fully released from liability with the consent of all parties. The transaction involved in the case at bar is not a novation, but merely a simple assignment of a nonnegotiable instrument for the purpose of securing the payment of a debt, and the assignment was taken by appellant subject to the recoupments and setoff claimed by respondent.

For the foregoing reasons we are of the opinion that respondent is entitled to the recoupments and set-off claimed by it, which aggregate a sum in excess of the amount sued for by appellant.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

CENTER v. YELLOW CAB CO. OF LOS ANGELES et al.*

Civ. 7221.

District Court of Appeal, Second District, Division 1, California.

April 21, 1932.

Rehearing Denied May 19, 1932. Hearing Granted by Supreme Court June 20, 1932.

1. Appeal and error 🔑882(3).

Pedestrian seeking recovery against motorist on last clear chance doctrine cannot on appeal claim recovery on motorist's negligence and his own freedom from contributory negligence.

2. Automobiles 🔑245(91).

Right of pedestrian crossing street in middle of block to recover under last clear chance doctrine for injuries from being struck by motorist *held* for jury.

Facts disclosed pedestrian proceeded to cross busy street in middle of block and only once looked to left for approaching traffic and observed only black automobile approaching 50 feet distant and thereafter watched traffic to right and was struck from his left by yellow taxi as he was nearing center of street, and that taxi driver observed pedestrian at distance of 20 feet, saw he was not watching traffic to his left, and applied only foot brakes without sounding horn or turning to either side to avoid collision.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Edward L. Center against the Yellow Cab Company of Los Angeles and another. From a judgment of nonsuit, plaintiff appeals.

Reversed.

O'Melveny, Tuller & Myers and Pierce Works, all of Los Angeles, for appellant.

Nimmo, Leighton & Heath and Mark A. Hall, all of Los Angeles, for respondents.

HOUSER, J.

As adduced by plaintiff on the jury trial of the action in the lower court, which trial resulted in a judgment for the defendant and which judgment ensued from the granting of a motion for a nonsuit, and as appears from the combined unquestioned statements of facts by the respective parties herein, the evidence showed the following situation: In the city of Los Angeles, at a time when plaintiff was on his way back to his office from a business call, he essayed to cross Seventh street from south to north at a point slightly west of the middle of the block lying between Broadway and Hill street. He walked hurriedly. There was no pedestrians' crosswalk in the middle of the block where plaintiff attempted to cross the street; a line of automobiles was parked parallel to the south curb of Seventh street, about one foot from the curb, and which automobiles were about six feet wide; there were two lines of street car tracks in the center of Seventh street; it was twenty-five feet from the south curb of Seventh street to the most southerly of the four car rails; the space between the two rails of the south track was four feet, and between the south rail of the north track and the north rail of the south track was a distance of seven feet; a line drawn halfway between the south rail of the north track and the north rail of the south track was the center of the street. Plaintiff had knowledge of the facts that Seventh street was a street upon which many automobiles were passing; that more than one automobile might probably be passing along the street at that time; that automobiles frequently travel abreast of one another on Seventh street between intersections; and that one automobile might pass another in the middle of the block. As plaintiff emerged from between two of these automobiles at a point seven feet north from the southerly curb of Seventh street, for the *first* and *only* time he looked to the westward in order to observe approaching traffic, and continued looking in that direction only during the time it took him to travel two or three feet beyond the parked automobiles. He saw nothing but one automobile which was at a distance of about fifty feet to the west, and which automobile he described as a "large black car" that was slowly approaching alongside the line of parked automobiles. No other traffic being in sight in that direction, he continued at a brisk walk across the street in a slightly northeasterly direction, looking at the same time to the east to observe traffic approaching from that quarter; he did not see the automobile that struck him before it actually did so. He was struck from the rear at a point two or three feet south of the most southerly rail of the car tracks, at which time and place he observed that the northerly half of the street was clear of traffic coming from Broadway. From plaintiff's location when he last looked to the west, to the point where the collision occurred, he traveled a distance of between ten and fifteen feet. The vehicle which struck him was an east-bound yellow taxi, operated by defendant Foley, a driver in the employ of defendant Yellow Cab Company. Foley's automobile was traveling in second gear at a speed of from ten to fourteen miles per hour at the time when he first saw plaintiff, who was then about twenty feet distant from "where he (Foley) was sitting," which was in the driver's seat in the taxi. It was seven feet from the driver's seat to the front end of the taxi. Foley saw that plaintiff was looking "the

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 13 P.2d 918.

other way"; that he was unaware of Foley's approach; and the latter attempted to stop the taxi by applying the foot brakes, which were of the two-wheel variety. He did not sound the horn of the taxi, nor did he make any attempt to swerve the taxi in either direction to avoid striking plaintiff, although the whole left side of the street was clear, nor did he attempt to apply the emergency brake. It took Foley one-half or three-fourths of a second to apply the foot brakes. It would have taken one second to a second and one-half to apply the emergency brake. Going at the speed at which the driver was going at the time of the accident, the taxi could have been stopped in a shorter distance by using the foot brake alone, than by using both the foot brake and the emergency brake.

[1] Although appellant contends that from the foregoing facts it does not follow that as a matter of law plaintiff was guilty of contributory negligence and for that reason was precluded from the recovery of a judgment against the defendant, since from the proceedings had in the lower court it satisfactorily appears that on the trial of the action the "entire theory" relied upon by plaintiff for the recovery of a judgment against the defendant was founded upon the application to the facts of the doctrine of "last clear chance," plaintiff cannot now be permitted to raise the question of his right to a recovery based upon the negligence of the defendant and his own freedom from contributory negligence in the premises.

[2] Considering the facts herein, as to whether on the doctrine of "last clear chance" plaintiff was entitled to have the jury pass upon the question of his right to recovery of a judgment, the respective decisions by the courts of this state are not entirely harmonious one with the other. Beginning notably with the case of Holmes v. South Pacific Coast Ry. Co., 97 Cal. 161, 31 P. 834, and thereafter continuing in a line of decisions by the Supreme and the Appellate Courts of this state, the principle of law is generally announced that if plaintiff's negligence was contributory to the happening of the accident and was continuous to the instant when he received the injury of which he complains, no recovery may be had by him. Among the many authorities which support the foregoing doctrine, see Everett v. Los Angeles, etc., Ry. Co., 115 Cal. 105, 43 P. 207, 46 P. 889, 34 L. R. A. 350; Sego v. Southern Pacific Co., 137 Cal. 405, 70 P. 279; Green v. Los Angeles, etc. Ry. Co., 143 Cal. 31, 76 P. 719, 101 Am. St. Rep. 68; Basham v. Southern Pacific Co., 176 Cal. 320, 168 P. 359; Young v. Southern Pacific Co., 189 Cal. 746, 210 P. 259; New York L. Oil Co. v. United Railroads, 191 Cal. 96, 215 P. 72; Rowe v. Southern California Ry. Co., 4 Cal. App. 1, 87 P. 220; Riney v. Pacific Electric Ry. Co., 45 Cal. App. 145, 187 P. 50; Garrison v. Pearlstein, 68 Cal. App. 326, 229 P. 348; Bagwill v. Pacific Electric Ry. Co., 90 Cal. App. 114, 265 P. 517; Giannini v. Southern Pacific Co., 98 Cal. App. 126, 276 P. 618.

However, if not so numerous in authority, at least by eminent and unquestionable pronouncement of the law, it has been positively declared that the "last clear chance" rule is applicable to a situation where the person injured, although continuously guilty of contributory negligence in the premises, is either oblivious to, or unconscious, or unaware, of the danger, and for that reason is unable to escape it. Palmer v. Tschudy, 191 Cal. 696, 218 P. 36; Darling v. Pacific Electric Ry. Co., 197 Cal. 702, 242 P. 703; Berguin v. Pacific Electric Ry. Co., 203 Cal. 116, 263 P. 220; Atkins v. Bouchet, 86 Cal. App. 294, 260 P. 828; O'Farrell v. Andrus, 86 Cal. App. 474, 260 P. 957; Smith et al. v. Los Angeles Ry., 105 Cal. App. 657, 288 P. 690. With this latter statement and application of the rule we are in accord.

It is therefore concluded that, considering the evidence presented by plaintiff, under appropriate instructions, the instant case should have been submitted to the jury.

The judgment is reversed.

We concur: CONREY, P. J.; YORK, J.

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122 Cal.App. 627

AVOCADO SALES CO. v. WYSE et al.

Civ. 8225.

District Court of Appeal, First District, Division 2, California.

April 18, 1932.

Rehearing Denied May 18, 1932. Hearing Denied by Supreme Court June 16, 1932.

1. **Injunction** 🔑55.

In absence of express contract, equity will not enjoin servant, after termination of employment, from soliciting business from former employer's customers, where by so doing no business secret or trust reposed in him because of relationship is violated.

However, in such competition the servant must act with the utmost fairness, resolving every doubt in favor of his former employer, rather than against him.

2. **Injunction** 🔑55.

Facts *held* not to show violation of business secret or trust reposed in former salesmen of wholesale avocado concern; hence injunction restraining salesmen from canvassing concern's customers did not lie.

Facts disclosed that both plaintiff and defendants were wholesale avocado firms selling to grocery stores, vegetable or fruit stands, better class of hotels, cafés, and clubs which retailed them; that these retailers were solicited by other firms and individual sellers; and that it was generally known that the better class of hotels, cafés, and clubs serve avocados.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by the Avocado Sales Company against Sam A. Wyse, doing business as the Avocado Wholesale Company and another. From an adverse judgment, plaintiff appeals.

Affirmed.

John W. Hart and Delvy T. Walton, both of Los Angeles, for appellant.

Patterson, Bailey & Montgomery and Charles C. Montgomery, all of Los Angeles, for respondents.

BURROUGHS, Justice pro tem.

This is an appeal by plaintiff from a judgment denying the injunction prayed for and dissolving the temporary injunction previously issued.

The facts, as set out in the findings, are as follows: That one Joseph L. Brodkey, predecessor and founder of the Avocado Sales Company, the plaintiff in this action, had, between the dates of August, 1925, and January, 1928, built up a large and lucrative business in the sales of avocados in the city and county of Los Angeles, and that he did employ defendants Sam A. Wyse and Barney M. Rothschild in the months of November and September, 1926, respectively, on a commission basis to sell avocados in said territory; that each of these defendants had a certain district or territory over which he was required to canvass and call upon the customers of plaintiff on regular days; that the names and addresses of the customers and the particular days of the week upon which they should be called upon were known to each with other facts, information, and knowledge connected with the sale of avocados, but that none of such information, knowledge, or facts is of a confidential or secret character. Defendant Sam A. Wyse left the employ of the plaintiff on January 31, 1929, and immediately thereafter commenced a competitive business as the Avocado Wholesale Company canvassing and soliciting the customers of plaintiff in the same district over which he worked as salesman for plaintiff. He stamped his fruit with the same size print, the same color ink (a vegetable ink) prescribed by the pure food laws of the state, and used the same size boxes (a standard size used for packing avocados). The defendant did not intend to deceive nor did he deceive any customer into thinking that he was purchasing from the former employer, but, on the contrary, the customers at all times knew that they were purchasing from a rival company.

It was further found that on the 12th day of March, 1929, the defendant Barney M. Rothschild left the employ of the plaintiff and entered the employ of the defendant Sam A. Wyse; that he canvassed and solicited over the same territory previously canvassed and solicited by him as salesman of the plaintiff; that defendants had been introduced by plaintiff to many of his customers; and that defendants secured for plaintiff other customers "by going down the street and using their eyesight and finding other retail stores, fruit stands, clubs, hotels and cafes which appeared to them would have use for avocados," and in a number of instances procured fruit stands and markets not previously dealing in avocados.

The court found that the customers of the plaintiff to whom defendants sold are fruit stands, grocery stores, and public markets with a few of higher class cafés, hotels, and clubs; that said purchasers of avocados may be easily ascertained by any one desiring to sell avocados wholesale; that such retail dealers in avocados are merchants whose names are readily ascertainable and whose places of business can be easily found by persons not possessed of such information as was given to defendants or ascertained by them during their employment by plaintiff; that the hotels, cafés, and clubs included in plaintiff's list are of the higher class of such places, and from their appearance and the character of their business may be readily known as purchasers of avocados; that "said customers do not now nor have they ever purchased exclusively of plaintiff, but buy from peddlers and dealers generally as the price and condition of the market require."

It is sought by this action to restrain defendants from canvassing or in any manner soliciting a certain list of customers in the territory formerly solicited by these defendants as employees of plaintiff, and the court found as follows: "That a selective list of customers in the district and territory solicited by defendants during the employment by plaintiff, numbers approximately 92 and contains some of the most desirable accounts which have been sold by plaintiff during the period of its activity. That the number of wholesale purchasers of avocados in the territory solicited by defendant Sam A. Wyse during his employment by plaintiff, including 62 of the names in plaintiff's selected list, is between 100 and 150; that the number of wholesale purchasers of avocados in the territory solicited by Barney M. Rothschild during his employment by plaintiff, including 25 of those on plaintiff's selected list, is approximately 50. That the selected list of customers of plaintiff company is the bulk of the avocado trade in the city of Los Angeles and vicinity and particularly in the territory solicited by defendants."

Appellant cites many California cases in which former salesmen have been restrained from soliciting the same districts for another employer. Cornish v. Dickey, 172 Cal. 120, 155 P. 629, holds that a bakery salesman can be enjoined from soliciting and supplying his formor patrons with the products of its rival.

In Empire Steam Laundry v. Lozier, 165 Cal. 95, 130 P. 1180, 44 L. R. A. (N. S.) 1159, Ann. Cas. 1914C, 628, it was held that equity would properly enjoin a laundry wagon driver from soliciting or receiving, on behalf of another laundry, work from any of his former customers.

In New Method Laundry Co. v. MacCann, 174 Cal. 26, 161 P. 990, 991, Ann. Cas. 1918C, 1022, a laundry solicitor is enjoined. In this decision it is said: "It has been determined that if a person establishes a trade or business which depends for its continuance upon keeping secret the names of customers, or other valuable information known to such person no agent or employee, having been intrusted with such secrets in the course of his employment, can thereafter utilize his secret knowledge against the interests or to the prejudice of such person." This conclusion was reached in Empire Steam Laundry v. Lozier, supra.

In this last-mentioned case, at page 102 of 165 Cal., 130 P. 1180, 1183, 44 L. R. A. (N. S.) 1159, Ann. Cas. 1914C, 628, the court quotes and approves the following language from Witkop & Holmes Co. v. Boyce, 61 Misc. Rep. 126, 112 N. Y. S. 874, as follows: "In recent years there has been developed, by the adjudications of our courts and by legislation, a considerable body of law looking toward the protection of the business world against unfair competition; and, if we correctly interpret these decisions, a court of equity stands ready to restrain such acts. We therefore are of the opinion that, independent of any express contract between the parties, equity will restrain the acts of which the plaintiff complains, and which the defendant threatens and claims the right to do. This arises out of a violation of duty having its origin in the relation of employer and employed, and an implied contract that an employee will not divulge *confidential knowledge gained in the course of his employment, or use such information to his employer's prejudice.*" (Italics ours.)

In Pasadena Ice Company v. Reeder, 206 Cal. 697, at page 703, 275 P. 944, 947, 276 P. 995, it is said: "We appreciate the suggestion of counsel that great caution should be practiced by the courts in the exercise of their power to enjoin and restrain a person from pursuing any calling or profession he may choose to follow. This right is a property right, and has ever been zealously guarded by courts of equity. New Method Laundry Co. v. MacCann, supra. It should not be taken from a person, except upon a clear and most convincing showing that in exercising his right to labor, he is violating an express duty he owes to others."

Dairy Dale Co. v. Azevedo, 211 Cal. 344, 295 P. 10, follows the cases cited above and affirms the granting of an injunction against a former employee of plaintiff, who was engaged in the business of selling and distributing milk and other dairy products, from soliciting the patronage of certain customers of plaintiff. The fact that said defendant was employed by plaintiff for a number of years, that in the course of such employment he learned the names and addresses and requirements of plaintiff's customers on certain routes, and that just prior to the termination of his employment with plaintiff he commenced to solicit these customers on behalf of a competitor of plaintiff presented a proper case for an injunction. It was there said: "It is settled in this state that the names, addresses, and requirements of an employer's customers on such a route, which constitute part of the good will of the business, are trade secrets; and equity will restrain their disclosure by an employee. We recently gave full consideration to this question and restated the principles upon which such relief is granted in Pasadena Ice Company v. Reeder," supra.

[1] In 32 Corpus Juris, page 160, paragraph 217, after setting out the rule followed in the cases cited supra, it is said: "On the other hand, in the absence of express contract, equity will not enjoin an agent or servant, after termination of his employment, from soliciting business from the customers or patrons of his former principal or employer, *where by so doing no business secret or trust which has been reposed in him because of his relation as agent or servant is violated*; but in such competition he must act with the utmost fairness, resolving every doubt in favor of his former employer, rather than against him." (Italics ours.)

The case of Boosing v. Dorman, 148 App. Div. 824, 133 N. Y. S. 910, 912, is cited as an example of the application of this latter part of the rule. In that case the court, finding that the names of customers, retail dealers in butter and eggs, were all listed in public directories and were not under the facts shown trade secrets, went on to say: "The other knowledge which Dorman acquired by calling upon these customers in the course of his employment, with regard to their habits of buying, their financial worth, and their individual characteristics and preferences, can hardly be denominated 'trade secrets' which an employee is prohibited from using for his own benefit after the termination of his employment, in the absence of an express contract."

In another New York case, Peerless Pattern Co. v. Pictorial Review Co., 147 App. Div. 715, 132 N. Y. S. 37, 39, the court says: "All that clearly appears is that he undertook to use in his new employment the knowledge he had acquired in the old. This, if it involves no breach of confidence, is not unlawful; for equity has no power to compel a man who changes employers to wipe clean the slate of his memory." It was further held that the defendant could "enter into competition with plaintiff, even for the business of those who had formerly been plaintiff's customers, providing such competition is fairly and legally conducted."

In all of the California cases cited, supra, a trade secret and trust has been violated. Lists of customers, whether in writing or in the memory of the agent, were secret lists, and a trust reposed in the agent because of his relation to his principal has been violated. We have found no California case where an injunction was asked under the same statement of facts as in the case at bar; and in New York, where it was asked for under a very similar condition, it was refused.

In each of the California cases, supra, where an injunction was granted, the facts came directly under the rule as set out in 32 Corpus Juris, page 160, under the heading, "Improper Use of Information in the Nature of Trade Secrets," and under the affirmative part of said section. We believe that the case at bar comes squarely under the negative part of said section as quoted supra.

The facts in the case at bar are very similar to the facts in Boosing v. Dorman, supra.

Appellants stress the case of Pasadena Ice Company v. Reeder, supra, saying: "One of the defendants enjoined was a wholesaler, who in turn sold to retailers." In that case there was a most flagrant conspiracy to injure and destroy the business of the former employer. The defendant Reeder was assistant manager of the plaintiff company when he quit their employment and went into the ice business for himself under the name of the Purity Ice Company, and the other defendants were also former employees of the plaintiff company. Reeder sold ice in wholesale quantities to certain of these defendants, who in turn would retail the ice thus purchased to individual customers. Each of these retailers owned the delivery truck used by him and retailed his ice direct to the consumer, and sold and delivered ice in the same territory in which he had worked as an employee of the plaintiff, and solicited the business and patronage of the former customers of plaintiff, whom he had formerly supplied with ice. In denying the petition for a rehearing, the Supreme Court said that these defendants entered into a combination, "having for its purpose and effect the creation of a competing business to that of their former employer through the combined use of such confidential information and business secrets of their said employer, as they had each obtained in the course of their former employment." And further, the court said: "We are satisfied that such a combination as that shown to have existed among these several defendants, the direct object and effect of which is to injure or destroy the business of their former employer, comes clearly within the equitable principles relating to unfair competition in conformity with which the injunction here was, we think, properly issued."

In all of the California cases in which the injunction has been granted the customers were individuals being ultimate consumers of commodities or individual customers of laundry, bread, ice, or milk concerns, and the lists of names and addresses were secret lists; but can a list of grocery stores, vegetable or fruit stands, etc., where avocados are sold to the general public, where displays are made to attract the attention, be considered as any one's private list? Can it constitute confidential information and a trade secret? Could not any salesman see at a glance where to attempt to sell his wares? Both the plaintiff and defendant are wholesale firms selling only to retailers, and it is shown that these retailers are solicited by other firms and individual sellers. It is also generally known that the better class of hotels, cafés, and clubs serve avocados. These people are not buying exclusively from one person or firm, as in the cases heretofore before the court. It would be unusual for the people to patronize more than one laundryman, iceman, or milkman, allowing him to solicit at their doors.

If the list, against which the plaintiff seeks to enjoin, is not confidential, the plaintiff can have no proprietary interest therein. If the defendants had possessed no knowledge gained through their employment, would not the exercise of just ordinary perspicacity have sent them to these very places to solicit buyers? We think so.

This appellant is asking us to go further than any reported case has yet gone when it asks us to say that a salesman for a wholesale concern calling upon well-known retail dealers to solicit orders and deliver goods for his employer and thereby making personal friends and acquiring a personal knowledge of his customers shall be, after the termination of such employment, debarred from dealing with the same customers for his own benefit. As said in Peerless Pattern Company v. Pictorial Review, supra: "Equity has no power to compel a man who changes employers to wipe clean the slate of his memory."

[2] The facts do not show the violation of any business secret or trust reposed in these defendants because of their relation to plaintiff. The fact that the plaintiff and its predecessor in interest have devoted energy, time, and money to advertise and increase the use of avocados, and the local consumption thereof does not entitle them to a monopoly. The information which the plaintiff claims to have given the defendants as to the manner of promoting sales generally by displaying pictures tending to show ways in which avocados might be used, recipes, etc., was for public dissemination. It was in no sense confidential matter; but rather, education for the general public which would increase the retailers' business and therefore profit as many dealers as the retailer may buy from.

It is not shown, nor is it charged, that defendants, since leaving plaintiff's employment, have used any of plaintiff's advertising matter. It seems to be presented for the purpose only of showing how plaintiff, through defendants as his salesmen, advertised the use of avocados and increased the sales thereof, and that defendants as a rival business are profiting by plaintiff's business energy, in that more people are using avocados than were acquainted with them when plaintiff commenced his business.

We think that a careful comparison of the facts in the case at bar with the facts shown in the cases cited in which the injunction has been granted will show that the case at bar is not one in which a restraining order should have been granted.

The judgment and order are affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

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122 Cal.App. 571

PEARSON v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO.

Civ. 8448.

District Court of Appeal, First District, Division 2, California.

April 14, 1932.

1. Partnership 🔑259½.

One whose right to possession of boat as solvent partner was confirmed by federal court *held* not to have dissolved partnership by notifying bankrupt copartner of rescission of contract to purchase interest therein.

2. Affidavits 🔑17.

Assertion in affidavit, filed in response to motion to dismiss action against affiant and his wife, that they appeared therein, *held* mere conclusion of law, not fact finding in conflict with court's finding that no appearance was made (Code Civ. Proc. § 1014).

3. Mandamus 🔑43.

Partner rightfully in possession of mortgaged boat *held* entitled to peremptory writ of mandate to dismiss foreclosure suit against bankrupt copartner (Code Civ. Proc. § 581a).

4. Process 🔑150.

Court lost jurisdiction of suit on day that time for return of summons expired without return having been made (Code Civ. Proc. § 581a).

5. Mandamus 🔑4(3).

Right of appeal from order denying motion to dismiss suit to foreclose mortgage on boat in movant's rightful possession *held* not speedy nor adequate remedy barring mandamus to dismiss action (Code Civ. Proc. § 581a).

Original proceeding by Arvid Pearson for a writ of mandate to the Superior Court of the State of California in and for the City and County of San Francisco.

Peremptory writ granted.

George D. Collins, Jr., and Alfred J. Hennessy, both of San Francisco, for petitioner.

Charles F. Rafferty, of San Francisco, for respondent.

NOURSE, P. J.

This is an original proceeding seeking a writ of mandate requiring the respondent court to dismiss an action entitled Schultze v. Morgan et al.

The petitioner alleges that he is the surviving solvent partner in the ownership and possession of a certain boat named the Saxon; that said partnership was composed of Louis Morgan and himself; that Morgan was duly adjudged bankrupt and that petitioner is in possession of and entitled to the possession of said boat for the purpose of liquidation of the partnership affairs; that on January 5, 1927, summons was issued in the case entitled Schultze v. Morgan, praying for the foreclosure of a chattel mortgage upon said boat; that said summons was directed to Louis Morgan and Mabel Morgan, his wife, the defendants in said action; that on January 26, 1927, summons and complaint in said action were served in the city and county of San Francisco upon said defendants; that the return of said summons was not made thereto until April 16, 1931; that no appearance was ever made by either of the defendants in said action; that on April 16, 1931, the default of said defendants was entered in said action for their failure to appear therein, and, on the basis of said default, judgment was entered decreeing the foreclosure of the chattel mortgage and ordering the sale of said boat. It was also alleged that upon proper notice the petitioner herein applied to the superior court on November 12, 1931, for an order vacating said judgment upon the grounds that it was void for want of jurisdiction of the court to enter it. The respondent has appeared herein by demurrer and answer. The answer denies, for want of information and belief, the pertinent facts alleged in the petition; but at the time of the hearing upon the return of the alternative writ these facts were either stipulated to or proved by documents received in evidence, and we accordingly find that all the facts hereinbefore stated are true.

[1, 2] We will first address ourselves to the discussion between the parties as to these facts. The petitioner's ownership of or right to possession of the boat Saxon is material to his right to prosecute this proceeding as the party beneficially interested in having the former action dismissed. The conceded facts are that Pearson and Morgan entered into an agreement of partnership for the construction and operation of the Saxon, and that Morgan was later adjudged a bankrupt. Pearson then retained possession of the boat as the surviving solvent partner and his right to such possession was confirmed by the United States Circuit Court of Appeal in Pearson v. Higgins, 49 F.(2d) 47, 49. Respondent's only answer to this proposition is that subsequent to the formation of the partnership Pearson gave Morgan notice of his rescission of the contract to purchase an interest in the boat and that he thereby dissolved the partnership. A complete answer to this argument is found in the case cited, and further citation is not necessary. Secondly, it is argued that the respondent court was authorized to find that the defendants Morgan had in fact appeared in the action entitled Schultze v. Morgan because of the affidavit filed in response to petitioner's motion to dismiss wherein defendant Louis Morgan asserted that, after the service of the summons and complaint upon himself and his wife, they personally visited the office of the attorney for the plaintiff in said action, and then and there appeared in said action and gave to plaintiff written notice of their appearance. It is now argued by respondents that the statements in this affidavit constitute a conflict between the express finding made by the trial court in Schultze v. Morgan, that no appearance had been made. The conflict is such in name only. The judgment in Schultze v. Morgan was rendered solely upon the finding that no appearance had been made. The default of the defendants in that action was entered without notice to them upon the grounds that they had failed to appear in answer to the summons. Because of this state of the record the assertions in the Morgan affidavit are mere conclusions of law and not statements of fact, and this court must rely upon the face of the record in Schultze v. Morgan, which shows conclusively that no appearance had been made. The Code expressly provides how an appearance can be made in lieu of the service of process. Code Civ. Proc. § 1014. The same section requires service of notice of subsequent proceedings after appearance, but dispenses with such notice where the defendant has been served with process and fails to answer.

[3, 4] Upon this state of facts the petitioner's right to a peremptory writ of mandate stands uncontestable. As the owner, or the one entitled to the possession, of the boat, he is a party beneficially interested in the dismissal of the action brought to foreclose a mortgage upon the boat. Section 581a, Code of Civil Procedure, provides that unless the summons shall be served and return thereon made within three years after the commencement of the action, the action must be dismissed on the court's own motion "or on motion of any party interested therein, whether named in the complaint as a party or not." Because of the failure to make return of summons within the three-year period, the trial court lost jurisdiction of the case on the very day that period expired, that is, lost jurisdiction to make any other order than a dismissal of the action. 9 Cal. Jur. pp. 533, 534; Swortfiguer v. White, 141 Cal. 576, 579, 75 P. 172; Vrooman v. Li Po Tai, 113 Cal. 302, 304, 305, 45 P. 470; Davis v. Superior Court, 184 Cal. 691, 694, 195 P. 390; Modoc Land, etc., Co. v. Superior Court, 128 Cal. 255, 256, 60 P. 848; Donner v. Superior Court, 82 Cal. App. 165, 168, 255 P. 272, where additional cases are cited. In Swortfiguer v. White, supra, it is said on page 579 of 141 Cal., 75 P. 172, 173: "There having been no service and return made of the summons within three years from the commencement of the action, or appearance within that time by any of the defendants, that action was practically put an end to, and it was the imperative duty of the court to have dismissed it at the expiration of three years from its commencement. * * * The court below thereupon lost all jurisdiction over the cause."

[5] Applying the rule of the foregoing decisions to the case at hand we must hold that because of the failure to comply with the provisions of section 581a, Code of Civil Procedure, the trial court lost jurisdiction over that cause on the date when the three-year period expired and that the entry of the judgment in favor of plaintiff upon a return of summons made four years after the commencement of the action was void upon the face of the record for want of jurisdiction; that the trial court then had jurisdiction in that proceeding to do nothing but dismiss the action upon its own motion or upon the motion of a party beneficially interested therein; and that the right of appeal from the order denying petitioner's motion to dismiss is not a speedy nor an adequate remedy. This was

so held in Davis v. Superior Court, 184 Cal. 691, 696, 195 P. 390.

Let a peremptory writ issue as prayed.

We concur: STURTEVANT, J.; SPENCE, J.

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122 Cal.App. 720

DAVIDSON v. NATIONAL TOOL & METALS, Inc., et al.

Civ. 8025.

District Court of Appeal, Second District, Division 2, California.

April 20, 1932.

Hearing Denied by Supreme Court June 16, 1932.

1. Damages 🔑**132(8).**

$3,000 damages for fracture of ulna and two ribs of 83 year old woman, who failed physically and mentally thereafter and had not recovered nearly year later, *held* not excessive.

2. Pleading 🔑**236(3).**

Denial of motion to amend answer during trial so as to allege contributory negligence on theory of joint venture *held* not abuse of discretion.

Defendants contended that they did not discover that plaintiff and driver of automobile, in which she was riding, were on trip together to visit relatives at time of collision, until driver so testified at trial; but plaintiff disclosed fact of such visit in answer to question concerning it by defendants' counsel on taking of her deposition about six months before trial.

3. Appeal and error 🔑**1041(3).**

Denial of motion to amend answer during trial so as to allege contributory negligence on theory of joint venture *held* not prejudicial error.

There was no showing in defendants' brief on appeal that there was any evidence sustaining allegations of proposed amendment at least prima facie.

4. Pleading 🔑**236(3).**

Allowance of trial amendment to answer is within trial court's discretion.

5. Appeal and error 🔑**959(3).**

Trial court's ruling on motion to amend answer during trial will not be disturbed, unless his discretion was abused.

Appeal from Superior Court, Ventura County; Edward Henderson, Judge.

Action by Adele Davidson against the National Tool & Metals, Incorporated, and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Tipton & Sawyer, of Los Angeles, for appellants.

Coleman E. Stewart, of Santa Barbara, for respondent.

FRICKE, Justice pro tem.

This is an appeal from a judgment in a personal injury action, arising out of an automobile collision, wherein the plaintiff was awarded damages in the sum of $3,000.

[1] Appellants' first point is based upon the claim that the damages awarded are excessive. The plaintiff, eighty-three years of age, suffered a complete fracture of the left ulna and of the fourth and fifth ribs on the left side. The collision occurred in April, 1930, and there is evidence that from the time of the accident she failed both physically and mentally; that prior to the accident she was very active both mentally and physically and read a great deal, but after the accident she lost all interest in reading and in her former activities and had not recovered at the time of the trial, which was had nearly a year later. Under the circumstances we cannot say that the award of the jury, sustained by the trial court, was other than the result of an honest and sober conclusion warranted by the facts.

[2-5] The other point raised is that the trial court erred in refusing to allow the defendants, during the trial, to amend the answer so as to allege contributory negligence and that the plaintiff and the driver of the vehicle in which she was riding were engaged in a joint venture. Appellants contend that it did not discover that the plaintiff and the driver of the automobile were on a trip to Los Angeles together to visit some relatives at the time of the collision until the driver so testified at the trial, following which testimony the motion for leave to amend the answer was made. It appears, however, that the defendants took the plaintiff's deposition about six months prior to the trial, at which time, as stated in appellants' brief, "the defendants were attempting to obtain sufficient facts to determine if sufficient facts existed and the relationship between plaintiff and the driver of the car in which the plaintiff was riding was of such a nature as to justify setting up the defense of contributory negligence based upon the theory of a joint enterprise." While the plaintiff's memory was not clear as to details, she did, in her deposition, disclose the fact of the visit to her relatives and that her granddaughter was driving the car, and an examination of the deposition, questions as well as answers, quite clearly shows that appellants were thereby made aware of the basic facts of the trip, if, as indicated by the fact that the subject of a "visit" first ap-

pears in the deposition in a question propounded by appellants' counsel, the fact of the visit was not known to them even before the taking of the deposition. Furthermore, appellants do not, in their brief, point out that there was, at the time of the request, before the trial court such a state of facts as would tend to sustain the proposed amendment, nor does there appear to have been any showing that, had the amendment been allowed, there was in existence evidence which would, at least prima facie, have sustained the allegations proposed. In the absence of an ability to sustain the allegations of the proposed amendment, the court's denial of the motion for leave to amend the answer could not have prejudiced the appellants. Whether or not such an amendment should be allowed is a matter within the discretion of the trial court, and its ruling will not be disturbed on appeal unless that discretion has been abused. College National Bank v. Morrison, 100 Cal. App. 403, 280 P. 218; Rogers Bros. v. Beck, 43 Cal. App. 110, 184 P. 515; Williams v. Youtz, 178 Cal. 107, 172 P. 383; Baxter v. Riverside Portland Cement Co., 22 Cal. App. 199, 133 P. 1150. We can find no cause for holding that the court abused its discretion in denying the motion, and the motion for a new trial, based upon the points involved in this appeal, was properly denied.

The judgment is affirmed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

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122 Cal.App. 575

PASADENA MERCANTILE FINANCE CORPORATION v. DE BESA et al. (RODECKER et al., Interveners).

Civ. 7145.

District Court of Appeal, Second District, Division 1, California.

April 14, 1932.

Rehearing Denied May 13, 1932. Hearing Denied by Supreme Court June 13, 1932.

1. Corporations 🔑307.

Directors occupy fiduciary relation to corporation and stockholders.

2. Corporations 🔑314(2).

Directors, by acceptance of office, preclude themselves from engaging in transacaction in which their private interests conflict with duty they owe stockholders.

3. Corporations 🔑316(1, 4).

Contract whereby directors employed themselves as fiscal agents for sale of corporate stock *held* void as against public policy and not subject to ratification by succeeding directors.

4. Corporations 🔑316(1).

Where directors employed themselves as fiscal agents for sale of corporate stock, that succeeding directors elected to allow them to continue *held* to entitle directors to commissions for sales made from date succeeding directors took office.

HOUSER, J., dissenting in part.

Appeals from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by the Pasadena Mercantile Finance Corporation against L. S. De Besa and another, wherein Carl Rodecker and another intervened. From the judgment, defendants appeal, and plaintiff appeals from parts thereof.

Affirmed.

Walter M. Campbell, of Los Angeles, for plaintiff.

Woodruff, Musick & Hartke and Laurence B. Martin, all of Los Angeles, for defendants and interveners.

YORK, J.

Plaintiff brought the within action to recover the sum of $21,600 paid by plaintiff to defendants as fiscal agents for plaintiff in the sale of its capital stock. The plaintiff corporation was organized October 29, 1924, and the first sale of stock was made about February 5, 1925. From the latter date until May 10, 1925, the defendants, together with one Hugh Kelley (these three owning a nominal amount of stock, which was all that had been issued), constituted the entire board of directors of plaintiff corporation. On May 10, 1925, a new board of directors was elected, defendants continuing to act as fiscal agents and continuing to sell stock under permit from the commissioner of corporations authorizing the payment of 20 per cent. commissions.

At the time of the institution of the action, an attachment was issued and levied upon property of the defendants, whereupon they filed with the sheriff a bond for the release of the attachment, signed by the interveners as sureties.

Findings of fact were made, from which the court made its conclusions of law to the effect (a) that plaintiff is entitled to judgment against defendants for the sum of $10,908.84, which included principal and interest; (b) that plaintiff is estopped to demand of and receive from said defendants the commissions paid to said defendants between the 15th day of May, 1925, and the 15th day of July, 1925, by reason of the fact that the control of the board of directors of said corporation passed, on said 15th day of May, 1925, from the defendants to directors appointed by them from among stockholders who had theretofore purchased stock in said corporation from said defendants, although no affirmative action was taken by said board of directors either appointing defendants as the fiscal agents of said corporation or ratifying any action taken by them as such fiscal agents; (c) that plaintiff is not entitled to judgment for the commissions paid to defendant De Besa between the 15th day of July, 1925, and the 30th day of July, 1925, because the stock sold between those dates was sold under the appointment of defendant De Besa as temporary fiscal agent of plaintiff.

Based upon the findings and the aforesaid conclusions, judgment was rendered for the said sum of $10,908.84, money had and received by defendants for the use and benefit of plaintiff between the 5th day of February and the 2d day of May, 1925, and that plaintiff take nothing as to the items of the claim for money paid subsequent to the 2d day of May, 1925.

Defendants appeal from said judgment and the whole thereof. Plaintiff appeals from so much of the judgment as denied to it the recovery of the sum of $1,804 "had and received by defendants for the use and benefit of plaintiff between the 5th day of February, 1925, and the 2nd day of May, 1925, to-wit: on the 11th day of April, 1925," together with interest in the sum of $520.55, and from that part of the judgment which decreed that plaintiff take nothing as to the items of its claims sued upon for the period subsequent to May 2, 1925, that is to say, the items of its account arising between the 2d day of May, 1925, and the 15th day of July, 1925, totaling $8,322, with interest thereon.

Defendants contend that the judgment is not sustained by the evidence and is against the weight of the evidence, and that it is against law.

Plaintiff maintains that the court erred in disallowing the item of $1,804 and the items of commissions paid between May 2 and July 15, 1925.

[1-3] Defendants, as directors of plaintiff corporation, occupied a fiduciary relation to the corporation and its stockholders. Having been intrusted with the management of the corporate property for the common benefit of the stockholders, directors, by their acceptance of office, preclude themselves from doing any act or engaging in any transaction in which their private interests conflict with the duty they owe to the stockholders, and from making any use of their power or of the corporate property to secure to themselves an advantage not common to all stockholders. 6 Cal. Jur. 1071. The contract made with themselves whereby they employed themselves as fiscal agents for the sale of capital stock of the corporation was void as against public policy, and therefore was not subject to ratification by the new board of directors which was elected on May 15, 1925.

[4] On the other hand, the new board of directors, when it came into being on May 10, 1925, having elected to allow the defendants to continue to act as fiscal agents, and having elected to accept on behalf of the corporation the benefits derived thereby, became liable to said defendants for the commissions earned by them subsequent to May 10, 1925.

The judgment is affirmed.

CONREY, P. J.

I concur in the judgment. The appeals are presented without any bill of exceptions, and therefore without any specification of errors, other than such specifications as may be found in the briefs.

In the very extensive opening brief on behalf of defendants, a reader may soon discover that defendants are intending to attack the court's findings of fact, or some of them. For it is said that "the judgment entered is not sustained by the evidence and is against the weight of the evidence." Probably the writer of the brief intended to assert that the findings of fact (on which the judgment rests) are not sustained by the evidence, and are against the weight of the evidence. The findings of fact are contained in nineteen separate paragraphs. To which ones, and to what parts, of these nineteen paragraphs are defendants directing their objections? And as to which ones is it claimed that they are wholly without evidence to sustain them? If in reality defendants are arguing only that they are against the weight of the evidence, then in that respect they are asking the Court of Appeal to determine facts by passing upon the merits of conflicting evidence. But the Courts of Appeal will not thus usurp the functions of the trial court. In order to arrive at the merits of the appeal of defendants, in so far as those merits depend upon evidentiary matters, it is essential that there be some specification, directing attention to the particular facts found, as to which it is contended that there is no evidence legally sufficient to sustain them. There are no such specifications. Not only do the rules of practice require them, but the heavy burdens of the court make it unreasonable for a litigant to expect that the court will search the record to find errors therein. I shall assume, therefore, in this case, that the evidence is sufficient to sustain each and every finding of fact.

The next one of the principal grounds of appeal of defendants is found in the statement that "the judgment is against the law." This I interpret to mean that the facts found by the trial court do not legally justify the conclusions of law which the court announced, and which were carried into the judgment.

It was found by the court that on certain dates between February 5 and May 1, 1925, the defendants became indebted to the plaintiff for moneys had and received by them to the use of the plaintiff in certain sums amounting in all to $8,323, all of which remains due, owing, and unpaid; that between October 29, 1924, and May 2, 1925, the defendants, without authority so to do, pretended to act as the fiscal agents of the plaintiff in the sale of its capital stock, and that they did, during said period, sell capital stock of the plaintiff corporation of a stated value, of which they have accounted to the plaintiff for all except the sum of $8,323; that the defendants then and there were officers of said corporation and constituted a majority of the board of directors thereof, and by virtue thereof, controlled said corporation, and did cause to be paid a commission to themselves of 20 per cent. of the amounts received by said corporation on each of said respective sales, said commissions being paid at the time that each of said respective sales were made. It is further found that the defendants have failed, neglected, and refused to pay to the plaintiff the sum of $8,323, or any part thereof, and that the same is due, with interest, etc. It is further found that it is untrue that the plaintiff acquiesced in, accepted and has retained the benefits of all of the stock sales in said plaintiff corporation made by the defendants; that it is true that all moneys derived from said stock sales were paid to the plaintiff corporation by the defendants or by the subscribers to said stock; that it is untrue that the plaintiff has kept and retained all of said moneys so received by the defendants from said stock sales above mentioned; that it is untrue that the plaintiff at all times knew that the defendants and each of them were, or that they believed themselves to be, the lawfully authorized fiscal agents for said corporation; that it is untrue that said plaintiff corporation at no time prior to the receipt by the defendants through the mail of a purported notice of rescission of said alleged agreement for said fiscal agency informed the defendants or made known to the defendants that plaintiff did not consider them its fiscal agents; that it is true that said stock sales were made in good faith by the defendants, and that it is untrue that the defendants are entitled to any commissions for sales of stock of the plaintiff corporation made by the defendants between October 29, 1924, and May 2, 1925; that it is untrue that the plaintiff is estopped from setting up or urging the invalidity of any agreement or agreements with the defendants as the fiscal agents of plaintiff corporation; that it is true that between the 29th day of October, 1924, and the 2d day of May, 1925, defendants pretended to act as the fiscal agents for the plaintiff corporation, and, being without legal authority so to do, and at the time when the defendants L. S. De Besa and H. C. Maynard were officers and directors of the plaintiff corporation, made stock sales in the plaintiff corporation amounting to $50,635, and caused the purchase price of said stock to be paid to the plaintiff corporation, and that concurrently with each respective sale of said stock said defendants, acting in the capacity of officers of the corporation, caused to be paid to themselves, or their agent or nominee, a commission of 20 per cent. of each of said respective sales, which said commission said defendants were not authorized to pay.

It was upon the basis of the foregoing findings of fact that the court reached its conclusion that plaintiff is entitled to the judgment as entered against it in said sum of $8,323, with interest as computed thereon.

Under defendants' general assignment of error in their statement that "the judgment is against the law," their first specification (Opening Brief, p. 214) is that "the action of the lower court in admitting the minute book and the minutes of plaintiff in evidence in support of plaintiff's case is contrary to law." This point is not relevant to the principal proposition, but is a misplaced argument on an assignment of error somewhat informally made near the beginning of their brief, viz. that the court erred in overruling objections to the introduction of the minutes as evidence. Defendants (at pages 24 to 47) have quoted from the record some of the evidence, including a part of the minutes, and the objections made and the rulings thereon.

For a correct appreciation of the merits of the objections made to the admission in evidence, of the said minutes, it is well to have in mind that the evidence had shown (and the court by its findings found it to be true) that the control of the board of directors of plaintiff passed on the 15th day of May, 1925, from the defendants to directors appointed by them from among stockholders who had theretofore purchased stock in said corporation from the defendants. Although it was thus proved and established that the new directors were substituted into the board of directors or added to the board by action of the original directors themselves, it was not shown or found that the new directors were in any sense representatives of the defendants. On the contrary, it appears that the newly constituted board of directors was composed of the same persons who on behalf of the corporation have been directing the prosecution of this action. It was by reason of this change in the control of the board of directors that the court found that the plaintiff is estopped to demand and receive from the defendants the commissions which it paid to the defendants on sales made on and after May 15, 1925.

Overruling objections on the part of the defendants, the court received in evidence the minutes containing a resolution of the board of directors of the plaintiff adopted at a meeting held on the 15th day of May, 1925, as well as other minutes of later dates. Even if these rulings of the court were erroneous, I think that there was no resulting injury to the defendants.

Appellants (defendants) stress the proposition that the burden rested upon the plaintiff to prove its case. That is so subject to the rule that the burden is upon the defendant to prove the facts of its affirmative defenses. In this action it is established, beyond controversy, that the defendants, at the time when they claim to have been authorized to charge and collect the commissions covered by the judgment against them, were the owners of all of the issued stock. But, in addition, they were both promoters and directors of the corporation. Thus they became trustees, not merely for the corporation as originally constituted, but also for the stockholders who were induced to come in, and whose payments into the treasury constituted the very fund out of which the commissions were paid. Western States Life Ins. Co. v. Lockwood, 166 Cal. 185, 190—195, 135 P. 496. The contract to pay commissions was in effect a contract made by defendants with themselves, but in violation of a trust. Such contracts are said to be invalid, as being contrary to public policy. There is some confusion in the decisions, as to whether they are void, or only voidable. It seems to me that a contract may be void, or only voidable, according to the attendant facts. In the case at bar, the contract at the time when it was made was prima facie void; for the contract itself contemplated the existence of other stockholders who on purchasing stock would instantly be entitled to protection against a contract thus made.

It is true that a corporation has power to enter into a contract with a promoter or director, whereby a right to commissions for agency services may be acquired. But that power must be exercised by authorized persons. A director is without authority to act for the corporation in a contract with himself. As to that transaction he must be regarded as not a director. On application of this rule to the instant case, and particularly to the commissions included in the judgment against defendants, it appears that there was never any act of the corporation authorizing the payment of those commissions. There being no contract, there was nothing in existence, and there was nothing capable of ratification.

I think that the judgment is also sustainable as against the cross-appeals. The facts, as set forth in the findings, are sufficient to create an estoppel against recovery from defendants of commissions for services rendered by them after the entire situation with respect to those matters had become well known to the entire body of directors and stockholders.

HOUSER, J.

I concur in the affirmance of that part of the judgment only by which it was ordered "that the plaintiff take nothing as to the items of the claim sued upon subsequent to the 2nd day of May, 1925." As to the conclusion reached by my associates regarding the remainder of the judgment of the lower court, I dissent.

First, I cannot agree that by its own minute record of a purported transaction which allegedly has occurred between the corporation and some other party the corporation may in any manner support its cause of action. To my mind, such evidence is but self-serving, hearsay, and incompetent.

Secondly, although I agree that, ordinarily speaking, a director of a corporation legally should be regarded as a trustee for the corporation and the stockholders thereof, and consequently, in accordance with the well-established rule, may not, on behalf of the corporation, enter into binding contractual relations between it and himself, nevertheless, from a consideration of the authorities, I am convinced that such a contract is not void ab initio, but, to the contrary, is merely voidable. In other words, any contract between the corporation and one of its directors, however irregular and unenforceable in its inception, which contract, had it been entered into between the corporation and a third person, would have been valid, either by subsequent acts of omission or of commission on the part of the corporation, may become as binding as though originally it was not properly or legally subject to any adverse criticism or objection. And just such a situation was present in the instant case. Acting upon an assumedly voidable contract, with not only constructive notice of all the facts relating thereto, but as well with full actual knowledge of all of them, a new board of directors of the corporation, of which neither of the defendants was a member, not only completely ratified the original contract, but in addition thereto adopted it and continued it in force.

Thirdly, without a recitation of the pertinent facts which existed in connection with the point, I am clearly of the opinion that each of the stockholders of the corporation, as well as the corporation itself was estopped from denying the legality of the contract.

122 Cal.App. 584

LETTEAU v. ELLIS et al.

Civ. 8277.

District Court of Appeal, First District, Division 1, California.

April 15, 1932.

Rehearing Denied May 14, 1932. Hearing Denied by Supreme Court June 13, 1932.

Covenants 🔑72.

In action for forfeiture for breach of condition in deed to prevent occupancy by negroes, changed conditions whereby district had become negro district *held* to prevent recovery.

> To give effect to such restrictions would be unjust, where the changed conditions resulted from causes other than their breach. In such case technical rules and distinctions made between conditions, covenants, and mere restrictions should not be considered, because a principle of broad public policy necessitates a sacrifice of many former claimed individual rights; and the rule regarding the disinclination to disturb vested property rights has to some extent yielded, so that they are now considered merely personal and have been subjected to the common good.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by George H. Letteau and others against Pauline Ellis and others. From the judgment for defendants, plaintiffs appeal.

Affirmed.

Moote & Longcroft, of Los Angeles, for appellants.

Afue McDowell, of Los Angeles, for respondents.

PARKER, Justice pro tem.

This action was to have a forfeiture declared after breach of condition. The case may be better understood from a general summary of the facts.

About the year 1905 Lulu N. Letteau was the owner of real property in the city of Los Angeles, which she subdivided into three blocks of sixty lots each and placed upon the market under the name of "The Entwistle Tract." In the deeds by which the great majority of the lots were sold the following clause appears: "* * * Said lot shall never at any time be sold, rented to or occupied by any person of Negro descent; and that a violation of any of said conditions shall work a forfeiture of title thereof to said party of the first part, their successors or assigns." This provision was omitted from the deeds to nine lots, though contained in the deed to the lot here involved.

In the year 1907, by a deed containing the provision quoted and duly recorded in the recorder's office of the county of Los Angeles, lot 51 of block B in said tract was conveyed to one Kershaw, from whom, by a series of conveyances, the defendant Pauline Ellis traces her title. In the year 1912 Lulu N. Letteau died, leaving as her heirs the plaintiffs, to whom all of her estate was distributed. Pauline Ellis, herself a person of negro descent, allowed the property to be occupied by persons of negro descent, and plaintiffs seek to have title to the property declared in them by reason of the claimed breach of the conditions hereinbefore set forth. The action was commenced in July, 1926. The facts as contained in the foregoing statement are not denied; at least, a full and fair consideration of the defendants' main position permits acceptance thereof. Defendants contend that conditions have so far changed since the imposition of the conditions as to preclude the granting of the relief sought.

The findings of the trial court on the question are not challenged, and are substantially as follows: That, by reasons other than the breach of said condition as to said lot, the conditions of the locality of said lot and tract have, since the original deed, changed so fundamentally and radically that neither said lot nor said tract is any longer suitable for use with restrictions against occupancy by persons of negro descent, or for the purposes which the original grantor sought to establish or maintain by said conditions; that, when the tract was originally laid out, the territory embraced therein and the adjacent territory was sparsely settled and close to the then city limits, and occupied by Caucasians only; that at that time the comparatively few negroes in Los Angeles lived in what was then known as the "Negro District," about five miles from this tract; that in 1909 persons of negro descent commenced buying, owning, controlling, and occupying land all around the tract, and from that time persons of negro descent have occupied lands within the tract, and from time to time more and more of said persons of negro descent have purchased and taken occupancy of land in said tract and in the surrounding tracts, until in the year 1926 said tract and the locality in which it is situate has become and now is very thickly settled with persons of negro descent, and such occupancy has been by and with the consent and knowledge and without objection from plaintiffs; that some of these negro occupants have made purchase price payments to plaintiffs on account of purchases of lots in said tract; that, since said alleged restrictions and conditions were so attempted to be established, said tract, lot, and locality have been and now are occupied almost exclusively by negroes; that in very close proximity to said lot and tract there

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

are, and for over ten years have been, churches, schools, business houses, apartment houses, flat buildings, and other kinds of premises, owned and occupied by negroes in very great numbers; that two blocks from said lot there is under construction the largest negro-owned hotel in the western part of the United States, which hotel, with the stores beneath, will be used entirely by negroes; that negroes do now, and for over ten years last past, have been used to congregate, walk, drive, pass, and appear at all hours of the day and night, openly, publicly, continuously, notoriously, constantly, and extremely noticeably, on the sidewalks, roads, streets, in the houses and all about said lot, tract, and locality in usual, ordinary activities of a residential district, where it was and is now commonly known by the public generally that the negroes reside and live; that, as results thereof, nearly all persons not of negro descent have moved out of said tract and locality, and have been replaced by negroes; that most of the real estate in said tract and locality is now offered for sale and occupancy to negroes, who are the only ones easily available; that said tract and locality are included within the "Negro District" and occupied almost exclusively by negroes; that public authorities and the public generally have taken cognizance of, and have submitted to, this enlargement of the said negro district, and for the past ten years have, by common usage and consent, included in the so-called "Negro District" all of the land of this tract, and included nearby tracts located further from the original negro district than the Entwistle tract.

From these findings the court below concluded that plaintiffs had waived their rights to enforce any of the conditions or forfeitures mentioned in this action, and further concluded that it would be extremely harsh and inequitable to enforce said forfeiture of any of said conditions or restrictions as to said lot 51. Judgment thereupon went for the defendants.

At the outset, reference may be had to the following cases: Los Angeles Investment Co. v. Gary, 181 Cal. 680, 186 P. 596, 9 A. L. R. 115; Janss Investment Co. v. Walden, 196 Cal. 753, 239 P. 34; Wayt v. Patee, 205 Cal. 46, 269 P. 660. These cases hold that the provision in a contract for the sale of real property that no part of said property shall ever be used or occupied by any person who is not of the white or Caucasian race is constitutional and valid. Respondents readily concede this to be the law of this jurisdiction. But, argue respondents, the found changed conditions make it unjust and inequitable to enforce the condition. There is much authority in support of respondents' position. Downs v. Kroeger, 200 Cal. 743, 254 P. 1101; Hess v. Country Club Park et al. (Cal. Sup.) 2 P.(2d) 782; Hurd v. Albert (Cal. Sup.) 3 P.(2d) 545, 76 A. L. R. 1348. These cases deal with restrictive covenants and conditions limiting the use of real estate; the particular restrictions being as to the maintenance of the property as residential. The holding in each case is that, where there has been a change in the uses to which property in the neighborhood is being put, so that such property is no longer residence property, it would be unjust, oppressive, and inequitable to give effect to the restrictions, if such change has resulted from causes other than their breach. A reference to these cases suffices. The subject is exhaustively covered, and leaves no further ground of discussion.

Appellants, however, argue with much plausibility that a so-called race restriction or condition against use by a race other than white is not within either the spirit or the letter of the doctrine announced in the cited cases. Distinctions of some nicety are drawn between conditions as such, and covenants and restrictions as to use. Under the rule of Los Angeles Investment Co. v. Gary, supra, the validity of the condition rests upon the use and occupancy alone. In the case of Koehler v. Rowland, 275 Mo. 573, 205 S. W. 217, 221, 9 A. L. R. 107, which case involved race restrictions, the court adopts the rule of changing conditions, and says: "It is true that where circumstances are changed, owing to the natural growth of a city or of the present use of a whole neighborhood, so that the purpose of a restriction in a conveyance no longer can be accomplished, and it would be oppressive and inequitable to give effect to such restriction, the courts will not enforce it, whether it be a restrictive covenant to restrain the violation of which injunction is sought, or whether it is a condition providing for a re-entry in case of breach." And, of particular interest here, the court says further: "If the court upon sufficient inquiry had found * * * that the conditions had so changed since the conveyance was made, by negroes occupying the surrounding lots, that an enforcement of the restriction no longer could serve the original purpose, then it would have been improper to allow the forfeiture."

We find it needless to follow appellants' arguments on the technical rules and distinctions made between conditions, covenants, and mere restrictions. In many, if not all, of the cases dealing with changed conditions, the terms have been used with apparent disregard of the niceties of differentiation, and the reasons advanced would have application to a resulting situation, regardless of the means of its creation. A principle of broad public policy has intervened to the extent that modern progress is deemed to necessitate a sacrifice of many former claimed individual rights. The only obstacle met has been the rule of property or as termed the disinclination to disturb vested property rights. To some extent this, too, has yielded in the sense that many rights formerly labeled as property rights by a process of academic relation are now considered merely personal and have been subjected to the common good.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

122 Cal.App. 675

PEOPLE v. MYERS.

Cr. 2166.

District Court of Appeal, Second District, Division 1, California.

April 19, 1932.

Rehearing Denied May 2, 1932. Hearing Denied by Supreme Court May 19, 1932.

1. **Criminal law 🔑1159(5).**

   Appellate court *held* bound by verdict, where evidence of alibi for accused merely controverted evidence of his participation in robbery.

2. **Criminal law 🔑658.**

   Arrest of witness after testifying, and examination by prosecuting attorney, did not constitute misconduct prejudicial to accused.

   > Witness was arrested after testifying but not in the presence of the court, or jury, nor with the knowledge of the prosecuting attorney. He was examined by the prosecuting attorney and released. Occurrence need not have been divulged in court but for the insistence of the accused's attorney, and it was not shown that any intimidation was practiced or that accused was deprived of any testimony.

3. **Criminal law 🔑1139.**

   In robbery case, tried before jury, accused *held* not entitled to have appellate court receive additional evidence casting doubt on credibility of witness (Code Civ. Proc. § 956a; Const. art. 6, § 4¾).

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Vernon Myers was convicted of robbery, and he appeals and moves to introduce new evidence.

Motion denied, and judgment affirmed.

John F. Groene, of Los Angeles, and Vernon Myers, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

HOUSER, J.

From the "verdict of the jury finding defendant guilty of robbery, and fixing the degree first degree robbery, from the order of the court denying the motion and grounds for a new trial," and from the "judgment and sentence of the court, * * *" defendant appeals to this court.

[1] There is no merit in the first point presented by appellant to the effect that the evidence was insufficient "to sustain the verdict." An examination of the transcript of the proceedings had on the trial of the action discloses the fact that not only was defendant positively identified by the victim of the robbery in question as one of the persons who assisted in the commission of the offense of which defendant was charged, but, in addition thereto, that a witness who theretofore had pleaded guilty to the commission of the identical offense testified to facts which, if believed by the jury, clearly established the criminal connection of defendant as an active participant therein.

The fact that by the testimony of another witness who was introduced by defendant evidence was given of the presence of defendant, on the date when the offense was committed, at a place so remote from the scene of the crime that it would have been physically impossible that defendant could have assisted in its commission, merely presented a conflict in the evidence; and the decision by the jury thereon is binding and conclusive on this court. People v. Yeoman (Cal. App.) 1 P.(2d) 993.

[2] Appellant complains that the deputy district attorney in charge of the prosecution of the action was guilty of misconduct which was prejudicial to the substantial rights of defendant.

From the record herein it appears that after a certain witness had completed his testimony, and after the trial court had adjourned for the day, and after the jury had dispersed, the said witness was arrested by two police officers who took him into the office of the district attorney, where he was detained for a period of about one hour, during which time he was questioned by a deputy district attorney and by him informally charged with having committed perjury in the giving of his testimony. On the resumption of the trial on the day following such incident, the attorney for defendant insisted on bringing the matter to the attention of the court in the presence of the jury. After his conviction of the crime of which he was charged, defendant presented his motion for a new trial, based in part upon affidavits which contained statements of fact which he alleged occurred at and during the time of the arrest and detention of the witness as aforesaid, together with a general allegation that the conduct of the district attorney in the premises constituted such an intimidation not only of the particular witness of defendant, but as well of other witnesses intended to be introduced by defendant, that he was deprived of a fair and impartial trial. Counter affidavits were filed by the prosecution from which it appeared that nearly every essential fact which was alleged by defendant was contradicted. But in any view of the situation, it was satisfactorily shown that neither of the police officers who assumed to arrest defendant's witness was in any way connected with the office of the district attorney; but, to the contrary, that their action in the premises was taken entirely upon their own initiative and without the knowledge, consent, or acquiescence of the district attorney until after said witness had been taken to his office, where, after having been questioned as aforesaid, the witness was released. It also was shown that the arrest of the witness did not occur in the presence of the judge of the trial court, nor of any member of the jury; and that but for the insistence of the attorney for defendant that the facts relative to the matter be divulged in open court and in the presence of the jury, neither the jury as a whole, nor any member thereof, need have known of the existence of the occurrence until after the verdict had been rendered. Moreover, no facts were disclosed by virtue of which a just conclusion might have been reached that either the witness in question, or any other witness, was in any manner or at all intimidated by what had taken place, or that by reason of such alleged misconduct of the district attorney defendant was deprived of the benefit of any testimony or evidence which otherwise would have been submitted for the consideration of the jury. In such circumstances, it may not be judicially declared that because of the untoward incident in question defendant suffered any injury.

[3] No other point suggested by appellant as a sufficient reason for reversal of the judgment is worthy of serious consideration by this court. However, in connection with his appeal herein, appellant has presented a motion to the effect that at this time and before this court he be permitted to introduce additional evidence for the purpose of establishing the falsity of the testimony given on the trial of the action by the alleged accomplice of defendant, to the end that this court may make a finding of fact which will have the effect either of discharging defendant from the charge against him, or of reversing the judgment and granting defendant a new trial. As authority for such motion and the suggested procedure, appellant relies upon the provisions of section 4¾ of article 6 of the Constitution and section 956a of the Code of Civil Procedure.

At the outset it is apparent that, even though it might be fairly established that the testimony given by the admitted accomplice of defendant was unworthy of belief, there would remain the testimony given by the victim of the robbery, which in itself was sufficient to support the judgment. But on examination of the authorities to which attention has been directed it is noted that by the opening sentence in each of them the power of the court to extend any relief is made entirely dependent upon a case "where trial by jury is not a matter of right, or where trial by jury has been waived." Obviously when in a criminal action in which the defendant is charged with the commission of a felony a trial by jury is a matter of right, or when, as was the case herein, the defendant has been tried by a jury—by the express terms of the Constitution, as well as of the statute, he is in no position either to demand or to expect that this tribunal will receive evidence for the purpose either of casting doubt upon the credibility of any witness who may have testified in the lower court, or for the purpose of establishing, either conclusively or otherwise, the utter falsity of the testimony given by such witness. In other words, in response to the motion made by appellant, even though no other reason may exist for its denial, it need only be stated that in the opinion of this court neither the provision of the Constitution, nor that of the section of the Code to which reference has been had, has any application to a situation such as is here presented. Syfert v. Solomon, 95 Cal. App. 228, 272 P. 810.

The judgment, as well as the order by which the motion of defendant for a new trial was denied, are, and each of them is, affirmed.

The appeal from the "verdict of the jury" is dismissed.

The motion to introduce additional evidence is denied.

We concur: CONREY, P. J.; YORK, J.

122 Cal.App. 617

WATKINS et ux. v. WARREN et al.

Civ. 8223.

District Court of Appeal, First District, Division 2, California.

April 18, 1932.

1. Action 🔑12.

Equitable defense cannot be based on contract which defendant failed to perform.

2. Vendor and purchaser 🔑299(3).

Vendees' attempt to excuse default by asserting vendors' fraud in procuring contract *held* not proper defense in vendors' action in ejectment for possession only.

> Vendees, in action of ejectment by vendors to recover possesion of premises conveyed on ground vendees defaulted, offered evidence, which was rejected, in support of affirmative defense of fraud alleged in answer based on misrepresentations by vendors as to value of previous crops, existence of frost, condition of trees, etc. At the trial it was stipulated by the vendees that the payments had not in fact been made as required by the contract, but they sought to excuse their failure to pay on their allegations of fraud.

3. Vendor and purchaser 🔑95(2).

Vendor, by accepting delinquent payment under contract of sale, waived provision making time of essence as to those payments.

4. Vendor and purchaser 🔑95(3).

Vendor's notice that payment of future installments will be strictly required *held* not affected by subsequent acceptance of delinquent installments past due at time.

5. Vendor and purchaser 🔑101.

Vendor's notice that payment of future installments will be strictly required affects only payments becoming due thereafter.

6. Vendor and purchaser 🔑299(3).

Presumption arises, absent contrary allegation, that vendee wife, joint purchaser, received same notice as vendee husband, again making time of essence of contract.

7. Vendor and purchaser 🔑214(1).

Vendors, having looked to original vendees for payment, *held* not required to give vendees' assignees notice requiring strict performance.

8. Vendor and purchaser 🔑101.

Notice requiring strict performance by vendees *held* not insufficient, though signed only by vendor wife, where notice to vacate upon vendees' default was signed by vendor husband only, and judgment in ejectment restored possession to both.

9. Vendor and purchaser 🔑299(3).

Where time is of essence, allegation of waiver accompanied by offer of payment constitutes equitable defense to vendor's action in ejectment.

10. Vendor and purchaser 🔑299(3).

Naked pleading of waiver without alleging willingness and ability to perform obligations of contract of sale is unavailing in ejectment.

11. Vendor and purchaser 🔑299(3).

In vendors' action in ejectment to recover possession only, vendees' allegations of waiver of prompt payment, without alleging ability and willingness to pay, *held* insufficient.

12. Vendor and purchaser 🔑299(4).

In vendors' action in ejectment to recover possession only, denying vendees interlocutory decree allowing time to meet delinquent installments *held* not error.

> Interlocutory decree granting vendees time within which to meet delinquent installments was properly denied, where facts disclosed that large installment which became due two and one-half months after first notice was given was not paid; where notice to vacate was given soon thereafter; where action was filed seven days later; and where trial was not held until three months later, at which time vendees asked stay of execution for 24 hours and court granted 48 hours, but past-due installments were not paid.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action in ejectment by J. F. Watkins and wife against J. F. Warren and wife and others. Judgment in favor of the plaintiffs, and the defendants appeal.

Affirmed.

Zach Lamar Cobb, and Earl A. Littlejohns, both of Los Angeles, for appellants.

Harry L. Cohn, Jonah Jones, Jr., and Charles C. Stratton, all of Long Beach, for respondents.

BURROUGHS, Justice pro tem.

This is an appeal from a judgment in ejectment rendered against the vendees in possession.

The action was for the possession of real estate sold to appellants by respondents under a contract of sale. The appellant vendees made default in various payments, and under the forfeiture clause, time being of the essence of the agreement, the respondent vendors elected to declare the contract terminated, suing for possession only.

The purchase price as set out in the contract was the sum of $22,500 to be paid as follows: $5,000 upon the execution of the agreement, payment of which was acknowledged; vendees agreed to pay a certain trust deed for $6,500 due the Mutual Building & Loan Association of Long Beach, Cal., also a certain trust deed for $1,000 in favor of Frank C. Root; further, the sum of $1,500 on or before June 30, 1928, and $4,160 on or before December 30, 1928, and the further sum of $4,160 on or before December 30, 1929, all to bear interest at 8 per cent. per annum, payable semiannually from date. Vendees were to keep improvements on the premises insured for an amount of at least $2,200. The first installment of taxes for the year 1927–1928 was to be paid by the sellers, and all subsequent assessments were to be paid by the buyers. The agreement dated December 2, 1927, is between "J. F. Watkins and Ethel A. Watkins, husband and wife, * * * Sellers, and J. F. Warren and Adelaide K. Warren, husband and wife, as joint tenants with right of survivorship, hereinafter designated as the Buyers."

The defendants and appellants by their answer set up the affirmative defense of fraud, alleging that they were induced to make the contract through the fraud which consisted of misrepresentations as to the value of previous crops, as to existence of frost, and as to the condition of the trees, etc. They allege the transfer of all right, title, and interest of the Warrens, husband and wife, to William T. and Velma Morgan, and that the consent of these defendants was likewise procured through the fraud of plaintiffs. They specifically deny each and every allegation of default, but at the trial they stipulated that such payments had not in fact been made by them, excusing their failure to pay on their allegations of fraud. Upon objection by plaintiffs, the court refused to allow defendants to present any evidence in support of their affirmative defense. However, leave was granted them to file an amendment to the answer whereby they set up allegations purporting to show that plaintiffs, by their acceptance of payments after the due date thereof, had waived their right to declare a forfeiture. Objection to evidence under this defense was also sustained.

Plaintiffs and respondents introduced as exhibits certain letters referring to the contract. One dated October 10, 1928, is addressed to "Mr. J. F. Warren, 5436 Hampton Court, Los Angeles, California." In this letter occur the following passages:

"I wish to, at this time, call your attention to the fact that the payments of both principal and interest are now in arrears and that I look to you for the payment of same immediately.

"Any arrangements or contracts which you might have issued covering the same property would not affect the payments due me as this would be a personal matter between yourself and the party to whom you are selling to.

"It is therefore demanded that all future payments on the contract to be made direct to me by yourself strictly in performance of the contract. * * *

"[Signed] Ethel A. Watkins."

The letter of January 2, 1929, addressed to "J. F. Warren and Adelaide K. Warren, 5436 Hampton Road, Los Angeles, California," calling attention to the agreement of sale, recites "that the following payments are delinquent:

"Balance of June 30th payment $166.67; Interest on June payment to December 30, 1928, $27.47;

"You have failed to pay the taxes in accordance with the terms and conditions of the contract hereinabove referred to;

"You have failed to make the payments to the Mutual Building and Loan Association of Long Beach, California, and we are advising you that you are delinquent to said company in the amount of $232.80;

"You have failed to pay the payment due December 30, 1928, in the amount of $4160, together with interest in the amount of $332.80.

"We wish further to call your attention to that part of the agreement which provides that time is the essence of the agreement; that should you fail to comply with the terms and meet your payment that you should forfeit all moneys heretofore paid under the contract, and in accordance with said provisions we hereby demand immediate possession of said property.

"[Signed] J. F. Watkins."

A copy of the foregoing letter was inclosed in a letter sent to the defendants William T. and Velma Morgan with a demand to vacate the premises on or before January 5, 1929. This letter was also signed by J. F. Watkins.

Plaintiffs' Exhibit No. 1, a copy of the contract in question, shows by its indorsements the acceptance of past-due payments as follows:

Indorsement on principal:

7-10-28	$ 414.00
7-19-28	414.00
10-16-28	263.76
11-5-28	250.00
	$1,341.76
Balance past due	158.24
	$1,500.00

Indorsement of interest:

7-14-28	$ 200.00
11-5-28	200.00
	$ 400.00

These are the payments by the acceptance of which appellants allege plaintiffs and vendors waived their right to declare a forfeiture.

[1, 2] Appellants claim that they should have been permitted to offer evidence under their affirmative defense of fraud and misrepresentation. By their answer defendants are attempting to claim a right to the possession of the premises without making the payments demanded by the contract of sale. Admitting default and making no offer to pay the amounts due, the attempt to excuse their default by alleging fraud in the procurement of the contract and asking for damages is neither proper answer nor counterclaim in an action for ejectment where plaintiff seeks possession only and does not sue for the remainder of the purchase price. Such claim cannot defeat plaintiffs' recovery, and defendants' claim for damages because of alleged fraud in the procurement of the contract cannot be said to arise out of the same transaction. The court very properly refused to receive evidence in support of the answer. This rule is set out very clearly in the following cases: Los Molinos Land Co. v. MacKay, 175 Cal. 305, 307, 308, 165 P. 926; Hincksman v. Delacour, 47 Cal. App. 416, 190 P. 832; Verbeck v. Clymer, 202 Cal. 557, 560, 561, 261 P. 1017. An equitable defense cannot be based on a contract which the defendant has failed to perform. Davidson Investment Co. v. Dabney, 103 Cal. App. 392, 284 P. 673; Haile v. Smith, 128 Cal. 415, 60 P. 1032; Hannan v. McNickle, 82 Cal. 122, 23 P. 271; Gervaise v. Brookins, 156 Cal. 103, 108, 103 P. 329; Hoffman v. Remnant, 72 Cal. 1, 12 P. 804, 805. In the case of Hoffman v. Remnant, supra, it is said: "To allow a defendant, in an ordinary action of ejectment, to set up matters which do not constitute a defense, but are intended merely as the foundation for a money judgment against plaintiff, would be to sanction something unknown to the principles and rules of pleading. * * *"

[3-5] Appellants claim that they should have been allowed to present evidence in support of their amendment to the answer. It is their contention that, by the acceptance of the past-due payments as set out herein, supra, plaintiffs waived their right to declare a forfeiture without proper notice and demand.

It has been repeatedly decided, and is undoubtedly the law of this state, that "a vendor by accepting payments after the times specified in the agreement for sale of real property waives the provision with reference to time being of the essence of the contract as to those payments, and cannot thereafter effectually declare a forfeiture of vendee's right to purchase and of payments already made without notice that in the future a strict performance will be required." Retsloff v. Smith, 79 Cal. App. 443, 450, 249 P. 886, 888; see, also, Newell v. E. B. & A. L. Stone, 181 Cal. 385, 388, 184 P. 659, 9 A. L. R. 993; Boone v. Templeman, 158 Cal. 290, 110 P. 947, 139 Am. St. Rep. 126.

It is clear that plaintiffs in this case by their acceptance of various past-due payments waived the time is of the essence clause as to those payments. The payment of $1,500 was due in toto June 30, 1928, also a payment of interest in the amount of $400, and plaintiffs accepted part payments on the 10th, 14th, and 19th of July, respectively, as shown by the indorsements on the contract. But there is no merit to appellants' contention that, by the acceptance after October 10, 1928, of further installments on these past-due payments, respondents waived the demand of October 10, 1928, restoring the time is of the essence clause. This notice is in no way affected by acceptance of past-due payments which were past due at the time the notice was given, nor is it retroactive. The notice is intended to affect and can affect only such payments as may become due after the date of the notice. If plaintiffs have accepted any past-due payment which became due after October 10, 1928, they have again waived the time is of the essence clause. The only payments set out in appellants' amendment to the answer by which they claim a waiver are these which were due and in default before the date of plaintiffs' notice. The authorities cited, supra, are clear on this point.

Appellants further contend that the notices and demands given by plaintiffs were insufficient in that no notice of any character was given to either of the defendants Adelaide K. Warren, William T. Morgan, or Velma Morgan, restoring the time provision of the contract or giving them an opportunity to make the delinquent payments; and, further, that the notices and demands were not signed by both plaintiffs.

The only allegation made by appellants as to the sufficiency of notice is found in the amendment to the answer, paragraph 3, which reads as follows: "Defendants further allege that they, and each of them, relied upon the acceptance of said payments after the same became due and thereby understood that no immediate default would be declared in the event that any of said payments were not made upon the day that same became due and the defendants William T. Morgan and Velma Morgan allege that they had no notice of any character, either oral or written, notifying them of the restoration of said time provision of said contract, and further allege that they had no notice of any character, either oral or written, regarding said payments until on or about the 2d day of January, 1929, when notice was served upon them by Jonah Jones, Jr., notifying them to vacate said premises by January 5th, 1929."

It will be noticed that there is no allegation of surprise as to either of the defendants in privity with the contract and no attempt to deny that both J. F. Warren and Adelaide K. Warren, the defendant vendees, received the notice of October 10, 1928, restoring the time clause to the contract.

[6] It was shown at the trial that the property in question is of record in the name of Ethel A. Watkins, though it was admitted to be community property. The notice was signed by Ethel A. Watkins only. The action in ejectment was brought by both parties. The notice of October 10, 1928, was addressed to J. F. Warren, and, in the absence of any allegation to the contrary, the court was entitled to presume that Adelaide K. Warren, his wife, received the same notice.

[7] Respondent vendors were not bound to notify the appellants Morgan (assignees of vendees), as no privity of contract existed between respondents and these defendants, respondents having at all times looked to the original vendees for payment as they stated in the said notice of October 10, 1928.

[8] The question remaining is: Was the notice ineffectual because signed by only one of the plaintiffs, both plaintiffs having joined in the action? Appellants cite the case of Jameson v. Chanslor-Canfield M. Oil Co., 176 Cal. 1, at page 4, 167 P. 369, 371. The facts in that case are not similar to the facts in the case at bar. It was there held that, where a lease provided that a forfeiture could take place only upon the giving of a thirty-day notice by the "parties of the first part," such forfeiture could not be claimed by two of the joint lessors over the objection of the third. The case was decided upon the strict interpretation of the terms of the lease. The court said: "We are not dealing with the rights and remedies secured to the lessors by force of the law, but with the rights which they secured to themselves by the provisions of their contract."

In the case at bar no notice is stipulated in the contract, and no notice of forfeiture was necessary except as plaintiffs by their leniency had waived their right to declare a forfeiture immediately after a breach and must give notice of their intent to reinstate the time is of the essence clause before their right of forfeiture could be claimed against defendants' belated offer of payment.

The notice of October 10, 1928, was signed by Ethel A. Watkins, vendor. The notice of January 2, 1929, was signed by J. F. Watkins, and the action was prosecuted by both parties vendor. The judgment of the court restored the possession of the property to the vendors named in the contract. There is no such confusion of interests as resulted from the decision in the Jameson case, supra.

In Newell v. Stone, cited supra, 181 Cal., at page 388, 184 P. 659, 660, 9 A. L. R. 993, it is said: "If, within a reasonable time after receipt of the notice, the purchaser had tendered payment of the amounts due under the terms of the contract, perhaps the seller would have been bound to accept such tender." And again "Plaintiff [the purchaser] was in default when the notice was received by him. True, his prior defaults had been condoned, and he could have reinstated himself by making prompt payments of the balance due under the terms of the contract; but he could not, by merely saying nothing, gain the right to demand repayment of the installments of the purchase price previously made."

[9-11] That an allegation of waiver accompanied by an offer of payment is an equitable defense to a suit in ejectment where time is of the essence of the agreement is established by many cases in this state. City of Los Angeles v. Krutz, 170 Cal. 344, 149 P. 580; Webber v. Herbert, 46 Cal. App. 84, 188 P. 819, and others. In the case at bar, neither the answer nor the amendment thereto raises any issue as to the facts alleged in the complaint. The court found, in addition to the finding of failure to make the full payment of the $1,500, that: "The defendants and each of them have failed and refused, and still fail and refuse, to comply with the agreement in that the said defendants have failed to pay the first half of the taxes delinquent December 3, 1928, and in addition thereto failed and refused, and still fail and refuse, to make the payments of principal and interest to the Mutual Building and Loan Association of Long Beach, California, for the months of October, November and December, 1928, being the said trust deed for the sum of Sixty-five Hundred ($6500.00) Dollars referred to in said contract; that the defendants and each of them have failed and refused, and still fail and refuse, to pay to the plaintiffs the sum of Forty-one Hundred and Sixty ($4160.00) Dollars, together with interest thereon, which said sum fell due under the terms of said agreement December 30, 1928, no part of which has been paid."

Appellants are here seeking equity to absolve them from a legal default without having offered to do equity. They seek to retain the possession of the land without offering to make the payments due and in default thereon. They attempt to set out a waiver by vendors of the time clause without showing willingness or ability to pay at any time or making any offer whatsoever. Had any one of the defendants come into court with an offer to pay all moneys then due on the contract, the excuse of waiver and surprise might have been considered by the court. In Verbeck v. Clymer, 202 Cal. 557, 261 P. 1017, 1018, it is said: "A purchaser cannot remain in possession of lands under a contract and at the same time refuse to pay the purchase price." The vendor by accepting payments past due does not waive his right to receive payment for his lands, and the only advantage gained by the vendee is the right under a proper showing to have his payments accepted within a reasonable time after the due date thereof. A naked pleading of waiver without alleging willingness and ability to perform the obligations of the contract is unavailing in a simple action in ejectment. Howard v. Hewitt, 139 Cal. 614, 73 P. 414; 25 Cal. Jur. 618, 619; Adams & McKee Land Co. v. Dugan, 68 Cal. App. 226, 228 P. 681. We believe that the notice of October 10, 1928, having given to the parties in privity with the contract actual notice, and having been claimed by both parties plaintiff, was sufficient to restore the time is of the essence clause to the contract, and a reasonable time has been given to the defendants in which to perform. The attempted defense of waiver was ineffectually pleaded, and the court correctly disallowed the offer of evidence thereon.

[12] Appellants protest against the court's failure to grant an interlocutory decree giving defendants time within which to meet the due payments. The record shows that more than two and one-half months after the date of the notice to restore, viz., on December 30, 1928, a payment of $4,160 became due. Three days later the notice (January 2, 1929) demanding possession was sent, and seven days thereafter the complaint was filed, and thereafter three months elapsed before the matter came on for trial. Defendant asked a stay of execution for twenty-four hours, and the court granted a stay of forty-eight hours. This question does not merit further discussion.

The appellants having offered no proper defense either by answer or amendment thereto, the judgment is affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

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122 Cal.App. 750

DAVID v. FROST et al.

Civ. 7173.

District Court of Appeal, Second District, Division 1, California.

April 21, 1932.

Rehearing Denied May 19, 1932. Hearing Denied by Supreme Court June 20, 1932.

1. Usury 🔑52.

Bonus paid by borrowers to lender for making of loan could be considered in determining whether interest paid on loan was usurious.

2. Mortgages 🔑335.

Trustee could sell land under trust deed, although bonus paid exceeded amount of installment interest in default.

3. Trial 🔑395(1).

Where finding might have constituted implied admission that some allegations of answer were true, but other findings clearly established trial court had no such intention, and no findings favorable to defendants could have been made, findings supported judgment for plaintiff.

4. Appeal and error 🔑1012(1).

Trial court's conclusion on weight of evidence will not ordinarily be disturbed by appellate court.

5. Mortgages 🔑369(3).

Mere inadequacy of price *held* insufficient ground for setting aside trustee's sale legally made.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by J. S. David against Ed Mark Frost, Ida J. Frost, and others wherein D. V. Gladish, Thomas Strain, and others were made cross-defendants. From the judgment, defendants named appeal.

Porter C. Blackburn, of Los Angeles, for appellants.

Affirmed.

Smith & Dunn, of Santa Monica, for respondent David.

HOUSER, J.

The action upon which this appeal depends was brought for the purpose of recovering a judgment against the defendants for a deficiency which represented the difference between the face value of a promissory note which was secured by a deed of trust of certain real property, and the price for which, under the provisions of said trust deed, the property was sold.

The principal defense to the action was that the interest provided by the terms of the promissory note, together with a bonus which was exacted from the maker of the note, constituted a charge for the use of the money which was lent that was greater than that permitted by the statute; in other words, the interest was usurious.

[1] The answer to the primary question suggested by appellants of whether a bonus of $225 paid by defendants Frost to plaintiff's assignor for the making of a loan of $4,500 by the latter to the former should be taken into consideration in a determination of the ultimate question of whether the interest paid on such loan was usurious is clearly indicated in the affirmative by the decision in the case of Haines v. Commercial Mortgage Co., 200 Cal. 609, 254 P. 956, 255 P. 805, 53 A. L. R. 725. Sharp v. Mortgage Sec. Corp. of America (Cal. Sup.) 9 P.(2d) 819. But even taking into consideration the payment of said sum of $225, and after applying the same as so much interest either paid or agreed to be paid, together with the interest actually provided for by the terms of the promissory note, the total interest thus computed on such note does not exceed or equal the amount which legally might be charged. In order to make the interest usurious, a second alleged charge would have to be added to the payments made by defendants Frost to plaintiff's assignor. Since by a finding of fact made by the trial court it appears that no such charge was made, and since such finding of fact is supported by substantial evidence, it follows that the contention by appellants that the interest on the promissory note was usurious cannot be sustained.

[2] The succeeding question presented by appellants in effect appears to be that, considering the conceded fact that the trustee's sale of the property described in the deed of trust was demanded and was brought about for the reason that a designated periodical payment of interest on the promissory note was in default—in the face of the doctrine announced in the cited authority to the effect that a bonus paid for the making of a loan should be regarded as so much advance interest paid, together with the fact that said bonus exceeded in amount the installment of interest which allegedly was in default—may it legally be declared that a condition had arisen which authorized the trustee to proceed with the sale and to sell the property held under the trust deed? But in the same authority, to wit, Haines v. Commercial Mortgage Co., 200 Cal. 609, 625, 254 P. 956, 255 P. 805, 53 A. L. R. 725, in principle that question also is decided adversely to the contention of appellants.

[3] Accompanied by both argument and authority, the point is urged by appellants that by each of several of the findings of fact made by the trial court a negative pregnant as to the actual facts is presented, with the result that a given finding of fact is contradictory of another specified finding, which presents the ultimate situation that the findings do not support the judgment, and that the judgment is therefore contrary to the law.

From an abstract standpoint it must be conceded that the position thus assumed is not without merit. The criticism aimed by appellants at the particular findings in question depends principally upon a technical rule of construction. For example, the language of each of several of the objectionable findings is to the effect that "all" the allegations contained within a specified paragraph of the answer of the defendants "are not true." Although such a finding may constitute an implied admission that some of the allegations contained in a particular paragraph of the answer may be true, other findings of fact clearly establish the fact that the trial court had no such intention, and that therefore no such construction of the questioned finding may rightfully be maintained. On examination of the findings of fact as a whole, the intention of the trial court is clearly discernible, with the necessary conclusion therefrom that in no circumstances, nor under any conceivable conditions, could a finding or a set of findings of fact reasonably or at all be expected, or in fact be made, which would be otherwise than adverse and contrary to the facts alleged in defendants' pleadings; and which, if sustained, might constitute a defense to the action. To the contrary, in all material respects findings of fact necessarily would be made which would sustain and support the theory of the case as outlined by the facts which appear in the pleadings in the action which were presented and filed by the plaintiff therein. In such circumstances, as in principle is declared by numerous authorities, the contention of appellants may not prevail. For example, in the case of American National Bank v. Donnellan, 170 Cal. 9, 15, 148 P. 188, 190, Ann. Cas. 1917C, 744, where the Supreme Court of this state had under consideration the effect of alleged contradictory findings of fact, in part it was said: "And next the contention is made that the findings themselves are in very vital respects contradictory and self-destructive. To both of these contentions it may be answered, first, in general terms, that it is only when a judgment rests upon some particular finding for its validity and support that the lack of sufficient evidence to support such finding, or the contradictoriness between two findings, treating of the same essential matter, will necessitate a reversal of the case; or, in other words, however unsupported, however lame, however inconclusive, any number of the findings may be, if in any case there be one clear, sustained, and sufficient finding upon which the judgment may rest, every presumption being in favor of the judgment, it will be here concluded that the court did rest its judgment upon that finding, or those findings, and the others may and will be disregarded."

And in Berry v. Crowell, 55 Cal. App. 534, 537, 203 P. 835, 836, the court said: "* * * If sufficient can be gathered from the whole of the findings of the court that material issues are fairly determined, the finding will support the judgment. * * *"

Likewise in Ready v. McDonald, 128 Cal. 663, 665, 61 P. 272, 79 Am. St. Rep. 76, the following language appears: "* * * It was not necessary that the facts as found should be in any particular form, or follow the pleadings. If the truth or falsity of each material allegation in issue can be demonstrated from the findings, the law is complied with"—citing authorities.

[4] Appellants further complain that the evidence was insufficient to support the findings; also that the trial court erred in refusing to permit in evidence certain proffered testimony which, if admitted, would

have tended to show inadequacy of consideration in the price for which the property in question was sold at the trustee's sale.

The first of such objections depends solely on the weight which appellants claim should have attached to the declarations of certain witnesses, as against a like situation with reference to testimony given by other witnesses. In such conditions, the well-established rule is that the conclusion reached thereon by the trial court is conclusive and will not be disturbed by an appellate tribunal, excepting in most exceptional circumstances of which none are here present.

[5] Regarding the remaining specification of error which, as hereinbefore outlined, related to the admissibility of evidence, it need be said only that no such issue was presented by either of the pleadings by the defendants. But, in addition thereto, "it is the settled rule in California that mere inadequacy of price, however gross, is not in itself sufficient ground for setting aside a trustee's sale legally made. * * *" 25 Cal. Jur. p. 90; 1928 Supp. to Cal. Jur. 1532; and authorities there respectively cited.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

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122 Cal.App. 451

B. & H. TRANSP. CO. v. JOHNSON, State Treasurer.

Civ. 8256.

District Court of Appeal, First District, Division 2, California.

April 11, 1932.

1. Automobiles ⚷97.

"Public highway," as used in Constitution providing for taxation of common carriers for compensation using any "public highway," embraces streets within limits of a city (Const. art. 13, § 15, adopted in 1926; Pol. Code, §§ 2618, 3664aa; St. 1923, p. 519).

> All streets are "highways," but not all "highways" are streets; term "highways" being a generic term embracing all kinds of public ways, such as county and township roads, and streets.
>
> [Ed. Note.—For other definitions of "Highway," see Words and Phrases.]

2. Automobiles ⚷102.

Allegation that common carrier for compensation using public highways was not operating between fixed terminals or over regular route is essential to statement of cause of action for refund of taxes paid under protest (Const. art. 13, § 15, adopted in 1926; Pol. Code, §§ 2618, 3664aa; St. 1917, p. 330).

3. Statutes ⚷190.

Statutory language which is clear and explicit, so that legislative meaning is plain, must be accepted.

4. Automobiles ⚷73.

Statute imposing taxes on common carriers for compensation using public highways is not unconstitutional because it applies to motorbuses operated wholly within limits of city (Pol. Code, §§ 2618, 3664aa; Const. art. 13, § 15, adopted in 1926; St. 1917, p. 330; St. 1923, p. 519).

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by the B. & H. Transportation Company against Charles G. Johnson, State Treasurer of the State of California. From a judgment of dismissal, plaintiff appeals.

Affirmed.

Meserve, Mumper, Hughes & Robertson, of Los Angeles (Timon E. Owens, of Los Angeles, of counsel), for appellant.

U. S. Webb, Atty. Gen., and H. H. Linney and Alberta Belford, Deputy Attys. Gen., for respondent.

JAMISON, Justice pro tem.

This appeal is from a judgment of dismissal entered after plaintiff had declined to amend after demurrer to its amended complaint had been sustained.

This is an action brought for the recovery of taxes paid by plaintiff to respondent under protest. The principal question involved in this appeal is the construction to be placed on section 15 of article 13 of the state Constitution. This section was adopted on November 2, 1926, and the first paragraph of said section is as follows: "Taxes levied, assessed and collected as hereinafter provided upon companies owning, operating or managing any automobile, truck or auto truck, jitney bus, stage or auto stage used in the business of transportation of persons or property as a common carrier for compensation over any public highway in this state between fixed termini or over a regular route, other than buses used exclusively for the transportation of pupils to or from any public school, when owned or operated by the school or school district, shall be entirely and exclusively for highway purposes, and shall be levied, assessed and collected in the manner hereinafter provided. The word 'companies' as used in this section, shall include persons, partnerships, joint stock associations, companies and corporations." This section further provided that all such companies engaged in the aforesaid business of transportation of persons, or persons and baggage, or persons and express, or persons, baggage, and express, where the same is transported on the same automobile, jitney bus, stage, or auto stage transporting said persons, shall annually pay to the state a tax upon their franchises, cars, equipment, and other property, or any part thereof used exclusively in the operation of their said business in this state, equal to 4¼ per cent. of the gross receipts. Section 3664aa of the Political Code contains substantially the wording of the Constitution.

[1] Appellant contends that the phrase "public highway" as used in said section of the Constitution is not broad enough to include city streets where the use of said streets is for a purpose which begins and ends within the limits of a city.

Section 2618 of the Political Code defines "public highways" as follows: "In all counties of this state public highways are roads, streets, alleys, lanes, courts, places, trails, and bridges, laid out or erected as such by the public, or if laid out or erected by others, dedicated or abandoned to the public, or made such in actions for the partition of real property." In the case of Montgomery v. Railway Co., 104 Cal. 186, 37 P. 786, 25 L. R. A. 654, 43 Am. St. Rep. 89, the court used the following language: "All streets are highways, but not all highways are streets. Common Council v. Croas, 7 Ind. 9; Lafayette v. Jenners, 10 Ind. 74; Clark v. Commonwealth, 14 Bush (Ky.) 166." And in Western Union Tel. Co. v. Hopkins, 160 Cal. 106, 118, 116 P. 557, 562, the court said: "The term 'public highways' includes streets in cities."

Roads and highways are generic terms embracing all kinds of public ways, such as county and township roads, streets, etc. 3 Words and Phrases, Third Series, 1108. In Venice v. Short Line Beach Land Co., 180 Cal. 447, 181 P. 658, 659, the court used the following language: "The law relating to highways is indicated by section 2618 of the Political Code, declaring that such highways are roads, streets, alleys, etc." The California Vehicle Act, § 21 (St. 1923, p. 519), describes a public highway as including every highway, road, street, etc. In other jurisdictions we find that the streets of a city are included in the word "highways." State v. Ferry Line Auto Bus Co., 99 Wash. 64, 168 P. 893; Forgy v. Rutledge, 167 Ky. 182, 180 S. W. 90, 92.

We are therefore of the opinion that the phrase "public highway" as used in the said section of the Constitution embraces the streets within the limits of a city.

The next contention of appellant is that to render a company liable to the tax specified in said section of the Constitution it must not only operate the stage or auto stage over a public highway, but said operation must be between fixed termini or over a regular course, and that the phrase, "fixed termini" necessarily implies the operation must be in part without the corporate limits of the city.

Appellant incorporated in its amended complaint, and made them a part thereof, two written protests at the time it paid the said tax. One of said protests was made when it paid the first installment of said tax, and the other when it paid the second installment. In the first written protest appellant stated that it was exclusively engaged in the business of transportation of persons for compensation over public streets within the corporate limits of the city of Long Beach and having all of its termini and its regular routes within the corporate limits of the said city of Long Beach. In the second protest it alleged it states the operations of appellant consist of the conduct of a line of passenger carrying motorbuses operating as a purely local service, wholly within the municipal limits of Long Beach and over and along fixed routes under a franchise from said city granted in accordance with its charter.

[2] One of the grounds for the demurrer to the amended complaint was that it did not state facts sufficient to constitute a cause of action. To constitute a cause of action for taxes paid under protest under said section of the Constitution and section 3664aa of the Political Code, it was essential that appellant in its complaint should have alleged facts that exempted it from such taxation. That is to say, it should have alleged that it was not operating between fixed terminals or over a regular route. On the contrary, we find that the complaint alleged that it was operating its buses over regular routes in the city of Long Beach and having all of its termini therein and also over and along fixed routes in said city. "Fixed termini" was defined by the Legislature in the Auto Stage Transportation Act (chapter 213, St. 1917, p. 330) as follows: "The words 'between fixed termini or over a regular route,' when used in this act, mean the termini or route between or over which any corporation or person, * * * usually or ordinarily operate any automobile, jitney bus, auto truck, stage or auto stage, even though there may be departures from said termini or route, whether such departures be periodic or irregular."

In its reply brief appellant contends that even if the complaint, with the two protests which are made a part thereof, be construed to be an allegation that appellant is engaged in operating motorbuses for compensation over a regular route, that said construction does not bring appellant within the purview of said section 15 unless the court declares that said section includes transportation companies engaged in a purely local service.

[3] The said section 15 and section 3664aa of the Political Code make no exception with respect to motorbuses operated wholly within the limits of a city. It operates equally upon all motorbuses engaged in the business of carrying passengers for hire within the state that come under the provisions of said sections. Where the statutory language is clear and explicit, so that the meaning of the Legislature is apparent, there can be but one construction whatever the consequences of the law may be. 23 Cal. Jur., 765.

[4] Lastly, appellant contends that said section 3664aa of the Political Code is unconstitutional in so far as it seeks to impose a tax upon motorbuses which are operated wholly within the limits of a city. No authorities are cited in support of this contention and we are of the opinion that this contention is without merit.

The judgment is affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

122 Cal.App. 547

BEAUMON v. KITTLE MFG. CO.

Civ. 7075.

District Court of Appeal, Second District, Division 2, California.

April 13, 1932.

1. Contracts 🔑143.

Where contract is clear and explicit, there is no occasion for construction.

2. Patents 🔑218(5).

Contract *held* to provide for payment of annual minimum royalty to licensor by party licensed to manufacture patented automobile signaling device.

3. Patents 🔑219(5).

Evidence *held* to show there was no failure of consideration for agreement to pay annual minimum royalty for license to manufacture patented device.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Leon Beaumon against the Kittle Manufacturing Company. From a judgment for plaintiff, defendant appeals.

Affirmed.

Stick, Moerdyke & Gibson, of Los Angeles, for appellant.

L. R. Wharton and Roscoe R. Hess, both of Los Angeles, for respondent.

IRA F. THOMPSON, J.

This appeal is prosecuted by the defendant from a judgment rendered against it and in favor of the plaintiff in the sum of $2,500 and costs. The facts necessary to an understanding of the discussion of the questions raised are as follows: Leon Beaumon, the respondent, conceived a device attachable to an automobile in the shape of an arrow, containing a neon gas-filled tube, means for lighting the same from the electrical current of the automobile, visible when lighted from either the rear or the front of the car and adjustable by the moving of a lever so as to indicate to both overtaking and oncoming vehicles a change of direction by the automobile so equipped and whether the change would be right or left as well as whether the automobile was making a stop. On December 31, 1927, the respondent entered into a contract with appellant whereby the latter was licensed to manufacture and sell the device, to cover which an application for patent was pending. The action was one to recover what it is contended was fixed by the contract as the minimum annual royalty. The paragraphs of that instrument which are directly involved in the principal argument of the appellant are as follows:

"Second: The licensee agrees to pay to the licensor a royalty or license fee in the amount of thirty cents (30¢) on, and for each and every device of whatsoever character or nature, including Neon or other luminescent vapor tube embodied in said patentable improvement, manufactured, used and sold, by or at the instance of the licensee, during the first year from and after date hereof, and a royalty of thirty cents (30¢) on and for each and every such device manufactured, used and sold during the second and each subsequent year thereafter. All royalties shall be payable monthly on or before the tenth (10th) day of each calendar month, at Los Angeles, California, to the licensor or his authorized representative.

"Third: The licensee agrees to pay to the licensor a total minimum royalty during each year of this agreement in the amount of twenty-five hundred and no/100 dollars ($2,500.00), and if the total royalties accruing to the licensor shall not equal such minimum amount, then the licensee shall pay to the licensor the difference between said minimum amount and the actual accrued royalties, and the payment of said minimum amount each year shall operate as a renewal of this license for a succeeding year."

"Seventh: The licensee agrees to prepare and submit to the licensor, on or before the tenth day of each month, a detailed statement showing the number of devices manufactured, sold and used during the previous calendar month and the amount of royalty due the licensor therefor, and at the end of each calendar month such statement shall show the total number of devices manufactured, sold and used during the year and the amount of royalty paid to and the unpaid balance due the licensor in accordance with the terms hereof. Payment for royalties due the licensor shall accompany said monthly statements. The sale of the article by licensee determines liability of licensee to licensor for payment of royalty."

"Eleventh: The licensor may terminate this agreement upon thirty days' written notice to the licensee, if the said licensee fails, neglects or refuses to pay all and singular royalties when and as the same may become due and payable and/or for the failure of the licensee to pay the minimum amounts herein provided, on or before the expiration of each calendar year from and after date hereof, and/or for the failure of the licensee to keep and perform all and singular covenants named herein; but in such event, the licensee shall not thereby be discharged from any liability to the licensor for any royalties due at the time of the service of such notice. The licensee may terminate this agreement only at the end of any calendar year during the life of this agreement by serving written notice upon the licensor of intention so to do, not less than thirty days (30) prior to the expiration of any year, and the payment of all royalties and moneys due the licensor at the time of such termination."

[1, 2] It is asserted and argued with great earnestness that the appellant assumed no absolute liability to pay a minimum royalty by the language quoted. Our attention is directed to previous rough drafts of the contract for the purpose of explaining an asserted ambiguity in the one which was signed by the parties and from which we have extracted the foregoing portions. The first rule respecting the interpretation of contracts is that we may not apply one of those well-recognized rules as an aid in its construction until we shall first be satisfied that the language is fairly susceptible of two different interpretations—in other words, we cannot and should not attempt to wrench the language from its ordinary meaning. And although the argument of appellant is earnest and ingenious, we have concluded that there exists in the present cause no reason to call for aid in arriving at the intent of the parties. First, they agreed upon a royalty for each device, which royalty, according to paragraph "seventh," was to be determined by its sale and not by its manufacture. The appellant agreed "to pay" these amounts and to account therefor on or before the tenth of each month. Second, appellant agreed "to pay" a "minimum royalty during each year of this agreement in the amount of twenty-five hundred" dollars, and, if the royalties upon the sold devices failed to equal the named sum, it is stated that appellant "shall pay the difference." It is difficult to perceive how language could be made more clear or explicit. It is said, however, that the clause, "and the payment of said minimum amount each year shall operate as a renewal of this license for a succeeding year," indicates that the payment of the minimum amount should be optional with the licensee. We cannot understand the contract in that light in view of the express agreement to pay, fortified as it is by a provision in paragraph "eleventh" for the termination of the contract by the appellant, and fixing the conditions thereof. To adopt the suggestion of appellant would not only do violence to the agreement "to pay," but also render nugatory the provision for termination by the licensee. All that would be required for its termination or cancellation under the theory thus advanced would be to refuse to do that which it agreed to do. The fair import of the quoted clause is that the payment of the minimum royalty shall extend the contract for a year so that the licensor may not terminate under those provisions of paragraph "eleventh" giving him that right for failure on the part of licensee to pay.

[3] It is next argued that there was a failure of consideration, and that by reason thereof appellant was under no liability to pay. This argument proceeds upon the theory that the claims allowed by the Patent Office were not sufficient to give the appellant the exclusive right to manufacture the device and not as broad as those anticipated at the time the contract was executed. A complete answer to this contention is contained in the finding of the court upon the issue and certain undisputed facts, together with slight additional testimony. The finding is as follows:

"With respect to the allegations contained in Paragraph Two of the second defense of the answer of the defendant, the Court finds:

"That it is not true that there was any failure of consideration on the part of the plaintiff herein in respect to the agreement set forth at length in the complaint.

"That at the date of the execution of said agreement, the defendant had never seen application number 172709 of the plaintiff herein, filed for letters patent of the United States on March 4th, 1927, or any copy thereof, and had no knowledge of the contents of said application other than the knowledge that the plaintiff herein had filed said application for letters patent upon a device practically identical in its operative principles, to a device which the plaintiff showed to the officers of the defendant on or about November 30, 1927.

"That prior to the execution of said contract, said defendant by its officers knew that all of the eight claims originally made in said application had been cancelled and further knew that the patent attorney of the plaintiff, who was at said time also the patent attorney of the defendant, had not at the date of the execution of said contract revised any of said claims but was contemplating the filing of amended or revised claims.

"That the device which was shown by the plaintiff to the officers of the defendant as aforesaid was a device for a direction signal arm to be used on an automobile, embodying the use of Neon or other luminescent tubes as a lighting medium.

"That the Commissioner of Patents at Washington, D. C., did on September 26th, 1928, reject all of the original claims, eight in number, contained in said application number 172709, and that the defendant by its officers had full knowledge thereof prior to the execution of said contract.

"That the plaintiff at no time made any representation to the defendant that said application involved any basic patent which would prevent all other persons from manufacturing or selling direction signals for automobiles embodying Neon or other luminescent tubes as a lighting medium.

"That the subject-matter of said contract was said device shown by the plaintiff to the officers of the defendant as aforesaid.

"That the plaintiff herein by his said patent attorney on March 31st, 1928, added to said application claims nine to twelve, inclusive, and cancelled claims one to eight.

"That subsequently said Commissioner of Patents rejected said claims nine to twelve, and that thereafter, to-wit: on November 12th, 1928, the plaintiff herein by his said patent attorney, cancelled claims nine to twelve, inclusive, and added claims thirteen to sixteen, inclusive, and that on December 3rd, 1928, plaintiff herein, by his said patent attorney, amended claims thirteen and fourteen.

"That on February 16th, 1929, the Commissioner of Patents allowed said claims thirteen to sixteen, inclusive, as amended, and that said claims cover patentable improvements in a direction signal of the character shown by the plaintiff to the officers of the defendant as aforesaid.

"The Court further finds that the subject-matter of said agreement between the parties hereto was not the claims in said application number 172709, but was the improvements in direction signals for automobiles for which the plaintiff made said application, and that said allowed claims thirteen to sixteen, inclusive, protect the operating mechanism for the specific structure which was the subject-matter of said agreement and offered not only substantial protection against competition but that the license granted to the defendant in said agreement is an exclusive license, and that the manufacture and sale of the device which was the subject-matter of the agreement, by any parties other than the defendant therein, would be an infringement of said allowed claims, number thirteen to sixteen, inclusive, and of the patent thereon when and if the same is issued, and that there is no evidence that convinces the Court that the defendant, in the manufacture and sale of said device which was the subject-matter of said agreement and which was shown by the plaintiff to the officers of the defendant as aforesaid, would be subject to any action or be liable for infringement of any patent whatsoever, whether issued or applied for."

It is undisputed that the first claims were rejected before the contract was executed, and that the other claims were made, canceled, amended, and allowed as recited in the finding. The respondent testified that he had a conversation with the secretary of appellant after the rejection of the first eight claims and before the contract was signed in which the secretary said, after being informed that the patent attorney would "get what was possible," as follows: "Well, we are satisfied, if he can get any little thing to cover the most vital part of the patent, just to protect us. If not, we will still continue to manufacture until dog eats dog." One of the patent attorneys testified that the claims allowed afforded "protection for the specific kind of product that the Kittle Manufacturing Company had been making, but certainly not to any other kind that any other one person might want to make," and further explained that it would protect against the manufacture of a rigid arm with a neon light mounted longitudinally, supported inwardly for protecting it against damage, although it would not prevent another from constructing an arm with the tube on the outside or from making one "only inside of one of the sides of the arm," which latter, of course, would be visible only from either the front or the rear while the signal in question was visible to either overtaking or approaching traffic. He also added that it would make no difference whether the tube was intermittently lighted from the spark plugs or whether it was operated by a lever or otherwise, yet there would be an infringement. It is plain, we think, that there was ample evidence to support the conclusion of the court that the appellant got that for which it contracted.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; FRICKE, Justice pro tem.

122 Cal.App. 768

SOHRAKOFF v. ZUMWALT.

Civ. 4510.

District Court of Appeal, Third District, California.

April 21, 1932.

1. Appeal and error ⚿1011(1).

Trial court's finding on conflicting testimony that plaintiff was not entitled to $500 item claimed due him *held* conclusive on appeal.

2. Sales ⚿89.

Agreement to extend time for payment for threshing machinery *held* not binding for want of consideration, where buyer only paid seller part of money already due.

3. Sales ⚿481.

Evidence showed seller overcharged buyer $1,705.43 in settlement of conditional sales contracts.

4. Sales ⚿481.

Where seller overcharged buyer, buyer *held* entitled to overcharges and interest thereon from date of settlement, where items constituting overcharges were certain, and only issue was whether seller was entitled thereto (Civ. Code, § 3287).

> Civ. Code, § 3287, provides that every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him on a particular day, is entitled also to recover interest thereon from that day.

5. Damages ⚿67.

Interest is allowable from time sum in suit becomes due, if sum is certain or can be made certain by mere calculation (Civ. Code, § 3287).

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by Paul Sohrakoff against I. G. Zumwalt, doing business under the name of the Colusa Implement Company. From the judgment, both parties appeal.

Affirmed.

C. D. McComish, of Colusa, for Sohrakoff.

U. W. Brown, of Colusa, for Zumwalt.

Mr. Justice PLUMMER delivered the opinion of the court.

The complaint filed by the plaintiff in this action set forth two causes of actions: First, for a judgment on overcharges relative to certain dealings had by the plaintiff and his assignors with the defendant; second, judgment for damages by reason of being prevented by the defendant from threshing certain crops for which the plaintiff and his assignors had contracts. The plaintiff had judgment for overcharges against the defendant in the sum of $1,705.43, with interest thereon at the rate of 7 per cent. per annum from December 23, 1926, the date of settlement between plaintiff and defendant. Plaintiff was denied judgment on his second cause of action. From the judgment awarding damages, as above stated, against the defendant, the defendant appeals. From the judgment of the court denying the plaintiff relief under his second cause of action, the plaintiff appeals.

In addition to what we have stated, the plaintiff claims that there should be added to the judgment awarded him on his first cause of action the further sum of $500.

The record shows that the plaintiff and A. D. Melnikoff, in their individual names, had a series of transactions with the defendant. In these transactions they signed at least six contracts and notes running in favor of the defendant. While the record does show that some other persons were interested in the farming operations carried on by the plaintiff and A. D. Melnikoff, it shows that all of the business transactions were carried on in the names of the two persons which we have just mentioned, and that all the transactions had with the defendant were had in the names of the two persons just mentioned.

The first point made for reversal by the appellant is that the plaintiff and others were doing business under fictitious names, and had not complied with the provisions of sections 2466 and 2468 of the Civil Code. While the record does show that there was some sort of agreement between the Russians relative to their farming operations, the testimony amply supports the finding of the court that no business was transacted under a partnership name or under any fictitious name, but that all the business was transacted by and in the names of Paul Sohrakoff and A. D. Melnikoff.

[1] The testimony and the record are conflicting as to the $500 item which the plaintiff claims should have been allowed, and under such circumstances we cannot hold that there was any error in the finding of the court. On the part of the plaintiff, it was contended that an assignment of a certain account in the sum of $500 by the plaintiff to the defendant was taken as a payment by the defendant. On the part of the defendant it is contended that the assignment of the account was taken only for collection, and that the amount was never collected. It appears that a certain person by the name of Moore owed the plaintiff and his assignors on an unpaid bill for harvesting corn, and

that this bill or account was assigned to the defendant.

[2] The plaintiff's appeal from the denial of judgment on his second cause of action appears to be without any substantial merit. The only reason assigned for reversal is the contention that the defendant agreed to allow the plaintiff and his assignors until November 1, 1926, in which to make payment for certain threshing machinery. The indebtedness for the machinery was evidenced by certain promissory notes which were already due. While it does appear that the defendant did agree to allow additional time within which payment might be made upon the notes and conditional contract under which the defendant had sold the threshing machinery, it appears that the agreement was not binding for want of consideration; the plaintiff only paying to the defendant a part of the money which was already due.

The record shows that in the transactions had between the defendant and Paul Sohrakoff and A. D. Melnikoff a somewhat lengthy book account was incurred; that an indebtedness was created in favor of the defendant in the sum of several thousand dollars; that in the transactions there was purchased from the defendant a grain harvester, a bean harvester, cultivators, and supplies for the machinery just mentioned, such as gasoline, oils, etc. During the course of the transactions between the parties just mentioned, the grain and beans or crops raised by the plaintiff and his assignors were turned over to the defendant, and also payments were made to the defendant of considerable sums of money; that, during the course of the dealings to which we have referred, the defendant took possession of both the bean harvester and also the grain harvester, and made repairs thereon, and sale thereof to other persons. In these transactions the defendant entered upon his books charges as follows: "Delivering bean harvester, $60.00; painting harvester, $25.00; repairs on harvester, $62.15; 10% for selling harvester, $300.00; overcharge on bean cultivator, $25.00; rebuilding header and harvester, $794.67; commissions, and 22 trips, $440.00; on delivering bean harvester $52.50; total $1759.32." From which there was deducted $53.99 as a balance otherwise due the defendant.

The court found that none of these items was a proper charge against the plaintiff or his assignors. It appears that during the course of the transactions the defendant made several trips out where the Russians were carrying on their farming operations, and charged the Russians the sum of $220 therefor, or $10 a trip. The record shows that these trips were made at the sole instance of the defendant, and for his own purposes.

[3] The record also shows that, when the defendant retook a header and harvester, he proceeded to rebuild the header from a 20-foot to a 24-foot width, and charged the expenses thereof to the plaintiff and his assignors. Likewise, after the defendant took possession of the bean harvester, and made a subsequent sale thereof, he proceeded to charge the plaintiff and his assignors commissions for making such sale. The appellant claims that the $60 for delivering the grain harvester and $52.50 for delivering the bean harvester, and commissions for selling the grain harvested in the sum of $300, commissions for selling the bean harvester in the sum of $220, and $220 for trips to the Russian ranch, all aggregating the sum of $877.50, should, in any event, be deducted from the $1,705.43 awarded to the plaintiff in this action. A simple statement of these facts shows that the trial court was correct in disallowing these items. The record shows that, in the settlement had between the plaintiff and his assignors and the defendant in this action, all of these items were charged by the defendant, and settlement made as though the defendant was entitled to payment on account thereof.

The conditional contracts under which the property was sold provided that the defendant might take possession thereof and resell the same at public or private sale, and, after deducting all expenses and attorney's fees incurred therein, credit the proceeds upon the notes given for the payment thereof. There is no charge for taking possession of the property, no attorney's fees were incurred, and there is no provision allowing the defendant commissions for making a sale of the property, especially where he made the sale himself.

[4] It is further contended by the defendant that the allowance of interest by the court from the date of settlement was error, and the amount thereof should be stricken from the judgment. In support of this contention, the defendant calls our attention to section 3287 of the Civil Code, which we think, however, instead of supporting the defendant's contention, supports the trial court in allowing interest from the date of settlement. Section 3287, Civil Code, reads: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day," etc. The items constituting the overcharges in this case are all certain. On the day of settlement, and at the time the plaintiff and his assignors paid to the defendant the full amount, as appeared upon the books of the defendant, including the overcharges, there became vested a right to recover the amount of the overcharges. All the items constituting the total overcharge,

as found by the court, appeared upon the books of the defendant, were easily ascertainable, and the only issue involved was whether the defendant was entitled thereto.

We do not think the last sentence of the paragraph found in the case of Perry v. Magneson, 207 Cal. 617, 279 P. 650, 652, limits the right of the plaintiff to interest in this case. That paragraph reads as follows: "As to the time from which interest on the amount found due should have been allowed, respondent asserts that the trial court was correct in awarding interest from the date of the commencement of the suit, on the theory that the action was not one for damages, but was upon an obligation to pay a sum certain, which obligation must be treated as any other instrument calling for the payment of money. The general rule is that interest is allowable from the time the sum in suit becomes due, if the sum is certain or can be made certain by calculation. The test, then, to be applied in the instant case is whether or not the sum found to be due was known and admitted by the appellant to be due to the respondent." We do not think that the words "admitted to be due" by the appellant, as used in the above quotation, relieve the defendant in this case from his liability to pay interest. The mere fact that the defendant claimed that the respective charges were of amounts due him, when the amounts were fixed and certain, should not be allowed to relieve the defendant of his legal responsibility. Otherwise the defendant would be allowed to profit by his own false charges. In this case each item of the improper charge is certain. The amount of the improper charges could easily be ascertained by calculation. It requires no testimony to determine the amount of each overcharge. We think this case in principle is similar to the case of Hind v. Uchida Trading Co., Ltd., 55 Cal. App. 260, 203 P. 1028, 1029. In that case the question in dispute as to whether the agreement between the parties covered certain charges, such as insurance and freight to Japan, including the cost of tin lining and strapping the parcels in which the sheets of tin were shipped, the court found who was liable for the payment. The amount in that case was certain and fixed. The only question remaining, was the sum due. Interest was allowed on the items. The court said: "Appellant also attacks that portion of the judgment which allows interest on the amounts recovered from the date of the so-called overpayment. There had never been any dispute as to the amounts of these respective payments, and this was admitted at the time of the trial. The only dispute between the parties was whether the amounts so paid were due."

[5] Then, quoting from Gray v. Bekins, 186 Cal. 389, 199 P. 767, 771, appears the following: "The general rule is that interest is allowable from the time the sum in suit becomes due if the same is certain or can be made certain by mere calculation." Upon the authority of this case, it seems clear to us that the allowance of interest by the trial court on the overcharges made by the defendant should be sustained.

The judgment is affirmed both as to the appeal by the plaintiff and the defendant. Plaintiff will recover judgment for his costs incurred on account of the defendant's appeal, and the defendant will recover costs incurred on account of plaintiff's appeal.

We concur: PRESTON, P. J.; R. L. THOMPSON, J.

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122 Cal.App. 730

PUGH v. BAKURJIAN.

Civ. 4523.

District Court of Appeal, Third District, California.

April 20, 1932.

Trial ⚷260(1).

Appellant cannot complain of court's refusal to give unhelpful instruction, where same matters were covered by other instructions given.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by W. B. Pugh against Krikor Bakurjian. From judgment for plaintiff, defendant appeals.

Affirmed.

Derthick, Cusack & Ganahl, of Los Angeles, for appellant.

H. K. Landram, of Merced, for respondent.

ANDERSON, Justice pro tem., delivered the opinion of the court.

This is a case where the plaintiff claims the defendant was guilty of negligence in driving an automobile in such a manner as to inflict damages upon the plaintiff. The jury rendered a verdict against the defendant for $500 damages.

The defendant claims the court erred in refusing to give certain instructions, that there was insufficient evidence to support the verdict, and that there was contributory negligence on the part of the plaintiff.

It appears that the accident occurred when the defendant was driving on the wrong side of the road, and at a place where another

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

road led north of the road each automobile was traveling upon. Plaintiff at this point turned suddenly to the left, claiming that in his confusion he thought the defendant was going to turn into the road leading to the north. This matter was submitted to the jury under appropriate instructions, one of which was as follows: "You are instructed that if the plaintiff, W. B. Pugh, was in fact confronted with a sudden peril of accident through no fault of his own, then, even if it be true that he may have lost his presence of mind momentarily, forgotten, erred in judgment or omitted some precautionary measure which should otherwise have been taken, yet these factors themselves, alone, are not sufficient to charge him with negligence in law, the question being one of fact for you to determine under all conditions, from the evidence as presented."

Objection is also made upon the ground that the court refused to give the following instruction offered by the defendant:

"You are instructed in considering whether the defendant Krikor Bakurjian was negligent, or not, in the operation of and driving of his automobile, it is your duty to consider all of the circumstances shown by the evidence to have existed in connection with the accident immediately prior to and at the time thereof, including the width and surface of the highway, the traffic thereon, the weather conditions at the time of the accident, the positions of the various automobiles and of the plaintiff at the time of and immediately prior to the accident, the position of the plaintiff and of the defendant's automobile immediately after the accident, and such other facts and circumstances as may be shown by the evidence to have existed; and if, after a consideration of all those facts, you believe that the defendant Bakurjian exercised ordinary care in the matters relative to the accident, or if you believe that no negligence on his part was a proximate cause of the accident, then in such event your verdict will be in favor of the defendant; or if you find from all of these circumstances and conditions that the plaintiff was himself negligent in some manner, which contributed proximately, no matter how slightly, to the happening of the accident, plaintiff cannot recover and your verdict will be in favor of the defendant.

"Refused, not helpful—E. N. Rector, Judge."

We fail to see wherein the above-quoted proposed instruction could have rendered any assistance to the jury in deciding any issue in the case, particularly in view of the fact that the court gave the jury instructions covering the same matter.

Instructions on contributory negligence were also given by the court.

After a careful examination of the complete record, we can find no error.

We think the judgment should be affirmed. So ordered.

We concur: PLUMMER, P. J.; R. L. THOMPSON, J.

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122 Cal.App. 515

CENTRAL HOLDING CORPORATION et al. v. SUPERIOR COURT OF LOS ANGELES COUNTY et al.

Civ. 8216.

District Court of Appeal, Second District, Division 1, California.

April 12, 1932.

Appeal and error ⚷381.

Corporate sureties *held* not required to produce their books to determine correctness of financial statements filed for purpose of justifying as sureties on appeal undertaking (Code Civ. Proc. § 1057).

Application by the Central Holding Corporation and another for a writ of mandate to compel the Superior Court of Los Angeles County to accept undertaking on appeal.

Writ granted.

Davis & Thorne and W. A. Alderson, all of Los Angeles, for petitioners.

Everett W. Mattoon, Co. Counsel, S. V. O. Prichard, Deputy Co. Counsel, and Wright & Cooper, all of Los Angeles, for respondents.

TAPPAAN, Justice pro tem.

The action out of which this proceeding arose was one in which the Neale Rainbow Light Corporation was plaintiff and the petitioners were defendants. The plaintiff in that action recovered a judgment as against defendants and petitioners. Petitioners then made a motion for a new trial, which was denied and they then filed a notice of appeal, request for transcript under the provisions of section 953a of the Code of Civil Procedure, and an undertaking in more than double the amount of the judgment. This undertaking upon appeal was executed by two corporations, who at the time of the execution of the undertaking were authorized to become sureties upon such undertakings in the state of California and had complied with all statutory requirements on that subject. The plaintiff in the action thereupon filed and served its exceptions to the sufficiency of the undertaking as executed by the corporations and demanded that they qualify. Thereafter, and at the time and place designated for them to appear and qualify, the two sureties duly appeared and justified upon said undertaking by filing in said court all of the documents designated by section 1057a of the Code of Civil Procedure to be produced and filed by surety corporations upon justification upon such undertakings. The financial statement of each of said corporations thus produced showed that the assets of each of said corporations exceeded its liabilities in an amount in excess of the undertaking executed on the appeal. The plaintiff requested the production of the books of the surety corporations to determine the correctness of the financial statements so produced and filed. This the corporations refused to do, and the court thereupon refused to approve the undertaking. The petitioners thereupon filed their petition in this court for a writ of mandate to compel the superior court to accept and receive the undertaking on appeal and to make an order justifying the sureties thereon as sufficient. The respondents filed their answer to the petition admitting all the material facts of the petition. As to the facts, there is no controversy.

Section 1057a of the Code of Civil Procedure provides in part as follows: "Whenever the surety on a bond or undertaking authorized or required by any law of this state is a corporation of the state or a foreign corporation, authorized to become surety on bonds or undertakings in the state, and exception is taken to the sufficiency of such surety as required by law, such corporate surety may justify on such bond or undertaking as follows." The section then provides the procedure to be followed upon justification which it is admitted was fully complied with here. The section then provides: "Upon complying with the foregoing provisions and it appearing that the bond or undertaking was duly executed, that the corporation is authorized to transact business in the state, and that its assets exceed its liabilities in an amount equal to or in excess of the amount of the bond or undertaking, the justification of the surety shall be complete and it shall be accepted as the sole and sufficient surety on the bond or undertaking."

The question of the justification of corporation sureties upon bonds and undertakings has been before our courts of appeal in but two instances. The first case where this matter was discussed was Fox v. Hale & Norcross S. M. Co., 97 Cal. 353, 32 P. 446, 448, (Feb., 1893). The court in this case, after commenting upon the amount that corporate sureties were authorized to become sureties for, and pointing out that this matter was not covered by the statute as it then stood, make the following statement: "In the absence of such provision, petitioners claim that the amount is unlimited. We think, on the contrary, that the question may be safely decided upon analogous provisions with respect to natural persons. When a corporation executes an undertaking in pursuance of section 942, Code Civil Proc., exception to the sufficiency of the surety may be taken in pursuance of section 948, with exactly the same effect as if the undertaking had been executed by natural persons. In response to such exception the corporation must justify upon notice, and, in addition to the facts which qualify it to do business, it must, like natural persons, show surplus assets equal to the amount of its undertaking."

At the time the above-quoted case was decided, section 1057a of the Code of Civil Procedure had not yet been added to our Code, nor had section 1057 of the same Code been amended to provide for new undertakings with sufficient sureties, when it was made to appear to the court that the sureties upon an undertaking were insufficient. Section 1057a now provides a method by which corporation sureties, when exception to their sufficiency is taken, may justify. It outlines the procedure to be followed and designates the evidence to be produced. It meets in express terms the omissions in the law commented upon and pointed out in Fox v. Hale & Norcross S. M. Co., supra. Prior to 1911, when section 1057a was added to the Code of Civil Procedure, there was no special provision in our laws providing for the justification of corporate sureties. This statute expressly exempts such corporations from the general requirement that sureties must accompany the bond or undertaking with an affidavit stating their qualifications to so act. Under the condition of the law governing corporate sureties at the time of the decision of the case of Fox v. Hale & Norcross S. M. Co., supra, it would have been impossible to have arrived at any other decision than was there reached, but, with the changes in the law created by the addition of section 1057a and the amendment to section 1057, the reasoning as expressed in that case is inapplicable to the case at bar.

The only other case in which the matter of the justification of corporate sureties has been considered is San Francisco-Oakland Terminal Railways v. Superior Court, 48 Cal. App. 586, 192 P. 116, 117. The question present in this case was whether the provisions of section 1057a of the Code of Civil Procedure were exclusive in the matter of corporations justifying upon bonds or the court could permit them to justify by the production of other competent evidence. The court said in this regard: "The section of the Code expressly provides that, when its provisions are complied with, the court must accept the surety as sufficient. Its effect, therefore, is merely to make certain evidence conclusive upon the court for that purpose. It does not attempt to change the ordinary rules of evidence, and accordingly, if the surety does not elect to make proof of its sufficiency in the manner therein permitted, it may justify by any competent evidence proving that fact the same as other sureties may do."

The rule announced in the last-quoted case that the effect of section 1057a is to make certain evidence conclusive upon the court is reasonable and logical. There is nothing novel in enactments of this kind, and many examples of cases where evidence is declared to be conclusive are to be found in our statutes. Respondents' rights are fully protected by the provisions of section 1057 of the Code of Civil Procedure, which make provision for an inquiry into the sufficiency of the sureties and provide for the giving of a new bond in case of their insufficiency. It cannot be said that respondents have been deprived of any of their substantial rights by the provisions of section 1057a of the Code of Civil Procedure. This conclusion is manifest when the difference between natural persons and corporations as sureties is considered. "The individual surety, however honest and well qualified at the time he became surety, is liable to the contingencies of business, the change of value in property, and the inexorable chance of death, which brings his estate into the administration of the law under wholly changed circumstances. * * * 'On the happening of any of these contingencies, the only person in position to keep close watch is the principal, and his interest is adverse to making known any doubt as to the sufficiency of his friend, or to assuming the burden of finding a new surety; while the surety company must have a capital, the amount, nature of, investment, and management of which are known and within the constant sight of the court and the parties interested.'" King v. Pony Gold Min. Co., 24 Mont. 470, 62 P. 783, 786.

Let the peremptory writ issue.

We concur: CONREY, P. J.; YORK, J.

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122 Cal.App. 635

HICKS v. SULLIVAN et ux.

Civ. 4514.

District Court of Appeal, Third District, California.

April 18, 1932.

1. Animals ⚷74(5).

Evidence that dog had attacked a person, and chased and barked at children, sufficiently showed viciousness and owner's knowledge thereof.

2. Animals ⚷70.

Owner's knowledge that dog is disposed to commit injury charges him with liability without proof of negligence in restraining it.

3. Animals ⚷68.

Owner's permitting vicious dog to run at large in community constitutes negligence.

4. Animals ⚷68.

Owner *held* liable for injury to woman's hip in falling when attacked by vicious dog, notwithstanding dog was muzzled and did not bite woman.

5. Animals ⚷68.

Statute making owner liable for dog which bites, regardless of former viciousness or owner's knowledge thereof, does not exonerate owner, where victim is not actually bitten (St. 1931, p. 1095).

St. 1931, p. 1095, which became effective only after liability was incurred in case involved, did not purport to limit recovery to physical wound from biting, but created liability when the victim was actually bitten without requiring proof of previous vicious character of dog or owner's knowledge of its dangerous habits.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by Hazel Hicks against Martin Sullivan and another. From an adverse judgment, defendants appeal.

Affirmed.

Ray Manwell, of Marysville, for appellants.

Frank A. Duryea, of Marysville, for respondent.

PER CURIAM.

This is a suit for damages for injuries received as a result of the negligent harboring of an ill-tempered and dangerous dog.

The evidence satisfactorily shows the defendants owned and kept in Alturas a medium-sized wolfhound which was over four years of age. The dog had previously attacked other persons. It was known to the neighbors and school children to be ill-tempered. It had a savage nature. It was feared by many as a cross and dangerous dog. The defendants knew of this disposition of the dog. At the request of the chief of police they had provided the dog with a leather muzzle. It was, however, permitted to run at large.

On the occasion of the attack by the dog which is involved in this suit, the plaintiff was crossing the street in the vicinity of the defendants' residence. The dog, without provocation, came barking and lunging at her. She fought it with her shopping bag. In the encounter she fell and seriously injured her hip. The court, sitting without a jury, rendered a judgment for the plaintiff in the sum of $300. From this judgment the defendants have appealed.

Regarding the encounter, the plaintiff testified: "This dog just came running and barking right at me, and I spoke to the dog and he kept coming, and I seen that he was mad, and I jumped to one side, and he just jumped back and made another lunge at me. * * * I struck him with the shopping bag, and then I jumped to one side. I fought him there for, * * * it seemed to me a long time. * * * He just kept coming at me, and his eyes were green, looked green to me, and the froth was coming out of his mouth. * * * He kept on making advances toward me, lunged at me, just seemed to come right at my throat, and I knocked him off with this bag. * * * It seemed to me like something broke loose in my side, and I fell to the ground." A man came to her rescue, and the dog was driven away. The plaintiff was taken home. She sustained a serious injury to her hip from her fall which was occasioned by the encounter with the dog. The court adopted findings to the effect that she was injured "by reason of the vicious attack of the defendants' dog." The court also found that, while the dog was muzzled, the defendants had knowledge of the fact that it had previously viciously attacked another woman.

[1] The defendants contend that the findings and judgment are not supported by the evidence for the reason that it does not appear the plaintiff was actually bitten by the dog, and because the dog does not appear to have been a vicious or dangerous animal.

There is no merit in either of these contentions. The evidence is adequate to prove, not only that the dog was vicious and ill-tempered, but also that the defendants knew he had a savage disposition. The dog had previously attacked another woman. It was also accustomed to chase and bark at the school children. The chief of police warned the defendants and advised them to muzzle the dog. This was done. Yet, knowing this tendency and disposition of the dog, it was permitted to run at large.

[2, 3] Most dogs are usually considered domestic, companionable, good-natured, and harmless. Domm v. Hollenbeck, 259 Ill. 382, 102 N. E. 782, Ann. Cas. 1914B, 1272. They are valuable as watch dogs and for the care of stock. The law recognizes a property valuation in dogs and authorizes the ownership and possession of such animals. Some dogs reserve their friendship for their masters or the members of their own household. They are surly and antagonistic toward strangers. When an owner has reason to believe his dog is savage, ill-tempered, mischievous, or dangerous to persons or property, he may be kept only at the owner's risk, who will become liable for damages resulting from the conduct of the dog which exhibits such known traits of character. Notice that the disposition of a dog is such that it is likely to commit injury or cause damage is sufficient to charge the owner with liability for its conduct. Laverone v. Mangianti, 41 Cal. 138, 10 Am. Rep. 269; Kippen v. Lawrence Ollasson, 136 Cal. 640, 69 P. 293; Gooding v. Chutes Co., 155 Cal. 620, 624, 102 P. 819, 23 L. R. A. (N. S.) 1071, 18 Ann. Cas. 671; 3 C. J. 97, § 330; 1 R. C. L. 1116, § 59. In 3 C. J., at page 97, it is said: "When it is once established that the dog is of a vicious and mischievous nature, and that the person owning or keeping it had knowledge of that fact, the same responsibility attaches to the owner to keep it from doing mischief as the keeper of an animal (which is) naturally ferocious would be subject to, and proof of negligence on the part of the owner of the dog is unnecessary." In 1 Ruling Case Law, at page 1116, the same principle is thus expressed: "In case of injury the gravamen of the action is knowledge of the owner that the beast was the possessor of vicious or mischievous propensities. Negligence or lack of care on the part of the owner in keeping or restraining the animal need not be shown." It is negligent, however to permit an ill-tempered dog to run at large in a community. Society is entitled to be protected against wild or vicious animals.

[4] It is asserted the defendants are not liable in this case because the dog was muzzled and did not actually bite the plaintiff. There is no merit in this contention. One might claim with equal reason that the owners of the wolfhound are not liable because it did not devour the lady as the wolf did the grandmother in Little Red Ridinghood. It is not the laceration of the flesh only by the white fangs of a dog that creates liability. Any substantial damage to person or property which is the proximate result of the attack of a dog with known vicious habits, bad-tempered or mischievous traits, may create liability on the part of the owner. A dog with the habit of chasing after, barking at, or fiercely attacking, horses, may create a liability for damages for injuries sustained by the throwing of a rider as the result of such an assault upon a horse. In 3 C. J. 99, § 331, it is said: "Where the injury complained of is alleged to have resulted from a horse being frightened by dogs in the highway, the plaintiff is entitled to recover. * * * Actual biting of the horse need not be shown, it being sufficient if the dog ran after and barked at it."

In the present case the plaintiff was injured in attempting to defend herself against an unprovoked and ferocious attack of a vicious dog whose ill-tempered disposition was known to its master. It was a frantic encounter, as related by the plaintiff. She was terrorized. With green eyes and froth-covered mouth, the dog lunged at her throat. She fought it until she fell to the pavement and was injured. She was saved from the dog when a man arrived at the scene and drove the animal away. Surely the injury which the plaintiff received was the proximate result of her combat with the dog. The damages which she sustained are attributable to the assault of the dog and its known savage nature just as conclusively as though it had not been muzzled and succeeded in biting her. The mere nature of her injuries do not relieve the owners from responsibility.

[5] In support of their contention that liability of the owner of the dog is incurred only when the complainant is actually bitten, the Statute of California, for 1931, page 1095, is cited. This act provides in part: "The owner of any dog which shall bite any person * * * shall be liable for such damages as may be suffered by the person bitten, regardless of the former viciousness of such dog or the owner's knowledge of such viciousness." This statute does not purport to limit the recovery of damages actually suffered as the result of an attack by a savage dog, to the physical wound from biting. It creates a liability when the complainant is actually bitten without the usual necessity of proving the previous vicious character of the dog, or the knowledge of its dangerous habits on the part of the owner. It would be absurd to hold that a savage muzzled dog might knock a child down and claw it to death without creating a liability, if the owner knew its vicious nature and yet permitted it to run at large. Moreover, this statute was not enacted until after the liability in this action was incurred.

The judgment is affirmed.

RUESS v. BARON. *

Civ. 8262.

District Court of Appeal, First District, Division 2, California.

April 19, 1932.

Rehearing Denied May 17, 1932. Hearing Granted by Supreme Court June 16, 1932.

1. Vendor and purchaser 🔑18(4).

Services and expenditures in seeking purchaser of lands by one having option to buy or sell them rendered option irrevocable before time fixed, though nominal consideration expressed was not paid.

2. Contracts 🔑19.

While offer of promise for act is not accepted until act is fully performed, offer cannot be revoked after offeree does substantial act looking to performance.

3. Vendor and purchaser 🔑18(1).

Services and expenditures in seeking purchaser of lands by one having option to buy or sell them constituted consideration for promise to hold entire offer open until date stated.

4. Contracts 🔑65(2).

While consideration is necessary element of every contract, each promise or covenant need not have distinct consideration.

5. Contracts 🔑65(2).

Validating power of consideration extends to all parts of entire contract.

6. Appeal and error 🔑169.

Claim not presented by pleadings nor covered by findings will not be considered on appeal.

Appeal from Superior Court, Santa Barbara County; Wm. D. Dehy, Judge.

Action by H. J. Ruess against Pierre F. Baron. Judgment for defendant, and plaintiff appeals.

Reversed.

Ernest C. Griffith, of Los Angeles, for appellant.

Robertson & Crawford and J. Will Smith, all of Santa Barbara, for respondent.

DOOLING, Justice pro tem.

On July 2, 1928, the defendant and respondent Baron signed a writing purporting on its face to be in consideration of $1 paid, whereby he purported to give to plaintiff and appellant Ruess the sole and exclusive option to buy or sell on or before the 1st day of October, 1928, certain described lands for the total price of $100,000, payable $20,000 down and the balance upon certain term payments to be secured by a mortgage on the land. Some time after the receipt of this writing appellant Ruess wrote the word, "Accepted," followed by his signature at the bottom of this document and had his signature acknowledged and the document recorded. We need give no further consideration to this fact, since the trial court found that this purported acceptance was never communicated to respondent.

Appellant upon receipt of the authorization to buy or sell immediately took steps to endeavor to find a purchaser and expended both time and money in such efforts. On September 21, 1928, respondent Baron served a written notice upon appellant purporting to rescind and withdraw the option expressed in the document dated July 2, 1928. After receipt of this purported rescission and withdrawal and prior to October 1, 1928, appellant caused to be delivered to respondent an acceptance in writing of the offer to buy con-

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*For subsequent opinion see 17 P.2d 119.

tained in the document dated July 2, 1928; and offered to pay respondent the $20,000 down payment and to deliver a promissory note secured by a mortgage for the payment of the balance of $100,000 as in the option provided.

Respondent stood on his notice of withdrawal and refused performance. Appellant then commenced this action for specific performance or for damages if for any reason specific performance could not be decreed.

The trial court found that on September 24, 1928, plaintiff notified defendant of his acceptance of the option to buy but, that prior thereto the option had been rescinded and withdrawn and said purported acceptance was of no effect. From the judgment for defendant which followed, plaintiff appeals.

[1] The $1 consideration expressed in the option was not in fact paid, and respondent contends that the option was for that reason a mere revocable offer not supported by consideration and therefore subject to be withdrawn at any time. Appellant argues that, while the option was revocable at the outset, when he in good faith expended money, time, and effort in the attempt to find a purchaser that furnished a consideration for the agreement to keep the option open until October 1, 1928, and hence the subsequent attempt to withdraw the option was nugatory.

Appellant's position has the support of the decisions of our Supreme Court. Sill v. Ceschi, 167 Cal. 698, 140 P. 949, 950; Los Angeles Traction Co. v. Wilshire, 135 Cal. 654, 67 P. 1086; Blumenthal v. Goodall, 89 Cal. 251, 26 P. 906.

In Sill v. Ceschi, supra, the court said: "Since the authorization was for 30 days, a revocation within that period would not have been effectual, if plaintiff, prior to the attempted cancellation, had expended money and effort in seeking to find a purchaser." We are bound to follow the decisions of the Supreme Court and must hold on the authority of the cases above cited that the performance of services and the expenditure of money by appellant in seeking to find a purchaser rendered the option irrevocable prior to the time fixed therein October 1, 1928.

[2] The question of whether such an offer becomes irrevocable upon the offeree undertaking performance and before performance is completed is one which has not so much troubled the courts as the law writers and commentators. An offer of a promise for an act, i. e., of a unilateral contract, is not accepted until the act called for has been fully performed. Logic has seemed, to many writers on the subject, therefore to compel the adoption of the rule that no matter how far the offeree has proceeded toward performance the offer nevertheless may be revoked unless the act called for has been fully completed. Williston on Contracts, vol. 1, §§ 60, 60a, p. 100 et seq.; Mechem on Agency (2d Ed.) vol. 2, §§ 2452–2454, p. 2049; Wormser, Unilateral Contracts, 26 Yale Law Journal, 136. Other writers realizing the hardships involved in such a rule have suggested various grounds upon which the view adopted by our Supreme Court might be logically supported. Ashley, Consideration Other Than a Counter Promise, 23 Harvard Law Review, 159; McGovney, Irrevocable Offers, 27 Harvard Law Review, 654; Ballantine, Acceptance of Offers for Unilateral Contracts by Partial Performance, 5 Minnesota Law Review, 94. Whatever the logical difficulties involved, the growing tendency among American courts, working through the more realistic medium of litigated cases, has been to ameliorate the hardships inherent in holding that such an offer may be revoked at any time before full performance and to hold that such an offer cannot be revoked after the offeree has done some substantial act looking to performance. Page on Contracts, §§ 130, 131, p. 194 et seq.; 17 California Law Review, loc. cit. 157 et seq. Whatever its logical foundation, our Supreme Court in the cases above cited has aligned itself on the side of this growing volume of decisions which has been accepted by the American Law Institute in its proposed Restatement of the Law of Contracts and crystallized there in section 45 in the following language: "If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer, or, if no time is stated therein, within a reasonable time." See Restatement of Contracts Annotated, 4 Southern California Law Review, Supplement, p. 64 et seq., for a general discussion of this section and the California cases.

[3-5] It is a peculiarity of the option here in question that in so far as it is an offer to sell it is the offer of a unilateral contract which would be accepted by the production of a buyer ready, able, and willing to buy on the terms prescribed; but in so far as it is an offer to appellant himself to buy it is the offer of a bilateral contract which would be accepted by appellant's agreement to buy on the terms stated. In attempting to procure a purchaser appellant was doing acts looking to the acceptance of the offer to him to sell to a third person, but the option being in the alternative, to buy or sell, the consideration found in the services performed and money expended in seeking to find a purchaser would furnish consideration for the promise to hold the entire offer open until October 1, 1928. "While a consideration is a necessary element of every contract, it is not necessary that each separate promise or covenant should have a distinct consideration. If there is but one consideration offered in return

for several promises, and it is accepted for them together, it will support them. * * * If A gives value for two or more promises from B, B cannot claim that one of such promises was not supported by consideration, though the parties have not apportioned the consideration to the separate promises." Page on Contracts, vol. 1, § 525, pp. 861, 862. "The validating power of a consideration extends to all parts of an entire contract." 6 Cal. Jur. p. 164; Tennant v. Wilde, 98 Cal. App. 437, 277 P. 137. The alternative option to appellant to buy or sell was desirable to him in that if he failed to secure a purchaser he could still buy himself, and he might not have been willing to attempt to sell if he had not been given the right to buy.

We conclude that, under the settled rule in California, at the time the attempt to revoke the option was made it had become irrevocable and the acceptance of September 24, 1928, resulted in a binding contract.

[6] It is claimed that the option was abandoned before acceptance by an oral agreement between the parties under which for a period appellant ceased trying to find a purchaser and sought instead to lease the oil rights in the land. It is sufficient answer to this claim that it was neither presented by the pleadings nor covered by the findings.

The court found solely on the issue of the existence of a contract. What relief, if any, appellant may be entitled to depends on the determination of other issues which were not decided but must be decided on a new trial.

Judgment reversed.

We concur: NOURSE, P. J.; SPENCE, J.

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122 Cal.App. 590

ALLEN v. BAY CITIES TRANSIT CO. et al.

ROYSTON v. SAME.

Civ. 725, 726.

District Court of Appeal, Fourth District, California.

April 15, 1932.

1. Appeal and error ⚷525(1).

Record should show whether instructions were given at request of appellant claiming them to be erroneous (Code Civ. Proc. § 609).

2. Appeal and error ⚷1068(1).

That instruction was favorable to one of two codefendants in personal injury action *held* harmless, where verdict was rendered against both codefendants.

3. Appeal and error ⚷1026.

Mere abstract error does not warrant reversal of judgment.

4. Damages ⚷132(5).

$15,000 damages for ruptured ligaments, displacement of uterus, enlargement of right ovary, and bruises on body, and loss of wages, *held* not excessive.

> Facts disclosed that injuries to 21 year old girl consisted of bruises on body, legs, back, and head, resulting in recurring headaches and permanent backaches and swollen legs when standing for specified time, and that ligaments fastening hip bone to spine were probably torn, that uterus was displaced and right ovary was enlarged, and that injured person lost six months' employment at $18 per week, and was unable to stand continual work thereafter.

5. Appeal and error ⚷979(2).

Granting new trial for insufficiency of evidence is so entirely within trial court's discretion that order will not be reversed, unless clearly abused.

Appeals from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Separate actions by Elizabeth Allen and Kathryne J. Royston, a minor, by her guardian ad litem, against the Bay Cities Transit Company, Lyman M. Hill, and the Pacific Electric Railway Company and C. W. Harris. From judgments for plaintiffs in both actions, defendants the Bay Cities Transit Company and Lyman M. Hill appeal, and, from orders granting new trials to defendants the Pacific Electric Railway Company and C. W. Harris, plaintiffs appeal.

Judgments and orders affirmed.

Louis P. Pink and George W. Seith, both of Los Angeles, for appellants Allen and Royston.

B. P. Gibbs, of Los Angeles, for appellants Bay Cities Transit Co. and Hill.

Frank Karr, E. E. Morris, C. W. Cornell, and O. O. Collins, all of Los Angeles, for respondents Pacific Electric Ry. Co. and Harris.

JENNINGS, J.

The appeals herein are taken by defendants, Bay Cities Transit Company, a corporation, and Lyman M. Hill, from judgments rendered in favor of plaintiffs in two actions separately instituted by each plaintiff. The actions were brought to recover damages for personal injuries alleged to have been sustained in the same accident, and, as the same facts relative to the accident, except those pertaining to the nature and extent of the injuries suffered by the respective plaintiffs, were involved in each case, by stipulation of all parties concerned the actions were consolidated and tried together before a jury, and, by further stipulation, the appeals have been consolidated and are brought up together upon one transcript. The trial resulted in verdicts in favor of each plaintiff against all defendants. In accordance with the verdicts thus returned, a judgment was rendered in favor of each plaintiff. Motions for a new trial were then made by each defendant and were granted as to defendants Pacific Electric Railway Company, a corporation, and C. W. Harris, and were denied as to defendants Bay Cities Transit Company, a corporation, and Lyman M. Hill.

Defendant appellants concede that, as the evidence produced during the trial of the actions was conflicting, it may not now be urged that the verdicts of the jury are lacking in evidentiary support. This concession renders unnecessary a detailed statement of facts. It is, however, contended that the court erred in giving certain instructions, and that the verdict in favor of plaintiff Elizabeth Allen is excessive.

With respect to the contention of these appellants that error was committed in the giving of the instructions complained of, plaintiff respondents urge certain objections thereto that merit consideration.

[1] It is first pointed out that the record fails to disclose whether or not the instructions which are claimed to be erroneous were given at the request of appellants, and it is contended that an appellate court is therefore warranted in presuming that the questioned instructions were given at the request of appellants in accordance with the rule declared in 2 California Jurisprudence, 870, in the following language: "If the record does not show at whose request instructions were given, it will be presumed that they were requested by the appellant who claims them to be erroneous." The rule thus stated has the support of numerous California authorities, among which may be noted the following: Gray v. Eschen, 125 Cal. 1, 5, 57 P. 664; Sutter Butte C. Co. v. American Rice & Alfalfa Co., 182 Cal. 549, 554, 189 P. 277, 279; Perry v. Noonan Furniture Co., 8 Cal. App. 35, 37, 95 P. 1128; Skrocki v. Stahl, 14 Cal. App. 1, 7, 110 P. 957; Finkelstein v. Cosgrove, 83 Cal. App. 201, 203, 256 P. 608. However, it is proper to observe that the rule has been modified by the Supreme Court in Fawkes v. Reynolds, 190 Cal. 204, 211 P. 449, where it was held that, in an appeal taken upon a bill of exceptions from which it appeared that all of the instructions were given by the court, thus allowing to each party an exception thereto under section 647, Code of Civil Procedure, the record is not so ambiguous as to require an appellate court to presume that an alleged erroneous instruction was given at appellant's request, since, if such were the fact, it should appear by a statement in the bill of exceptions. The appeals herein were taken under the alternative method provided by section 953a, Code of Civil Procedure, and it may be conceded that Fawkes v. Reynolds, supra, is not therefore directly in point. In Sutter Butte C. Co. v. American R. & A. Co., supra, the appeal was taken under the alternative method, and the following language of the court is pertinent to the present discussion: "It is important for the record to show whether or not instructions complained of are given at the request of the party complaining, and this should be made clear by the judge. Section 609, Code Civ. Proc. In default of such explanation, a party complaining of such an instruction may find its objection precluded by the rule which favors the regularity of the proceedings in the trial court. Gray v. Eschen, 125 Cal. 5, 57 P. 664." The court did not, however, enforce the rule suggested, but proceeded to consider the instructions complained of and to hold that the jury could not have been misled by them. A recent decision of the District Court of Appeal for the Third District holds that there is no reason why the rule as modified by Fawkes v. Reynolds, supra, should not apply to an appeal taken under the provisions of section 953a, Code of Civil Procedure, since under the terms of this section five days' notice is required to be given to counsel of the settlement and allowance of the reporter's transcript by the trial judge, which, it is said, affords to an appellant an opportunity to have incorporated in the record information showing by whom the questioned instructions were proposed, and in this respect an appellant has the same rights as are afforded to a litigant whose appeal is taken under a bill of exceptions. The court thereupon held the instructions reviewable under the reasoning and conclusions of the Fawkes Case. Hayes v. Emerson, 110 Cal. App. 470, 294 P. 765.

If the court's decision is correctly reported, it is difficult to understand why, if, as the language of the decision states, in an appeal taken under section 953a, Code of Civil Procedure, an appellant has an opportunity to have incorporated in the record information showing the source of an instruction of which he complains, and does not avail himself of the opportunity, he may nevertheless urge his objection to such instruction under the theory that it will be deemed that exception was taken thereto in accordance with the provisions of section 647, Code of Civil Procedure. If, as the decision states, an appellant has the opportunity to dissipate any doubt as to the source of a questioned instruction, and fails to take advantage of the opportunity, it would appear logical that he thereby forecloses himself from thereafter urging objection to it. If, on the other hand, the court meant to say that an opportunity was afforded to a respondent to have incorporated in the record information showing the source of a questioned instruction, and, having failed to do so, the effect will be that an exception will be deemed to have been taken thereto, the question naturally arises why the burden of having incorporated in the record information as to the source of a questioned instruction should be placed upon a satisfied respondent rather than upon a discontented appellant. At all events, it will suffice to follow the example set in Sutter Butte C. Co. v. American R. & A. Co., supra, and to call attention to the importance of having the record contain information respecting the source of instructions which are claimed to be erroneous and the possibility of an appellant discovering that objections to instructions may be precluded by the presumption of regularity attaching to proceedings in the trial court, without foreclosing the objections of appellants by strict application of the rule.

[2, 3] A less technical objection to a consideration by this court of the instructions attacked by appellants is presented in the contention of respondents that, since it is conceded that the evidence produced at the trial was conflicting, and the verdicts and judgments rendered in conformity therewith are not vulnerable to attack on the ground of evidentiary nonsupport, a complaint that the alleged erroneous instructions were unduly favorable to codefendants of appellants is not sustainable. The record in the appeals herein presented shows that each respondent was a passenger for hire on an autobus of appellant Bay Cities Transit Company, a corporation, which, at the time of the accident, was being operated by appellant Lyman M. Hill. The accident in which the injuries were incurred by respondents resulted from a collision between the autobus and a street car of defendant Pacific Electric Railway, a corporation, which was being operated by defendant C. W. Harris. As heretofore noted, a separate action was instituted by each respondent against appellants and their codefendants Pacific Electric Railway Company and C. W. Harris. There is no pretense that any negligence of defendants Electric Railway Company and C. W. Harris or either of them is imputable to appellants. Under such circumstances, one defendant will not be heard to complain that instructions were given which were too favorable to his codefendant or that instructions applicable solely to his codefendant were erroneous. This is because of the general rule which permits an appellant to assign as error only such proceedings as injuriously affect him. 24 Cal. Jur. 865; Nichols v. Pacific Electric Railway Co., 178 Cal. 630, 174 P. 319; Goehring v. Rogers, 67 Cal. App. 253, 227 P. 687; Crabbe v. Rhoades, 101 Cal. App. 503, 524, 282 P. 10. The rule is peculiarly applicable here, since the jury returned a verdict, not only against appellants, but also against their codefendants. Whatever error may have been contained in the instructions complained of was rendered harmless by the verdict. Spear v. United Railroads, 16 Cal. App. 637, 117 P. 956. Appellants have not pointed out sufficient evidence appearing in the record showing that, but for the error of which they complain, there might have been a finding in their favor. At most, therefore, they have presented a mere question of abstract error which does not warrant reversal of the judgment. Hamlin v. Pacific Electric Ry. Co., 150 Cal. 776, 783, 89 P. 1109.

[4] The contention is made by appellants that the jury's award of damages in the amount of $15,000 for the injuries sustained by respondent Elizabeth Allen is excessive. No such contention is made as to the award of $1,250 for injuries sustained by respondent Kathryne J. Royston. As to respondent Elizabeth Allen, the evidence with respect to her age, physical condition prior to the accident, employment, injuries sustained, effect and duration of the injuries, and decrease in earnings subsequent to the accident, may be summarized as follows: At the time the accident occurred, on March 9, 1927, respondent Elizabeth Allen was 21 years of age and in perfect health. She was employed at a weekly wage of $18. As a result of the accident, she was rendered unconscious for a brief time. She suffered injuries to the back part of her head, her right jaw, her back, and her legs and ankles. The back of her head was considerably swollen, and was the source of severe pain and frequently recurring headaches, conditions which continued to persist at the time of the trial, which was more than 14 months subsequent to the date of the accident. Her right jaw was bruised and tender. She sustained numerous bruises on her body and on her legs and arms which remained for 2 or 3 weeks. Her legs and ankles were severely bruised, and the ligaments and muscles of her ankles were strained. As a result of the injuries in her legs and ankles, her legs became swollen to her knees when she remained standing for any appreciable length of time, a condition which persisted at the time of the trial. Her back was sprained, causing severe pain. There was marked tenderness in the region of the second, third, and fourth lumbar vertebræ, and the left lumbar muscle was rigid, indicating that there had been injury to the muscle tissue. She suffered severe pain in the lower portion of the spine, and any movement of the sacroiliac joints caused pain. The physician who furnished medical care and attention to her for several months subsequent to the accident testified that, in his opinion, there was a tearing of the ligaments which fasten the hip bone to the spine, and that these ligaments were probably torn from the spine. In his opinion, she will suffer permanent backache by reason of the ligaments being torn, leaving two rough bones. Her abdomen was bruised, and the muscles on the right side of the abdomen were irritated. The right ovary was enlarged, and

there was some displacement of the uterus. Because of the injuries resulting from the accident, her menstrual periods had been prolonged for 2 or 3 days and rendered very painful. She had been rendered nervous and irritable because of her injuries and the pains and aches suffered from them. She was confined to her bed most of the time for about 2 months, and was unable to go out of doors for 4 months subsequent to the accident. It was found necessary to administer sleep-inducing drugs for a period of from 6 to 8 weeks succeeding the accident to enable her to sleep. She required the care of a practical nurse for the first 4 months after the accident. She was not able to work until a period of 6 months had elapsed. When she returned to work, she was compelled to remain at home for 2 or 3 days each week because of headache, backache, and swollen legs. Her wages were correspondingly reduced because of this loss of time. From the above description of the injuries sustained by respondent Allen, it appears that, with the exception of the rupture of the ligaments attaching the hip bone to the spine and the displacement of the uterus and the enlargement of the right ovary, the injuries consisted principally of bruises from which serious and permanent effects may not reasonably be expected to follow. A medical witness testified that the injury to the ovary and the uterus may be repaired by a major operation whose average mortality is 3 per cent. At first blush, the jury's award conveys an impression of undue generosity. It is to be noted, however, that appellants moved the court for a new trial, and that, as one of the grounds specified in the notice of intention, appellants urged excessiveness of damages. The trial court, therefore, had the opportunity to reduce the damages allowed by the verdict, if, in the exercise of sound discretion, it had thought the award excessive. It did not take this action, but permitted the verdict to stand, not only as the appraisement of the jury, but as its own appraisal of the damages. This court is not in a position to challenge intelligently the judgment of the trial court with nothing of a substantial character before us to support a contrary conclusion. We think that it may not fairly be declared that the award was so grossly disproportionate to any compensation reasonably warranted by the facts presented on this appeal as to shock the sense of justice and raise at once a presumption that it was the result of passion, prejudice, or corruption rather than an honest and sober judgment. This view precludes the employment of the power of revision. Kelley v. Hodge Transportation System, 197 Cal. 598, 242 P. 76; Krause v. Rarity, 210 Cal. 644, 293 P. 62; Cooper v. Painless Parker, Dentist, 105 Cal. App. 110, 286 P. 1048.

[5] After the trial court had entered its order granting the motion of the defendants Pacific Electric Railway Company and C. W. Harris for a new trial, plaintiffs Elizabeth Allen and Kathryne J. Royston gave notice of appeal therefrom. Notice and request for the preparation of a reporter's transcript and clerk's transcript was duly given, and these documents have been filed. No brief in support of the appeal thus taken has been filed by either Elizabeth Allen or Kathryne J. Royston. The order granting a new trial specifically recites that it was granted on the ground that the evidence was insufficient to support the verdict against defendants Pacific Electric Railway Company and C. W. Harris. The granting of a new trial for lack of evidence to support the verdict is usually a matter so entirely within the discretion of the trial court that abuse of discretion must clearly appear to warrant a reversal of the court's order. In re Estate of Everts, 163 Cal. 449, 125 P. 1058; Tumelty v. Peerless Stages, 96 Cal. App. 530, 274 P. 430. No attempt has been made by either of the parties who gave notice of appeal from the court's order granting a new trial to the above-named defendants to show that the trial court abused its discretion in granting the motion.

The judgments and orders from which these appeals have been taken are affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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122 Cal.App. 716

McMANUS v. LARSON et al.

Civ. 6913.

District Court of Appeal, Second District, Division 1, California.

April 20, 1932.

1. Pleading 🔑424.

Motion to preclude introduction of evidence for failure to furnish bill of particulars is addressed to sound discretion of trial court (Code Civ. Proc. § 454).

2. Pleading 🔑424.

Trial court *held* not to have abused sound discretion in entering order precluding introduction of evidence for failure to furnish bill of particulars (Code Civ. Proc. § 454).

Discretion was not abused, because on March 29th defendants served on plaintiff demand for bill of particulars; the matter was again called to attention of plaintiff's counsel on April 8th, with the statement that defendants wished to take deposition of plaintiff's assignor, and that trial was set for May 31st; on May 13th notice was served that motion to preclude would be made on May 20th, and motion was so made by defendants and granted by the court.

3. Pleading ⚷424.

Motion to be relieved from order precluding introduction of evidence for failure to furnish bill of particulars is addressed to sound discretion of trial court, not to be disturbed by appellate court except for abuse of discretion (Code Civ. Proc. §§ 454, 473).

4. Pleading ⚷424.

Trial court *held* not to have abused discretion in refusing to relieve from order precluding introduction of evidence for failure to furnish bill of particulars (Code Civ. Proc. §§ 454, 473).

5. Appeal and error ⚷946.

That appellate court might have reached different conclusion does not indicate abuse of discretion by trial court.

6. Pleading ⚷424.

Plaintiff's mistake as to law governing bill of particulars is not ground for relief from order precluding introduction of evidence for failure to furnish bill of particulars (Code Civ. Proc. §§ 454, 473).

7. Pleading ⚷424.

That plaintiff's assignor was occupied with other matters *held* no excuse for his neglect to furnish bill of particulars so as to relieve him from order precluding introduction of evidence (Code Civ. Proc. §§ 454, 473).

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt and Marshall F. McComb, Judges.

Action by B. W. McManus against August H. Larson and another. From order precluding introduction of evidence, from order refusing to vacate such order, and from judgment for defendants, plaintiff appeals. Judgment affirmed, and appeals from orders dismissed.

Harrah, Louis & Quillian and H. B. Pool, all of Los Angeles, for appellant.

Phil S. Gibson, of Los Angeles (Mary Brownstein, of Los Angeles, of counsel), for respondents.

TAPPAAN, Justice pro tem.

Plaintiff, as assignee of an attorney, instituted this action to recover from defendants the sum of $4,000 alleged to be due upon an "open, mutual and current account." On March 29, 1929, defendants caused to be served upon plaintiff a demand for a bill of particulars of the items of the account sued upon. Thereafter, and on April 8, 1929, plaintiff having failed to serve or file a bill of particulars as demanded, defendants' attorney communicated with one of plaintiff's attorneys, and called his attention to the fact that more than 5 days had elapsed since the service of the demand for a bill of particulars, and that no bill had been served, that the case was set for trial for May 31, 1929, and that he desired to take the deposition of plaintiff's assignor. He also at this time informed plaintiff's attorney that, if the bill of particulars was not immediately served upon defendants, he would object to the introduction of any evidence pertaining to the account mentioned in plaintiff's complaint.

Defendants on May 13, 1929, the plaintiff still having failed to comply with defendants' demand for a bill of particulars, served upon plaintiff a notice that a motion to preclude the plaintiff from giving evidence of the account would be made on the 20th day of May, 1929. The court granted defendants' motion upon the day designated in the notice, and, on the same day that defendants' motion to preclude evidence was granted, plaintiff served and filed what purported to be a bill of particulars of the account. Thereafter plaintiff made a motion under section 473 of the Code of Civil Procedure, to be relieved from the order precluding evidence, and on June 6, 1929, this latter motion was denied by the court. The cause came on for trial on June 18, 1929, and the court, acting under the order made May 20, 1929, precluding evidence, sustained an objection to the evidence tendered by plaintiff in support of the allegation of his complaint. Judgment was thereafter entered for defendants. Plaintiff appeals from the order precluding evidence, the order denying relief under section 473 of the Code of Civil Procedure, and from the judgment entered in defendants' favor.

[1, 2] The first question upon this appeal is whether the trial court committed error in sustaining defendants' motion to preclude evidence. The failure on the part of plaintiff to comply with the demand for a bill of particulars, prior to the date upon which the motion to preclude evidence was heard and granted, is admitted, and in fact it appears. At the hearing had upon this motion, an affidavit of plaintiff's assignor was filed in opposition to the motion, in which affidavit the assignor stated that defendants, some years before the filing of the affidavit, had been informed of the items of the account, and were aware of their nature, but that the account covered a long period, and because of its great detail required considerable time for preparation, which time assignor did not have because of other duties. The record shows that plaintiff had had over 50 days since the service of the demand for the bill of particulars within which to prepare the bill of par-

ticulars, and that more than 40 days before the motion was granted defendants' attorney informed plaintiff's attorney that, if the bill was not furnished, he would object to the introduction of evidence of the account. That the procedure as adopted by defendants was justified under the circumstances is beyond question. Motions of this kind are addressed to the sound discretion of the trial court. The record fails to disclose that the trial court in granting this motion exercised other than a sound discretion. McCarthy v. Mt. Tecarte L. & W. Co., 110 Cal. 687, 693, 43 P. 391. Plaintiff had ample time within which to prepare the bill, was informed by defendants more than a month prior to the filing of the motion that defendants would stand upon the terms of the section of the Code precluding evidence if the bill was not served, and at the time of the granting of the motion the trial upon the merits was set only 11 days away.

[3] The remaining question presented here involves the refusal of the trial court to vacate the order made precluding the introduction of evidence. Plaintiff duly made a motion under the provisions of section 473 of the Code of Civil Procedure to be relieved from the order precluding evidence. This motion was denied by the court. On this motion the plaintiff again assumed the antagonistic position that the defendants were informed of the items, and that the account was old and long, and there was no time within which to prepare it, and further stated that he believed that he could file the bill demanded at any time before trial if defendants' rights were not jeopardized. It would also seem that at this hearing plaintiff contended, as he does here, that defendants were not entitled to a bill of particulars. Plaintiff cites in support of this contention the case of Auzerais v. Naglee, 74 Cal. 60, 15 P. 371. The facts involved there are foreign to those presented here. There the cause of action was based upon a contract, an "account stated." No question of items of account was involved. Plaintiff in his brief cites a large number of cases from other jurisdictions. Inasmuch as the law is established in this jurisdiction upon the subject, an extended statement of what the law may be in other jurisdictions would seem unnecessary. The principles of law by which courts are guided in considering motions to set aside defaults are established by many decisions of our courts. The motion is addressed to the sound and legal discretion of the trial court, and, in the absence of a clear showing of abuse in the exercise thereof, an appellate court will not disturb the order of the court below. Waite v. Southern Pacific Co., 192 Cal. 467, 221 P. 204; Toon v. Pickwick Stages, Northern Division, 66 Cal. App. 450, 226 P. 628; Waybright v. Anderson, 200 Cal. 374, 253 P. 148.

[4-7] The record here does not disclose that the trial court has abused this discretion, nor that it has failed to exercise it in a sound and legal manner. The fact that this court might have reached, upon the same showing, an opposite conclusion, is not indicative of abuse of discretion upon the part of the trial court. Waybright v. Anderson, supra. It should be noted in this regard that the bill of particulars that was on file at the time this motion was heard was one that, by reason of its very general statement and lack of assignment of dates, would have failed to comply with the requirements of section 454 of the Code of Civil Procedure. It should also be pointed out that the question present here differs from that presented in many of the cases referred to by plaintiff in that in those cases the question of the excluding of evidence was presented for the first time at the trial of the action, while here defendants made timely objection long before the time of trial. The fact that plaintiff made a mistake as to the law in the matter of the bill of particulars of itself is no ground for relief under the circumstances here disclosed. Garroway v. Jennings, 189 Cal. 97, 99, 207 P. 554. That the assignor was occupied with other affairs, and so had no time to prepare the bill of particulars, does not constitute an excuse for his neglect in that regard. Andrews v. Jacoby, 39 Cal. App. 382, 383, 178 P. 969.

The judgment is affirmed, and the appeals from the two orders are dismissed.

We concur: CONREY, P. J.; YORK, J.

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122 Cal.App. 774

MOSEKIAN et al. v. GINSBERG.

Civ. 364.

District Court of Appeal, Fourth District, California.
April 21, 1932.

Rehearing Denied May 19, 1932. Hearing Denied by Supreme Court June 20, 1932.

1. New trial 🔑66.

Verdict or other decision against law may be vacated and new trial granted on that ground (Code Civ. Proc. § 657, subd. 6).

2. New trial 🔑66.

Phrase "against law" in statute respecting new trial relates to matters which may furnish reason for re-examination of issue of fact (Code Civ. Proc. § 657, subd. 6).

[Ed. Note.—For other definitions of "Against Law," see Words and Phrases.]

3. New trial 🔑70.

"Insufficiency of evidence," as ground for new trial, means absence of evidence or that evidence admitted is lacking in probative force (Code Civ. Proc. § 657, subd. 6).

[Ed. Note.—For other definitions of "Insufficient Evidence," see Words and Phrases.]

4. New trial 🔑70.

Question of insufficiency of evidence to justify verdict is addressed to sound legal discretion of trial court on motion for new trial (Code Civ. Proc. § 657, subd. 6).

5. Appeal and error 🔑870(6).

Order denying new trial is reviewable on appeal from judgment (Code Civ. Proc. § 956).

6. Appeal and error 🔑979(1).

Ruling on motion for new trial on ground of insufficiency of evidence to justify verdict will not be disturbed on appeal, absent manifest abuse of discretion (Code Civ. Proc. § 657, subd. 6).

7. New trial 🔑70.

In determining motion for new trial based on insufficiency of evidence to justify verdict regarding damages, trial court should first determine from evidence whether complaining party was entitled to recover anything (Code Civ. Proc. § 657, subd. 6).

8. New trial 🔑75(5).

In automobile intersection collision case, evidence warranted trial court's conclusion that defendant was not guilty of negligence proximately causing injury, so that motion for new trial because of inadequacy of damages awarded was properly denied.

9. Appeal and error 🔑110.

Order denying new trial is not appealable.

Appeal from Superior Court, Fresno County; K. Van Zante, Judge.

Action by Esther Mosekian and others, minors, by Aznive Mosekian, and others, against Philip Ginsberg. From the judgment and an order denying a new trial, plaintiffs appeal.

Affirmed.

K. Kuyumjian and Barbour & Kellas, all of Fresno, for appellants.

Christian Hoeppner and Wakefield & Hansen, all of Fresno, for respondent.

THOMPSON, Justice pro tem.

This is an action brought by the heirs of Mosek Mosekian, deceased, to recover damages for his death alleged to have been caused by the negligence of defendant and respondent. The jury returned a verdict in the words and figures as follows: "We, the Jury in the above-entitled action, find for the plaintiffs and against the defendants and assess plaintiffs' damages in the sum of $0 (nothing)." The plaintiffs appeal from the judgment entered thereon and from an order denying their motion for a new trial. The action arises out of a collision between two motor vehicles which occurred on September 23, 1929, at the intersection of Fruit and Jensen avenues, public highways in Fresno county, resulting in the death of said Mosek Mosekian.

The appellants base their appeal upon the following grounds: (1) "That the verdict is contrary to law"; and (2) "that there was an insufficiency of evidence to justify the verdict in regard to damages, and that there was a clear abuse of discretion on the part of the trial judge in denying plaintiffs' motion for a new trial by reason thereof."

The verdict of the jury is a most unusual one and no authorities have been cited, nor do we know of any, which have passed upon a verdict couched in the words and figures of the verdict returned in the case at bar. It is quite apparent, however, that the jury intended to return the verdict in the form in which it appears in the record of the case, however anomalous that may be, as, immediately after the verdict was read, the jury was polled, and each one answered that the verdict as rendered was his or her verdict. The uncontradicted testimony of plaintiffs' witnesses also shows that, if plaintiffs were entitled to recover at all, they were entitled to recover a substantial amount of damages.

[1, 2] In support of their first point, appellants contend that, after plaintiffs established damages by uncontradicted evidence, a verdict that found for the plaintiffs and then denied them any relief is "contrary to law," and therefore appellants are entitled to a new trial. No authorities are cited by appellants or respondent in connection with this contention. A verdict or other decision "against law" may be vacated and a new trial granted on that ground. Code Civ. Proc. § 657, subd. 6; 20 Cal. Jur., p. 122. Section 656 of the Code of Civil Procedure defines a new trial as follows: "A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury, court or referee." As stated in 20 Cal. Jur., p. 122: "It has been judicially observed that the meaning of the code phrase 'against law' is not altogether plain. When considered in connection with preceding code provisions, however, it clearly relates to matters which may furnish a reason for the re-examination of an issue of fact." In re Estate of Keating, 162 Cal. 406, 410, 122 P. 1079; Kaiser v. Dalto, 140 Cal. 167, 169, 73 P. 828.

[3] With regard to appellants' second point on appeal, section 657, subdivision 6, of the Code of Civil Procedure, also provides that "insufficiency of the evidence to justify the verdict or other decision" is a ground for a new trial. The term "insufficiency of the evidence" means either an absence of evidence or that the evidence admitted at the trial is lacking in probative force to establish the proposition of fact to which it is addressed. 20 Cal. Jur., p. 106; In re Estate of Bainbridge, 169 Cal. 166, 170, 146 P. 427. When the question of the insufficiency of the evidence to justify the verdict is presented on a motion for a new trial, it becomes the duty of the trial judge to inquire into the question of sufficiency and to grant a new trial if in his judgment the evidence is insufficient to justify the verdict, or to deny the motion for a new trial if in his opinion the evidence is sufficient to sustain the verdict. 20 Cal. Jur. pp. 106, 107.

[4] Both of appellants' reasons for seeking a new trial on appeal, therefore, relate to matters which may or may not furnish a reason for the re-examination of issues of fact. There is a clear distinction between the duties and powers of a trial court in passing upon a motion for a new trial upon the grounds heretofore mentioned and those of an appellate court in reviewing the matter on appeal from the judgment. The appellate court is not concerned with questions of preponderance of the testimony or weight of the evidence; the only matter for its determination is whether or not there is evidence which, if given its fullest effect, is legally sufficient to support the decision. 20 Cal. Jur. p. 110; Guderitz v. Broadway Bros., 39 Cal. App. 48, 50, 177 P. 859. On the other hand, the trial court may weigh and consider the evidence on behalf of both parties and determine for itself the just conclusion to be drawn from it. The question of the insufficiency of the evidence to justify the verdict is addressed to the sound legal discretion of the trial court.

[5, 6] The question of appellants' right to a new trial was submitted and passed upon by the trial court on appellants' motion for a new trial, and the trial court's order denying said motion is properly reviewable on this appeal from the judgment Code Civ. Proc. § 956; Hughes v. De Mund, 195 Cal. 242, 247, 233 P. 94; Lambert v. Kamp, 101 Cal. App. 388, 390, 281 P. 690, although the 1915 amendments took away the right of appeal from an order denying a motion for a new trial. 2 Cal. Jur. pp. 173, 174, 175; Hughes v. De Mund, supra. The courts of last resort of this state have repeatedly held that insufficiency of the evidence to justify a verdict is a ground for a new trial which is peculiarly within the discretion of the trial court, and its order either granting or denying a new trial will not be disturbed on appeal, unless it appears that there was a manifest abuse of discretion. 2 Cal. Jur. p. 908; 20 Cal. Jur., p. 112; In re Estate of Wall, 183 Cal. 431, 432, 191 P. 687; Miraide v. Cochran, 109 Cal. App. 377, 380, 293 P. 165; Lambert v. Kamp, supra; Donnatin v. Union Hardware & Metal Co., 38 Cal. App. 8, 12, 175 P. 26, 27, 177 P. 845.

[7, 8] The real issue before this court, therefore, is not the direct question of whether or not the verdict is contrary to law, or whether or not there was an insufficiency of evidence to justify the verdict in regard to damages, but rather the question, Did the trial court abuse its discretion in denying plaintiffs' motion for a new trial? Lambert v. Kamp, supra.

With this question in mind, let us examine the record. There is very little conflict in the evidence. It shows that the decedent, accompanied by his father, John Mosekian, was driving a Dodge roadster in a southerly direction on Fruit avenue, and respondent was driving a Ford truck loaded with live stock in a westerly direction on Jensen avenue. The decedent died without making any statement. His father, who was riding with him, testified in substance that the machine which struck their machine was traveling in a westerly direction; that he does not know how fast the roadster was traveling, except that they had in the car some fruit and vegetables and were careful not to spoil them. He testified further: "I cannot give the rate of speed, and I didn't have the slightest idea of the rate of speed we were going, but about 20 miles an hour. That is my estimation." He testified on cross-examination that he did not see the truck that collided with them until after the collision; that he was looking straight ahead; that he did not know how the accident happened; that he did not know how fast the truck was traveling at the time it entered the intersection; and that he did not see the cars come together. A deputy sheriff testified that he saw "gouges and grease and marks of violence, and dug-in spots" west of the approximate center of the intersection. He also testified that the right rear fender of the roadster was crushed toward the back and in against the tire and there was a hole in the fender; and the force of the blow on the truck was from the side and the "frame member" was bent toward the center. He explained his theory of the collision from an examination of the vehicles and physical objects at the scene of the collision as follows: "I mean it more as if the truck had started to turn and the frame member, catching in the rear fender of the Dodge, had thrown the Dodge to the left, and caused it to turn over sideways, and the cramping of the truck with the momentum of the load shifting in it, bringing it over almost in an endwise position from the point of impact to where it lay." A girl, 9 years old, testified, but she seemed confused, and the only positive answer she gave was to the effect that "the truck hit the roadster."

The only other evidence adduced at the trial touching upon the question of responsibility for the collision came from defendant and respondent, who testified in substance that he was driving the truck involved in the collision; that he was driving toward the setting sun and had driven about 75 miles that day; that, when he first saw the roadster, he (respondent) was about 300 feet east of the intersection, and was traveling about 20 miles per hour; that the roadster was then "in front of Reis' slaughter house" (which another witness testified was 1056 feet north of the center of the intersection) and traveling about 25 to 30 miles per hour; that, as he approached and entered the intersection, he was traveling 15 miles per hour; that he did not see the roadster again until he reached the intersection, at which time the roadster was about 60 or 70 feet north of the center of the intersection, and the roadster was then traveling 35 to 40 miles per hour; he entered the intersection first, and continued to cross the intersection as he "thought he had plenty of time to get on through the intersection before the other car got there"; but he commenced to put on his brakes when he saw the roadster entering the intersection; and swerved his car to the south when he saw that the roadster "was practically on top of" him and he realized that a collision was unavoidable, at which time the roadster was traveling at a speed of 45 or 50 miles per hour; that the cars "sideswiped" and turned over. There was some conflict between the answers given by respondent in a statement taken by the sheriff a few hours after the collision and his testimony at the trial.

From an examination of the evidence, we cannot say that the trial court abused its discretion in denying plaintiffs' motion for a new trial. Appellants' right to recover any damages from respondent depended primarily on their ability to prove by a preponderance of the evidence that respondent was guilty of some negligent act or omission proximately causing or contributing to the injury complained of. The amount of resulting damage was a secondary matter, and, of course, did not need to be considered, unless such negligence was proved. Therefore, in determining a motion for a new trial based upon the insufficiency of the evidence to justify the verdict in regard to damages, the trial court should first determine from an examination of the evidence whether or not the complaining party was entitled to recover anything at all. Lambert v. Kamp, supra. If, in the opinion of the trial court in the case at bar, the evidence considered as a whole was of the character to clearly establish the fact that defendant (respondent) was not guilty of negligence and therefore not liable for any damage, then it constituted no abuse of discretion to deny the motion and thereby deny appellants a second attempt to recover something to which the trial court believed them not entitled. As was said in Donnatin v. Union Hardware & Metal Co., supra: "Every intendment must be indulged in support of the ruling made by the trial court. If in its opinion the evidence, considered as a whole, was of a character to clearly establish the fact that defendant was not guilty of negligence, and hence not liable for any damage * * * then it constituted no abuse of discretion for the court to deny plaintiff's motion for a new trial, made upon the ground of inadequacy of the amount awarded." In our opinion the evidence is such that the trial court was warranted in arriving at the conclusion that defendant was not guilty of negligence which proximately caused or contributed to the injury, and that the motion for a new trial was properly denied.

[9] The order of the trial court denying appellants' motion for a new trial not being an appealable order, the appeal therefrom is dismissed.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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122 Cal.App. 654

COBB et al. v. LANE et al.

Civ. 756.

District Court of Appeal, Fourth District,
California.
April 18, 1932.

1. Fraud 🔑20.

Fraudulent representations afford no basis for action or defense, unless party believed and was misled by them.

2. Appeal and error 🔑931(1).

Appellate court must view all inferences which trial court might reasonably have drawn as evidence tending to support finding assailed.

3. Appeal and error 🔑1010(1).

Trial court's determination of evidence is conclusive, unless appellate court can say that, as matter of law, evidence is insufficient to support findings.

4. Mortgages 🔑86(3).

Evidence *held* to support finding that mortgagor was not deceived or misled by alleged misrepresentations of mortgagee into buying realty involved.

Appeal from Superior Court, Fresno County; H. C. Lucas, Judge.

Action by C. H. Cobb and others against George S. Lane and another, who filed cross-complaint. From judgment for plaintiffs, defendants appeal.

Affirmed.

Gallaher & Jertberg, of Fresno, for appellants.

G. L. Aynesworth, of Fresno, for respondents.

THOMSON, Justice pro tem.

This is an appeal from a judgment in favor of plaintiffs in an action to foreclose a mortgage on real property. Defendants set up fraud as a defense, and filed a cross-complaint for damages by reason of said fraud.

A short time prior to 1916, plaintiff C. H. Cobb and some other persons organized a corporation named the Peerless Orchards Company, which corporation procured title to a certain tract of land in Fresno county. The corporation was organized for the purpose of selling those lands in small parcels to the public generally. Said C. H. Cobb was president of the corporation and acted as its general agent and manager. Upon the organization of the corporation a prospectus was issued, and certain newspaper advertisements were published by the corporation for the purpose of selling such lands, and it is upon the statements contained in this prospectus and other advertising matter that appellants seek to predicate their defense of fraud and their claim for damages set up in their cross-complaint. On February 15, 1916, J. R. Woods purchased from the corporation the 15 acres of land in controversy. The trial court found that he did not have any knowledge of said pamphlets or advertising material, and purchased said premises upon his own judgment and without any reliance upon any statement or representation of any person. The contract of sale provided for the payment of a total purchase price of $6,000, of which $600 was to be paid in cash, and the balance to be paid in installments for 48 months, and, upon the prompt completion of such installment payments, a deed would be made to the vendee conveying the premises to him and concurrently therewith the vendee would execute and deliver to the vendor his promissory note for the balance of the purchase price, payable in like manner as the original installments and secured by a first mortgage on said premises. On September 20, 1918, appellant George S. Lane purchased the property from Woods, who executed to said appellant an assignment of his contract. This sale from Woods to Lane was negotiated by Guy Stockton, who was the agent of the corporation for the sale of its lands, but who, for the purpose of this transaction, was employed and paid a commission by Woods. Stockton furnished appellants with copies of the advertising matter involved in the case, but the evidence shows that this was done without the knowledge or consent of any officer of said corporation. On February 15, 1921, pursuant to the provisions of the contract with Woods, the respondents, who had acquired the legal title to the premises, conveyed the premises to appellants, and appellants executed the mortgage sought to be foreclosed in this action. The lands failed to develop into profitable fig orchards; the proceeds from the crops being generally less than the cost of cultivation of the crops. After a number of extensions of time and changes in the terms and conditions of payments requested by appellants and granted by respondents, appellants being behind in the payment of certain installments of the note, respondents, on February 3, 1928, instituted this action to foreclose the mortgage, and appellants answered the complaint setting up fraud as a defense and interposed a cross-complaint alleging fraud perpetrated by the vendor upon appellants as inducements to appellants to purchase the lands.

Numerous findings of the trial court are attacked by appellants, among them being the following finding: "That plaintiffs did not personally or through their agents neither did the Peerless Orchard Company or its agent, seek cause, procure or induce defendants or either of them to purchase the J. R. Woods contract; that plaintiffs did not supply the defendants with any literature or make any representations to said defendants concerning the Woods contract or lands; that defendants did not read or rely upon any statements or representations written or oral, furnished, made or supplied to them by the plaintiffs or the Peerless Orchard Company; that said defendants were not deceived or misled by any statements or representations made by or on behalf of plaintiffs or the Peerless Orchard Company." Appellants contend that, by inference from this finding, "the court evidently found that the printed and published matters, caused to be printed and published by the Peerless Orchards Company, were false and fraudulent and intended to deceive persons who became interested in the purchase of the Peerless Orchard lands"; and that the representations by means of the pamphlet and newspaper advertisements were intended as an appeal to the public generally for the purpose of inducing members of the general public to invest in these lands; and that, if appellants obtained such printed material, it matters not that it was furnished by some one other than respondents or their agents. Appellants cite in support of their contention section 1711 of the Civil Code of California, which reads as follows: "One who practices a deceit with intent to defraud the public, or a particula class of persons, is deemed to have intended to defraud every individual in that class, who is actually misled by the deceit."

[1] We deem it unnecessary to determine this question in this case for the reason that it is a well-established principle of law that, regardless of any finding based upon those considerations, in order to entitle a party to prevail in an action or defense based on fraud or deceit, it must be established that said party actually was misled or deceived by, and relied upon, the representation or representations complained of. In the case at bar, appellants are confronted with the following finding made by the trial court: "That said defendants were not deceived or misled by any statements or representations made by or on behalf of plaintiffs or the Peerless Orchard Company." If this finding is supported by the evidence, it is sufficient to sustain the judgment, and is conclusive in favor of the judgment as rendered, regardless of the disposition of the other issues in the case, for this finding covers an essential element of appellants' claim for relief. "The party complaining must be deceived by the untrue statement, otherwise there can be no reliance." 12 Cal. Jur. p. 751. To entitle a person to relief or redress because of a false representation it is well settled that it is not enough to show merely that it was material, that it was known to be false, and that it was made with intent to deceive, but it must also be shown that it actually did mislead and deceive, or, in other words, that it was relied upon by the party complaining. De Garmo v. Petitfils Confiserie, 93 Cal. App. 261, 265, 269 P. 692; Maxon-Nowlin Co. v. Norswing, 166 Cal. 509, 511, 137 P. 240; Hallidie v. First Federal Trust Co., 177 Cal. 600, 603, 171 P. 431; Rouse v. Morgan, 108 Cal. App. 315, 320, 291 P. 441.

[2-4] With this principle of law in mind, it becomes highly important to determine whether or not the finding last above mentioned is supported by the evidence. The evidence shows that all of the dealings connected with the subject of the controversy on behalf of appellants were handled by appellant George S. Lane. The other appellant is his wife, who is a party to the note and mortgage involved in the case. Appellants urge that the uncontradicted evidence shows that appellant George S. Lane read all of the advertisements involved in the case, believed them and relied upon them, and that he was induced thereby to purchase the lands in controversy. Said appellant himself testified that he "received the pamphlets put out by the Peerless Orchards Company," and some newspaper advertisements relating to the Peerless Orchards Company land; that he read them, and relied on the statements contained therein. But the trial court was not bound to accept his word as conclusive in the matter, in the face of the facts and circumstances indicating a contrary conclusion. The evidence shows that said appellant was an experienced business man, being engaged in the retail lumber and coal business at Webster City, Iowa. He purchased the land in controversy from J. R. Woods at the instance of F. O. Gardiner, who owned a business college in Fresno and who had, according to his own testimony, considerable experience in practical fig culture. Said appellant had known Gardiner about twelve years prior to said purchase, and Gardiner was interested with him in a sawmill project in California, which they were then promoting. Gardiner had previously purchased for himself forty acres in the Peerless Orchards Company tract, and he had purchased some of the land in said tract for his sister and some for his brother, both of whom were neighbors of appellants in Iowa. Appellant George S. Lane, referring to his relations with said Gardiner, after relating some of the above facts, testified: "So I was naturally interested in what he was interested in too." Said appellant testified that Gardiner and he talked over the Peerless Orchards Company fig proposition; that Gardiner and he drove out and looked over the Peerless Orchards Company lands; and that Gardiner drove him out to the Markarian fig orchard, a large fig orchard about fourteen miles from the Peerless Orchards, where they saw men picking, processing, and packing figs; and Gardiner also took him to the Potter fig orchard in Fresno county; and he concluded that he would invest in the fig project if he had an opportunity. Said appellant then returned to his home in Iowa, where he learned from Gardiner that the Woods tract of land in the Peerless Orchards was for sale. Said appellant testified in this regard as follows: "And Mr. Gardiner wired me and I don't remember whether I wrote him a letter or wired him back, but at least he took it in for me (referring to the Woods tract of land), and took care of the payments until January. * * *" Said appellant further testified that Gardiner told him that the land involved in the case was blasted for every tree. From these facts and circumstances the trial court might reasonably have concluded that appellants did not rely upon the representations contained in the advertising matter of the Peerless Orchards Company, but made an investigation of their own and relied upon that and the judgment of Gardiner, who possessed information independent of the literature complained of. Although appellant George S. Lane testified that he relied on the statements contained in the Peerless Orchards Company literature relating to the land in controversy, still the facts and circumstances last above recited create at least a substantial conflict in the evidence; and findings made on such conflicting evidence are con-

clusive on appeal, and an appellate court must view all inferences which the trial court might reasonably have drawn as evidence tending to support a finding assailed. Hallidie v. First Federal Trust Co., supra; Bradbury Estate Co. v. Carroll, 98 Cal. App. 145, 151, 276 P. 394. The determination of the evidence by the trial court is conclusive on appeal unless it shall appear, as a matter of law, that it is insufficient to support the findings. In re Herman, 183 Cal. 153, 162, 191 P. 934; Bradbury Estate Co. v. Carroll, supra. In the case at bar the evidence, although conflicting, supports the finding of the trial court, and the trial court was warranted in concluding that appellants were not deceived or misled by any statements or representations made by or on behalf of respondents or the Peerless Orchards Company. Even if the trial court had found that the pamphlets and other advertisements of the Peerless Orchards Company contained fraudulent statements and representations, and had found that the same were furnished to appellants by respondents or the Peerless Orchards Company, the further finding that appellants did not rely upon such statements or representations, or were not deceived or misled thereby, would still have required the judgment given herein. Maxon-Nowlin Co. v. Norswing, supra.

In view of our determination that the finding of the trial court to the effect that appellants were not deceived or misled by the representations complained of is supported by the evidence, and therefore sustains the judgment, it becomes unnecessary to determine the other points urged by appellants.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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122 Cal.App. 704

MADSON v. COHN.

Civ. 745.

District Court of Appeal, Fourth District, California.

April 19, 1932.

1. Adverse possession 🔑24.

Proof of occasional occupancy is not sufficient to establish title by adverse possession (Code Civ. Proc. §§ 322, 323).

2. Adverse possession 🔑17.

Paying taxes, planting rose bushes, watering trees, cleaning foxtail off, and visiting unfenced vacant lots, *held* not to constitute continued occupation and possession required to establish title by adverse possession (Code Civ. Proc. §§ 322, 323).

While it appeared that claimant to title by adverse possession paid sidewalk assessment and taxes, the only evidence as to possession or occupancy was that he visited the property from four to six times a year, at which time he "looked around; figured on a few things to do with it," and during two years his father at his request planted two rose bushes between the sidewalk and the curb, and four trees just inside the sidewalk, and that during one year the foxtail was cleaned off the lots, which were never rented or leased for any purpose.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by C. C. Madson against Irving Cohn, surviving executor of the last will and testament of Charles Cohn, deceased. Judgment for plaintiff, and defendant appeals.

Reversed.

Borton & Petrini, of Bakersfield, for appellant.

Chas. N. Sears, of Bakersfield, for respondent.

BARNARD, P. J.

This is an action to quiet title to two lots in the residential district of Bakersfield, based upon a claim of adverse possession. The title to the property was not traced, so far as the record shows, except that it was acquired through a tax deed by Charles Cohn, now deceased, on July 24, 1918. On January 21, 1920, this plaintiff obtained a deed covering this property from the estate of S. M. Morrison. Subsequently the plaintiff paid off the balance of an assessment for putting in a sidewalk in front of the property, the first instalment of which had been paid by Cohn. This action was brought on April 4, 1927, the amended complaint alleging that the plaintiff is and has been the owner and in the possession of the property, and "that said plaintiff for a period of over five years prior to filing of his complaint herein and had been in possession of said property herein continuously and paid all taxes, State, County and municipal, levied and assessed against said property and during all of said time had been, and ever since has been, and now is in adverse possession of said property, continuously since the day of ——, and paid all taxes levied against said property, State, County and municipal, and all assessments made and levied against said property, and improved said property." Judgment was entered in favor of the plaintiff, the court finding that ever since January 22, 1920, the plaintiff "has been in possession, and now is in actual possession of said described land and premises."

The only question raised by this appeal is as to whether or not adverse possession was established by the respondent, which, in turn, depends upon whether the finding just referred to is sustained by the evidence. While it appears that the respondent paid the remaining installments of the sidewalk assessment and paid all taxes after January 21, 1920, the only evidence as to possession or occupancy is as follows: The respondent visited the property from four to six times a year, at which times he "looked around; figured on a few things to do with it." During 1925 or 1926 the father of respondent, at his request, planted two rose bushes between the sidewalk and the curb and four trees just inside the sidewalk. These trees were watered during two summers, and were then broken down and killed by some boys who used the lot for a ball ground. The only other evidence of work or cultivation done on the place was that during one year the foxtail was cleaned off the lots. The lots were not fenced, there were no buildings upon them, and they were never rented or leased for any purpose.

The necessary requirements for establishing a claim of adverse possession, under a color of title, are set forth in section 322 of the Code of Civil Procedure, and include "a continued occupation and possession of the property." Such possession and occupation is further defined in section 323 of this Code. The general rules applying, where it is sought to establish adverse possession, are thus laid down in Unger v. Mooney, 63 Cal. 586, 49 Am. Rep. 100: "The adverse character of the possession must in every case be manifested to the owner. The owner must be notified, in some way, that the possession is hostile to his claim, or the statute does not operate on his right. (See remarks, in opinion, in Thompson v. Pioche, 44 Cal. 517, 518; Trustees, etc., Town of Fort [East] Hampton v. Kirk, 84 N. Y. 220 [38 Am. Rep. 505]; Culver v. Rhodes, 87 N. Y. 354; Abell v. Harris, 11 Gill & J. [Md.] 371, per Dorsey, J.) As was said in the case cited from 84 N. Y., per Andrews, J., 'the object of the statute defining the acts essential to constitute an adverse possession is, that the real owner may, by unequivocal acts of the disseizor, have notice of the hostile claim and be thereby called upon to assert his legal title.' Hence, an open and notorious occupation with hostile intent is a necessary constituent of an adverse possession. Neither a hostile intent without such occupation, nor such occupation without hostile intent, is sufficient."

In Stanley v. Westover, 93 Cal. App. 97, 269 P. 468, 473, the court said: "One of the elements necessary to constitute adverse possession is that the adverse claimant must have been in the actual possession of the real property for a continuous period of five years."

In Eddy v. Demichelis, 100 Cal. App. 517, 280 P. 389, 390, it is said: "The presumption of ownership is with the paper title. Clear evidence is necessary to overcome this presumption. The adverse claim of right must not only exist in the mind of the claimant, but must be proven to have been communicated in some way to the owner so that his failure to object may be taken against him as an acknowledgment of or acquiescence in the right claimed"—citing cases.

[1, 2] Proof of occasional occupancy is not sufficient to establish a title by adverse possession. Maginnis v. Hurlbutt, 49 Cal. App. 460, 193 P. 606. In Huling v. Seccombe, 88 Cal. App. 238, 263 P. 362, it was held that the occasional cutting of wild grass or weeds was not sufficient proof of occupancy or possession upon which to base a claim of adverse possession. In Weyse v. Biedebach, 86 Cal. App. 736, 261 P. 1092, 1095, evidence to the effect that the appellant had posted upon the property a notice bearing his name and address with the word "owner" thereon, that he had paid all taxes, and that he had removed from the premises a tank with the oil contained therein, was held not sufficient to show the required occupancy or possession. In that case the court said: "But to sustain a title by adverse possession it is incumbent upon the claimant to show actual, continued occupation and possession for a period of five years, in addition to the payment of state, county, and municipal taxes levied and assessed upon the property. Code Civ. Proc. §§ 322, 323, 325."

Applying these rules to the case before us, we are forced to the conclusion that the evidence in this case does not show such a continued occupation and possession as is required by the statute, and that the finding in that regard is not supported by the evidence.

The judgment is reversed.

We concur: MARKS, J.; JENNINGS, J.

BODHOLDT v. GARRETT et al.
COLEMAN v. SAME.

Civ. 8135.

District Court of Appeal, First District, Division 1, California.

April 14, 1932.

Rehearing Denied May 14, 1932. Hearing Denied by Supreme Court June 13, 1932.

1. Evidence 🔑241(1).

Statements of employee not part of res gestæ, and not made as result of excitement from accident claimed to have been caused by employee's negligence, are not binding upon employer.

> While it is true that time is not the controlling element in the matter of res gestæ, still the statements must be, not only contemporaneous, but voluntary and the result of excitement, and made before a person has time to calculate and consider the form and substance of the explanation.

2. Evidence 🔑245.

In action against city for injuries from collision with city truck, truck driver's statement that broken truck spring caused collision *held* not binding upon city since not spontaneously made as result of excitement from accident.

3. Trial 🔑105(6).

Court may upon its own motion exclude incompetent evidence.

4. Automobiles 🔑242(2).

In action for personal injuries from collision of city truck caused by defective spring, res ipsa loquitur doctrine would apply if authorities should have known of danger (St. 1923, p. 675).

5. Municipal corporations 🔑847.

Defective condition of public property continuing for such period that proper authorities should have known of its danger to public is "constructive notice" to city (St. 1923, p. 675).

[Ed. Note.—For other definitions of "Constructive Notice," see Words and Phrases.]

6. Automobiles 🔑242(2).

One could not recover under res ipsa loquitur doctrine from city for injuries resulting from city truck collision, where there was no evidence showing city authorities should have known of defective truck spring causing collision (St. 1923, p. 675).

> To rule that the doctrine of res ipsa loquitur applies in any case brought under the provisions of St. 1923, p. 675, providing that counties and municipalities, etc., shall be liable for injuries to persons resulting from defective condition of public property, where officers having authority to remedy such defect had knowledge or notice thereof, etc., would result in nullifying the Legislature's intent that there shall be at least constructive notice of the defect or danger to those authorized to remedy the defect.

7. Appeal and error 🔑1056(1).

In action against city for injuries from collision of city truck caused by defective spring, excluding evidence that truck was zigzagging just before collision *held* harmless, where city authorities authorized to remedy defective spring had no knowledge thereof (St. 1923, p. 675).

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Actions by Peter Bodholdt and by Clifford M. Coleman against Lawrin Garrett, City of Oakland, and others. From the judgments in favor of the City of Oakland, plaintiffs appeal.

Affirmed.

L. L. Steele, of Oakland, and Jas. F. Brennan, of San Francisco, for appellant.

C. Stanley Wood, City Atty., Homer W. Buckley, Asst. City Atty., and John W. Collier, Deputy City Atty., all of Oakland, for respondent.

WARD, Justice pro tem.

These consolidated cases are actions for damages for certain personal injuries, brought under section 2, chapter 328 of the Statutes of 1923, page 675, which provides, in substance, that counties, municipalities, etc., shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public property where the officers having authority to remedy such condition had knowledge or notice of the defective or dangerous condition and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to take such action as might be necessary to remedy the condition or protect the public against such danger.

[1-3] One of the plaintiff's witnesses, immediately after the accident, inquired of an injured plaintiff as to his condition and thereafter walked across the street to interview the defendant Garrett. By question and answer the witness elicited the information from Garrett, the truck driver in the employ of the city, that the collision was due to a broken spring on the front portion of the truck. Appellants complain that the trial court erred in instructing the jury that this statement or admission of the driver was in no way binding upon the defendant city of Oakland. Statements of an employee not part of the res gestæ and not made spontaneously or as the result of excitement of

the accident are not binding upon the employer. Shaver v. United Parcel Service, 90 Cal. App. 764, 770, 266 P. 606. While it is true that time is not the controlling element in the matter of res gestæ, still the statements must be, not only contemporaneous, but voluntary and the result of excitement, and made before a person has time to calculate and consider the form and substance of the explanation. There is no evidence in this case to indicate that the particular statement was caused by excitement, and hence the ruling of the trial court cannot be disturbed. Lloyd v. Boulevard Express, 79 Cal. App. 406, 411, 412, 249 P. 837. Appellant further contends that no objection was made by respondent to this evidence, and that the court erred in striking the statement from the record. The court on its own motion, in the interest of justice, may exclude incompetent and inadmissible evidence. Kimic v. San Jose-Los Gatos, etc., Ry. Co., 156 Cal. 379, 390, 104 P. 986; Parker v. Smith, 4 Cal. 105, 106.

[4-6] Under the 1923 statutes, notice to or knowledge by the proper authorities of the defect or danger is required. If the authorities should have known of the danger, the doctrine of res ipsa loquitur applies. Damgaard v. Oakland High School District, etc. (Cal. Sup.) 298 P. 983. But, in a case where there is an absence of evidence from which an inference could be drawn that the persons authorized to remedy the defect should have known of such condition, the doctrine of res ipsa loquitur does not apply. In Damgaard v. Oakland High School District, etc., supra, a teacher undertaking to instruct pupils in experimentation of explosive gases should have known of the attending danger and should have taken the necessary precautions to avert an explosion. Actual notice is not necessary under such facts as appeared in the Damgaard Case. A defective condition continuing for such a period that the proper authorities should have had some knowledge of its danger to the public is constructive notice, but in this case there is no evidence that those authorized to remedy defects in the mechanical operation of this truck knew or could have known of the defective spring. There is no evidence that the truck was not in good condition at the time it left the immediate control of those authorized to repair. Under the statute, those authorized to remedy a defect when notified could not be held liable for the driver's failure to notify them. To rule that the doctrine of res ipsa loquitur applies in any case brought under the provisions of Statutes of 1923, page 675, would result in nullifying the intent of the Legislature, namely, that there shall be at least constructive notice of a defect or danger to those authorized to remedy such condition.

[7] Complaint is made that the court erred in refusing to permit evidence that the zigzagging of the truck over the roadbed for a period prior to the accident was the result of a defective mechanical condition. If admitted, this evidence would not supply the essential of knowledge by those authorized to remedy the condition.

The evidence referred to herein, having been correctly deleted, left plaintiff without proof of the essentials under the statute. A motion for a nonsuit, stating precisely the grounds of the motion, was granted, and it is from these orders that each plaintiff appealed.

Judgments affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

122 Cal.App. 649

CONRAD et ux. v. HAWK et al.

Civ. 622.

District Court of Appeal, Fourth District, California.

April 18, 1932.

1. Mines and minerals ⚷78(7).

Evidence *held* to support court's findings that lessee's breach of drilling obligations was not remedied within time specified by oil lease after notice of default.

2. Appeal and error ⚷1011(1).

Appellate court must accept trial court's finding, supported by competent and material evidence, and cannot reverse judgment because of conflicting evidence.

3. Mines and minerals ⚷78(3).

Service of notices of default and termination of oil lease on one of three trustees to whom lessee assigned all its assets for benefit of creditors *held* sufficient (Civ. Code, §§ 860, 2268).

> The declaration of trust placed title to entire trust estate in three trustees, required their joint action in trust affairs, and provided for appointment of new trustee to take place of one resigning or becoming disqualified.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by James J. Conrad and wife against J. D. Hawk, Fred P. Spraul, and others. Judgment for plaintiffs, and defendants Spraul and others appeal.

Affirmed.

Raphael Dechter, of Los Angeles, for appellants.

James L. Hansen, of Long Beach, for respondents.

MARKS, J.

This is an action to quiet title to real estate in Orange county, fee title to which is vested in respondents. Appellants are here on appeal from a judgment in favor of respondents.

Appellants asserted an interest in the property and the right to the possession thereof by virtue of an oil lease executed by respondents as lessors to J. D. Hawk, as lessee, assigned by him to the Bruce Oil Company and by it to appellants as trustees for the Bruce Oil Company and its creditors. The oil lease contained the usual provisions requiring drilling operations be started within a specified time and be prosecuted continuously and diligently until the well reached a specified depth, unless oil were found in paying quantities at a lesser depth. It also provided that, in case of a default in any conditions of the lease, except as to time in which drilling operations should be started, the lessors should give the lessee notice of such default, and, unless it were remedied within thirty days, they might proceed to a forfeiture of the lease at their option.

The Bruce Oil Company drilled a well to a depth of over 4,330 feet on the property, when it encountered mechanical difficulties in its drilling operations and exhausted its funds. It expended about $100,000 on the well and owed about the same amount to its creditors. It executed an assignment of all its assets for the benefit of its creditors to appellants as trustees to act for all the creditors as well as the company. The assignment and declaration of the trust bears the date of October 13, 1927, but it was probably executed and delivered several months later in 1928. No work was done on the leased property by the creditors' committee until on or shortly after April 1, 1929. This work was suspended either shortly after the service by respondents of a notice terminating the lease and the trustees' interest therein or upon the institution of this action.

On March 27, 1929, respondents caused a notice of default in performance under the lease and requiring the correction thereof within thirty days to be served. A notice of termination of the lease and the forfeiture of the rights of the lessee and the assignees because of a failure to remedy the default specified in the prior notice was served April 30, 1929. This action to quiet title was instituted May 29, 1929.

Appellants rely upon two grounds for a reversal of the judgment: First, that the evidence does not support the findings and judgment; and, second, that there was no proper service of either of the two notices to which we have just referred.

[1, 2] Respondents' first notice of default was based upon the failure of the lessee and the assignees to prosecute drilling operations diligently and continuously as required in the lease, and their final notice of default was based upon the failure to remedy this breach of the lease within thirty days from the service of the first notice. The trial court found that the drilling obligations of the lease had been breached by appellants, and that the breach had not been remedied within thirty days from the service of the first notice. This finding is attacked by appellants.

A careful study of the record before us has led to the conclusion that, had the trial court found that the breach of the contract had been remedied by appellants starting and continuing drilling operations on the property within thirty days after the service of the first notice, such a finding would have been supported by ample and sufficient evidence, and perhaps by a preponderance of all the evidence. However, the trial court did not so find, and there is evidence in the record supporting the finding made. Respondents produced one witness who testified that he visited the well on the leased property every day between March 26 and April 29, 1929, and saw none of the drilling operations described by the witnesses offered by appellants; that he went to the well for respondents to ascertain what, if any, work was being done there; that he saw workmen at the well, but that their only labors consisted of burning weeds, working on their own private automobiles, or sitting down resting; that his visits to the well were at almost every hour of the working day. Another witness for respondents testified that he visited the well at least every other day during the same period for the purpose of observing the work being done there. He corroborated the testimony of the other witness in every particular. This furnished sufficient evidence to support the questioned finding of the trial court. That we must accept as true a finding supported by competent and material evidence and cannot reverse a judgment because of a conflict in the evidence is too elementary to need the citation of authorities.

[3] Appellants' contention that there was a defect in the service of the two notices presents a more interesting question. Each notice was in the form of a letter addressed to appellants and others. We are not concerned with the service of the defendants other than the three trustees, as they have not appealed from the judgment against them. Each of the notices were inclosed in envelopes, sent by registered mail with return receipt demanded, addressed to appellant, Fred P. Spraul, at his Los Angeles business

address. Appellants maintain that the two notices should have been sent to each one of them, and that their delivery to Spraul alone was not sufficient to bind the other trustees or the trust estate.

In considering this question, it is necessary for us to determine the nature and extent of the estate of the trustees in the trust property. If it was joint, then the service of the notice on one trustee was a sufficient service to bind all of them. Ellis v. Columbine Creamery Co., 83 Cal. App. 48, 256 P. 489, 490.

The declaration of trust places the title to all of the trust estate in the three trustees. It requires their joint action in trust affairs, and provides for the appointment of a new trustee to take the place of one resigning or becoming disqualified. There is nothing in the instrument that would even suggest an intention to vest a several estate in the trustees or any of them.

Section 2268 of the Civil Code provides as follows: "Where there are several co-trustees, all must unite in any act to bind the trust property, unless the declaration of trust otherwise provides." Section 860 of the same Code provides as follows: "Where a power is vested in several persons, all must unite in its execution; but, in case any one or more of them is dead, the power may be executed by the survivor or survivors, unless otherwise prescribed by the terms of the power." These two sections contain a statutory enactment of the rule existing in many of the older states of the Union that cotrustees take a joint interest in the property of the trust estate that partakes of the nature of a joint tenancy and possesses none of the attributes of a tenancy in common. 26 R. C. L. 1333, § 196 et seq., and cases cited. In the case of La Forge v. Binns, 125 Ill. App. 527, it was said: "Appellants were appointed trustees jointly. By the common law and by an express provision of the statute, the estate of trustee is held in joint tenancy." See, also, Wilbur v. Almy, 12 How. 180, 13 L. Ed. 944; McGeorge v. Bigstone Gap Imp. Co. (C. C.) 88 F. 599; Fritz v. City Trust Co., 72 App. Div. 532, 76 N. Y. S. 625, affirmed 173 N. Y. 622, 66 N. E. 1109.

We have concluded that the service of the two notices on appellants was sufficient under the authorities cited and under Ellis v. Columbine Creamery Co., supra, where it was said: "But, assuming that the ownership by the plaintiffs was joint, the respondents question the sufficiency of the notice. In the case of Hepburn v. McDowell, 17 Serg. & R. (Pa.) 383, 17 Am. Dec. 677, it is held that notice to two or more persons engaged in a joint act is notice to all; and in Holbrook v. Holbrook, 15 Me. 9, the principle is announced that a notice given to one of two parties jointly liable is binding upon both. To the same effect, see the following authorities: Knight v. Fifield, 7 Cush. (61 Mass.) 263; Watson v. Walker, 23 N. H. 471. In the case of Morse v. Aldrich, 1 Metc. (42 Mass.) 544, the syllabus contains the following statement: 'Where the owner of land, by a covenant which binds his heirs and assigns, engages to do a certain act when thereto requested, a written request to do such act, addressed to all the heirs or assigns, and seasonably delivered at the dwelling house of one of them, is sufficient. * * *' In the case of Ellis v. Lull, 45 N. H. 419, it is held (syllabus): 'Where two or more persons are subject to a joint duty or obligation upon notice, and where other special notice is not made necessary by statute or by contract, a notice addressed to all and served on one is notice to all. * * *' As affecting the question of the sufficiency of the notice with reference to a renewal of the lease, or the execution of a new lease, given by the tenant to one of such joint owners only, the principle is laid down in 7 Ruling Case Law, p. 874, that such a notice is binding upon each and all of the joint owners. In discussing the difference in this regard between cotenants and joint tenants, it is said: '* * * Nor is the relation of cotenancy of such a nature that notices served on one cotenant, as, for example, of defects of title in the common property purchased, bind the remaining cotenants; but where a grant is made to several persons jointly, a notice addressed to all of them, and served on one of them, is sufficient. In such case it is held that notice to one is notice to all. * * *'"

Each of the appellants had actual knowledge of the contents of the two notices and acted upon them. According to the testimony of two of them, to prevent a forfeiture of the lease under its terms and those of the first notice, they started what they maintained were drilling operations on the leased property shortly after the receipt of this notice. They suspended these operations after the second notice was served.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

LUCAS v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

Civ. 8382.

District Court of Appeal, First District, Division 2, California.

April 19, 1932.

Rehearing Denied May 14, 1932. Hearing Denied by Supreme Court June 16, 1932.

Master and servant ⚷405(4).

Where employee established prima facie nonmedical case that inguinal hernia was caused by truck handle striking employee's groin, finding that hernia was not thus caused, nor existing hernia thereby aggravated, *held* not supported by evidence.

While there was some evidence that initial cause of rupture was not external blow or puncture by truck handle or otherwise, there was no evidence that by strain in pulling truck rupture was not caused by excessive pressure from within, and there was no evidence that an existing hernia was not, and could not have been, aggravated by either being hit by handle of truck or by excessive pressure from within caused by strain in pulling truck.

Proceeding under the Workmen's Compensation Act by Frank Lucas, employee, opposed by Rosenberg Bros., employers, and the Associated Indemnity Corporation, insurer. To review an award of the Industrial Accident Commission refusing compensation, employee brings certiorari.

Award annulled.

H. L. Richardson, of Oakland, for petitioner.

A. I. Townsend, of San Francisco, for respondents.

STURTEVANT, J.

This is an application for a writ of review in which the petitioner asks that an award heretofore made by the Industrial Accident Commission be annulled. The facts are brief. The petitioner was the only witness examined orally. There was only one additional piece of evidence and that was the medical report.

In his application filed with the defendant board the petitioner alleged that on November 24, 1931, he was employed as a laborer at Oakland by Rosenberg Bros., and that while so employed he was injured by being hit in the groin and ruptured on the right side. At the hearing had before the defendant board, the witness testified that at the time of the accident he was pulling on the handles of a freight truck and there was another man pushing; that he backed into a post and he was struck by the handle of the truck; that the handle hit him in the right groin; that it did not hurt much at the time, but it started hurting after—about ten minutes after; that about half an hour after the accident the petitioner took down his clothes and examined the spot; that at that time he found a lump—a little lump which he touched with his hand; that it was "sore like anything at that time"; and that before that time he had not had that lump. The medical report was as follows:

"Gentlemen: Mr. Frank Lucas, a Portuguese, married, 30 years of age, and employed as a laborer by Rosenberg Bros., reported to our office at about 3:00 p. m. on November 24, 1931 giving the following history.

"History: The alleged injury occurred today, November 24, at about 9:00 a. m. At that time while at work pulling on the handles of a freight truck, and with another man pushing on the opposite end of the truck, he backed into a post, the handle of the truck striking him in the right groin. Following the accident he had some slight dull pain in the right groin. He did not become sick to his stomach or nauseated. He did not stop working. At about 9:30 the patient had to defecate and he took occasion to examine himself when he found a swelling in the right groin about the size of a walnut."

If we pause at this point and look at the facts recited, it is patent that a prima facie nonmedical case was established by the petitioner. The only factor not developed was the extent of his injury.

The petitioner makes two separate claims. He contends that prior to the accident complained of he had no rupture and immediately thereafter he had. In the second place he contends that, even though he had a rupture prior to that date, the rupture was aggravated by operating the truck. In either event he claims he was entitled to relief. Before taking up either argument it will be well to quote the rest of the medical report. Commencing where we left off, the report continued as follows:

"Past History: Patient has never complained of previous trouble in the groin. There is no record of previous medical examinations in this region. There is no history of previous illnesses or surgical operations.

"Examination: Patient is a well nourished and muscled adult male of about the stated age. Physical examination is entirely negative except in relation to present complaint. Inspection of the right lower abdomen and groin does not reveal any external evidence of injury. There is no bruise or ecchymosis. There is no laceration of the skin. A fullness is noted in the right groin which is somewhat tender to palpation. The right external inguinal ring is dilated and its margins thin and poorly defined. There is no tearing or laceration of the tissues about the external ring. It readily admits the examining finger. The normal obliquity of the inguinal canal is lost, that canal being very patulous and the internal ring dilated sufficiently to admit the palpating finger. Upon coughing or straining an elastic expansile mass extrudes into the internal ring producing a visible swelling. Upon cessation of straining the mass protrudes about one inch through the external ring in the erect position but disappears completely in the recumbent position. There is very little tenderness about the right groin after reduction in the recumbent position. There is no edema or suggilation about the groin or the scrotum. There is no hematoma or hydrocele involving scrotum or cord.

"The left inguinal region is very little different from its fellow. The left external ring admits the examining finger with ease. An impulse is transmitted through the canal upon coughing or straining. The structures about the left canal are in poor tone but there is no protrusion on this side. The external genitalia are normal.

"Diagnosis: Complete, right, indirect, inguinal hernia. Incomplete, left, indirect inguinal hernia.

"Opinion: The attention of the patient was directed toward a complete hernia on the right side following direct trauma of mild degree sustained this morning. His hernia is characterized upon examination by a rather marked dilatation of both inguinal rings and canals. The injury was not of a character which would have caused forcible tearing or separation of tissues. The congenital weakness of the structure is shown by the bilateral character of the findings. The absence of constitutional symptoms and of local reaction to injury fail to support the contention that direct blow resulted in the causation of the present findings. In my opinion there is no industrial responsibility."

Returning now to the contention that the evidence showed that the rupture was directly caused by operating the truck, the respondents assert that, as there was no external evidence of a puncture of the abdominal cavity, the claim may not be sustained. That reply is not sufficient. While operating the truck the petitioner could have suffered an abdominal puncture by being hit by the handle of the truck. In that event the medical evidence is to the effect that there would have been abrasions of the skin; and, as there were none, it follows the hernia was not caused in that manner. Granting all of these contentions to be as stated, the case is not determined. The evidence showed that the membrane of the cavity was very weak. Pulling on the truck would cause an internal pressure on the membrane. That internal pressure may have caused the rupture. There is no evidence to the contrary.

We will now take up the second theory, viz., that an existing rupture was aggravated by operating the truck. An examination of the medical report does not disclose any information on that subject. The case then stands as follows: A nonmedical case was clearly established by the petitioner. There was some evidence that the initial cause of the rupture was not an external blow or puncture by the truck handle or otherwise. But there was no evidence that by the strain in pulling the truck a rupture was not caused by excessive pressure from within; and there was no evidence that an existing hernia was not, and could not have been, aggravated by either being hit by the handle of the truck or by excessive pressure from within caused by the strain in pulling the truck.

The second finding made by the respondents was: "The evidence does not establish that the hernia * * * complained of by said employee, * * * was * * * exacerbated by injury arising out of and in the course of said employment." And in denying the application for a rehearing before the commission, among other things, that body said: "Now, as to the aggravation theory, it must be borne in mind that this theory is entirely predicated on indirect violence or muscular action. Hernias of this type are always a matter of gradual development, and what happens is that an extra amount of bowel or omentum has been forced down and added to the unnoticed part previously there, thus rendering it recognizable. This theory is not involved here. There was no muscular action or effort and it is medically impossible for such a blow as this man received to aggravate a pre-existing one." Looking back at the evidence introduced before the board, it will be observed that there was not a particle of evidence supporting or tending to support any one of those statements. In other words, suppose that before the accident the petitioner had the weak membranes described in the report; that those membranes were separated into fine shreds, but had not given away entirely; and that on being hit with the truck handle, or by reason of excess pressure from within some of those shreds were broken, under such circumstances the petitioner would have been entitled to relief. However, there is not a word in the record showing that such a set of facts did not exist or could not occur. To meet the prima facie case established by the petitioner it was necessary that some evidence be introduced to disprove the supposititious case just stated.

The award is annulled.

We concur: NOURSE, P. J.; SPENCE, J.

122 Cal.App. 519

FOOTE v. SUPERIOR COURT WITHIN AND FOR LOS ANGELES COUNTY.

Civ. 8262.

District Court of Appeal, Second District, Division 2, California.

April 12, 1932.

Courts 🔑488(4).

Where court exceeds jurisdiction in transferring cause to tribunal which must decline to entertain it, case must be remanded for proper disposition (Code Civ. Proc. § 398).

Writ of prohibition to Superior Court, Santa Barbara County.

Petition by Arthur Foote against the Superior Court of the State of California, within and for the county of Los Angeles, for a writ of prohibition.

Application denied.

Frederick H. Brock, of Pico, for petitioner.

Fred A. Shaeffer, of Santa Maria, for respondent.

CRAIG, Acting P. J.

The petitioner, defendant in an action commenced in the superior court within and for the county of Santa Barbara, which prayed judgment for money in a sum approximating $500, moved and was granted therein a change of venue to the superior court of the county of Los Angeles. Thereafter, on motion of the plaintiff, the following order was entered: "It appearing to the court that the county clerk of Santa Barbara transmitted papers to the wrong court, it is ordered that the county clerk of this county return the papers to the county clerk of Santa Barbara county." By the instant proceeding it is sought to restrain all proceedings in said action in the county last mentioned.

By section 398 of the Code of Civil Procedure it is provided that an action pending in a superior court may for proper cause be transferred "to another superior court, or to a municipal court if the action be cognizable therein." That a valid order of transfer is final and deprives the original court of jurisdiction of the cause has been decided. Chase v. Superior Court, 154 Cal. 789, 99 P. 355. But where, as here, the original court exceeds its jurisdiction in transferring a cause to a tribunal which must decline to entertain it, the general rule requires that the case be remanded for proper disposition at its source. State ex rel. Winchel v. Circuit Court, 116 Wis. 253, 93 N. W. 16; Hurley v. Bevens, 57 Ark. 547, 22 S. W. 172; Salomon v. Chicago T. & T. Co., 115 Ill. App. 194; Mudge v. Hull, 56 Kan. 314, 43 P. 242; State ex rel. Williams v. Gray, 109 La. 127, 33 So. 108; Seth v. Chamberlaine, 41 Md. 186; Simpkins v. Parsons, 50 Okl. 786, 151 P. 588; Bowles v. State, 5 Sneed (Tenn.) 360; Servatius v. Pickel, 30 Wis. 507.

The application for a writ of prohibition is denied.

We concur: IRA F. THOMPSON, J., FRICKE, Justice pro tem.

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122 Cal.App. 538

BONGIOVANNI v. FICKETT et al.

Civ. 8226.

District Court of Appeal, First District, Division 2, California.

April 13, 1932.

1. Sales 🔑52(5).

Option to buy gravel plant and other personal property *held* under evidence entirely superseded by independent purchase contract which alone determined liability for taxes.

> The option was superseded because no payments were made thereon, and shortly after it was executed new negotiations were entered into which resulted in purchase contract which expressly provided that it was in lieu of all other proposals made to purchaser.

2. Evidence 🔑397(1).

Parol evidence *held* inadmissible to vary unambiguous provision in option agreement for payment of taxes.

3. Bills and notes 🔑534.

It is duty of trial court to fix reasonable attorney's fees, where attorney's fees are provided for in note.

4. Bills and notes 🔑534.

Where plaintiff's claim on note for more than $1,200 was reduced to $133.28 by defendants' counterclaim, and note provided for attorney's fees of 15 per cent., such fee should be computed on net rather than gross amount allowed plaintiff.

5. Appeal and error 🔑984(5).

Attorney's fees fixed by court in action on note will not be disturbed, in absence of abuse of discretion.

6. Sales 🔑313.

Where seller took security for purchase price, he was not entitled to vendor's lien for amount found due on note given as payment.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by Carlo Bongiovanni against W. H. Fickett and the Pavers Rock Company, who filed a counterclaim. From the judgment rendered, plaintiff appeals.

Affirmed.

O. H. Myrick and C. W. Pendleton, both of Los Angeles, for appellant.

Mark F. Jones and G. J. Oppegard, both of Los Angeles (W. L. Engelhardt, of Los Angeles, of counsel), for respondents.

BURROUGHS, Justice pro tem.

This is an action to recover overdue installments of principal, together with interest and an attorney fee, under the terms of a promissory note. The court awarded plaintiff a judgment in the sum of $1,262.66, but deducted therefrom a counterclaim in favor of the defendant in the sum of $1,129.38, and entered judgment in favor of plaintiff in the sum of $133.28. From the judgment the plaintiff has appealed.

The main issue involved is whether the consideration for which the promissory note was given was a part of the purchase price of certain personal property under and by virtue of the terms of an option for the sale thereof, or whether it was given as a part of the consideration for the same property in pursuance of a new and independent contract between the parties. If the option was the basis of the sale of the property, then the court was in error in allowing the counterclaim, otherwise, its judgment is correct. The facts are as follows: On May 31, 1928, the plaintiff, as the proposed seller, and the defendant W. H. Fickett and two other persons, as the proposed buyers, entered into an option agreement whereby the former agreed to sell to the latter personal property commonly called the "Rock Sand and Gravel Plant." There was also included in the option a lease of rock, sand, and gravel land, and permits from the United States Department of Agriculture for the use of other lands of a similar character. The purchase price named in said option was the sum of $95,000 to be paid as follows: $5,000 within 30 days from the date of the option; $10,000 within 90 days from said date; $10,000 within 150 days from said date; $5,000 within 180 days from said date—making a total sum to be paid of $30,000. The remaining $65,000 was an indebtedness of the plaintiff to third persons secured by a lien upon said property. There was also a provision in the option that the proposed purchasers were to promptly pay when due each and every installment of rent, royalties, dues, obligations, taxes, charges, and other liabilities due and to become due under and by virtue of a certain agreement, lease, and permit which were included in the option, in addition to paying to the plaintiff the $30,000 as aforesaid. That, when the last-named sum had been paid to the plaintiff, it then became plaintiff's duty to execute the necessary conveyances to the defendants of all of said property. The option to remain in full force and effect for the term of 180 days from the date thereof, unless sooner terminated by plaintiff because of failure of the proposed purchasers to make the payments at the times and in the manner provided in the option, or for failure to fulfill the terms of said agreement, in which case the option was to become null and void, and whatever sums of money had been paid thereunder were to be retained by the plaintiff as liquidated damages. The defendants entered into possession of said property on June 1, 1928, and continued in possession thereafter.

On the first Monday in March, 1928, taxes for that year became a lien against the optioned property in the sum of $1,085, which were paid by the defendant Fickett on October 10, 1928, and this last-named amount, together with $35 interest due thereon, is the counterclaim allowed by the court to defendants as an offset to plaintiff's demand. It does not appear that any sum was ever paid by the defendants to the plaintiff, in accordance with the terms of the option, but it does appear that as early as July 9th other negotiations were pending between the plaintiff and the defendant Fickett, concerning the purchase of this property. On August 10, 1928, this defendant rejected an offer of sale made by the plaintiff and made a counter offer to purchase the optioned property, the material part of which offer is as follows: "* * * To purchase said plant, personal property, good will, lease and permits mentioned in that option agreement dated May 31, 1928, entered into by and between you as the proposed seller, and myself * * *" and the other parties named, followed by a proposition of the terms and conditions, but there is no proposition for the payment of taxes as a part of the consideration, but it is further stated in the letter constituting the offer: "If this proposition is acceptable to you, we will conclude the deal immediately, and this is to be in lieu of any other propositions which you have heretofore made to me. You will signify your acceptance hereof by signing this offer." Which was signed as follows: "The above and foregoing offer to purchase is hereby accepted upon the terms and conditions mentioned therein." The parties thereupon executed an agreement in which plaintiff stated that all of the property so sold was free and clear of all incumbrances, except for the lien of the $65,000 indebtedness above mentioned, and that he would warrant and defend his title thereto against all lawful claims and demands.

[1] We are of the opinion from the offer, acceptance, and bill of sale that there was an abandonment of the option; that the offer and acceptance contained in the letter of August 10, 1928, was a new and independent contract; and the subsequent sale was based

thereon. To use the language of one of the witnesses, "the option fell through." This is also made clear by the language used in said letter "in lieu of any other propositions which you have heretofore made me." We think this conclusion is aided by the fact that the option was a unilateral agreement and therefore not a sale of the property. Ludy v. Zumwalt, 85 Cal. App. 119, 130, 259 P. 52; Hicks v. Christeson, 174 Cal. 712, 164 P. 395.

Appellant also contends that the option agreement of May 31, 1928, and the offer of sale and the acceptance of August 10, 1928, were a part of and should have been construed as one transaction. However, the latter instrument says in plain language that it supersedes all previous understandings and agreements of every kind, therefore, this contention cannot be maintained.

[2] Complaint is also made that the court improperly excluded oral testimony upon the question of the payment of taxes. Upon this question the option itself is unambiguous. The payment of taxes was one of the conditions upon which the proposed purchasers could buy the property. As heretofore stated, the option agreement is a unilateral contract, and a reading of the option agreement discloses that such payment of taxes was merely a condition upon which the property could be bought, and, being unambiguous, parol evidence was inadmissible to vary its terms. Further, the option agreement having been superseded by the later one, the exclusion of such oral evidence was proper.

It is further advanced as a ground for reversal that the payment of said taxes was the consideration to be paid by respondent for the privilege of entering into possession of the optioned property. In response to this contention the court expressly offered to allow evidence for that purpose, but such evidence as was offered fell short of establishing such an agreement and was directly contradicted. It is also to be noted that the option agreement itself lays no more stress upon the payment of taxes than any other payment provided for by its terms.

[3-5] The note provides for an attorney fee in the sum of 15 per cent. of the principal, in case suit is brought to collect the same. From this provision appellant argues that, as the court found $1,209.06 of the principal due, he was entitled to an attorney fee in the sum of $181.35, but the court allowed $18.60, being 15 per cent. of the amount actually found due, after deducting the amount of defendant's claim. It is the duty of the court to award reasonable attorney's fees. Mushet v. Department of Public Service, 35 Cal. App. 630, 170 P. 653. It has also been held that, where a counterclaim is allowed, the same should be taken into consideration in fixing attorney's fees, and no allowance should be made upon the amount of the counterclaim. Meadow Valley Land & Investment Co. v. Manerud, 81 Or. 303, 159 P. 559. As the amount found due plaintiff as principal amounted to $133.28, according to the terms of the note, plaintiff would only be entitled to 15 per cent. thereof, which was allowed by the court. Further, it is within the province of the trial court to fix a reasonable attorney fee, and, unless there is an abuse of discretion, the judgment of the trial court cannot be disturbed.

[6] Appellant also claims that he was entitled to a vendor's lien for the amount found due, but as he took security for the purchase money, he thereby waived his lien. 25 Cal. Jur. 752, § 219.

We find no error in the record. The judgment is affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

122 Cal.App. 712

KELLER v. KELLER.

Civ. 7240.

District Court of Appeal, First District,
Division 1, California.
April 20, 1932.

1. **Divorce 🔑184(6).**
Where final divorce decree is predicated on plaintiff's testimony, her version of occurrences after entry of interlocutory divorce decree must be accepted on appeal.

2. **Divorce 🔑156.**
Whether wife living with husband subsequent to entry of interlocutory divorce decree intended to effect reconciliation is fact question for trial court.

3. **Divorce 🔑156.**
Trial court's finding that wife living with husband after entry of interlocutory divorce decree did not intend reconciliation *held* not improper under evidence.

4. **Divorce 🔑156.**
Where interlocutory decree unassailed until time for application for final decree established ground for divorce, court must grant final decree unless there is cogent proof of reconciliation.

5. **Divorce 🔑156.**
Reconciliation, like condonation, is state of mind to be determined from all evidence, including rational inferences.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Charlotte Keller against Fritz Keller. From a final decree of divorce, defendant appeals.

Affirmed.

J. L. Smith, of San Francisco, for appellant.

Ford & Johnson, of San Francisco, for respondent.

JOHNSON, Justice pro tem.

This is an appeal by the defendant from a final decree of divorce, granted in favor of plaintiff after a hearing at which defendant contended that the application for the final decree should be denied, on the ground that the interlocutory decree had been followed by a reconciliation between the parties and conjugal cohabitation.

The interlocutory decree of divorce on the ground of extreme cruelty was granted in favor of plaintiff after failure of defendant to plead to the complaint, and was entered on June 22, 1928. No attempt was made by defendant to vacate the interlocutory decree, but on June 19, 1929, he filed a notice that on June 21, 1929, he would apply to the court for an order denying a final decree on grounds set forth in an accompanying affidavit.

The affidavit stated in effect that from June 22, 1928, the day of the interlocutory decree, to July 3, 1928, the parties had lived together as husband and wife, and that during that period the plaintiff had declared that she was sorry she had procured the decree and desired the marital relationship to continue, and that though, to her regret, she was about to make a trip to Europe, she would look forward with pleasure to a resumption of companionship with defendant on her return. Plaintiff further averred that, though it had been agreed that the interlocutory decree should be set aside, and that the parties should again live together as husband and wife, the plaintiff had since changed her mind and refused to return to the defendant.

On June 24, 1929, plaintiff made her application for a final decree; and, after certain intermediate proceedings not material to this appeal, a hearing was had on July 15, 1929, at which both parties appeared with their attorneys and gave their testimony. The testimony was in some particulars sharply conflicting, and was resolved by the court in favor of plaintiff, whereupon the final decree was made and entered on July 17, 1929.

The parties had settled their property rights before the suit for divorce, and the interlocutory decree provided that beginning July 1, 1928, the defendant should pay plaintiff $100 a month for her maintenance; but with plaintiff's consent this provision was omitted from the final decree.

[1] Inasmuch as the final decree is predicated upon the testimony of the plaintiff, her version of the occurrences after the entry of the interlocutory decree must be accepted. It had been planned that plaintiff should leave for Europe on July 3, 1928; and she testified that, during the fortnight between the time of the interlocutory decree and her departure, she continued to live in company with the defendant in the apartment which they had previously occupied together; and they continued to share the same bedroom, but, according to plaintiff, not the same bed. Plaintiff declared that she submitted to this arrangement on the suggestion of defendant because she had no money to go elsewhere; and moreover she had to pack her belongings which she was to take with her to Germany. Before she left, the defendant provided plaintiff with $300 for her tickets; and during her stay abroad sent her the sum of $100 on each of three occasions, but nothing more. When plaintiff left to go abroad, she and the defendant parted in a friendly way; and in a letter written to plaintiff shortly afterwards defendant referred to taking leave of her at the steamer "never to be seen again."

The parties are of mature age, have no children, and at the hearing the plaintiff expressed her irrevocable determination not to live with defendant again because of his ill treatment of her in the past.

[2, 3] There was evidence on the part of the defendant that, while they occupied the apartment together temporarily after the entry of the interlocutory decree, conjugal intimacies were permitted by plaintiff; but this was denied by plaintiff. Even if such were the fact, it would not be a controlling circumstance. Hawkins v. Hawkins, 104 Cal. App. 608, 612, 286 P. 747. The real question before the court was whether the circumstances as a whole showed a mutual intention to effect a reconciliation and unite in mending the break in the matrimonial yoke. This was a question of fact for the determination of the judge, who had the parties before him and patiently listened to each. The record, as we view it, indicates that he exercised his judgment fairly and discreetly.

[4] We are mindful of the rule that a sound public policy should ever influence the courts to be alert in lending aid to the preservation rather than severance of the matrimonial tie. On the other hand, when grounds of divorce have been established by an interlocutory decree, which has been unassailed until the time has arrived for application for a final decree, the courts then have their duty to abide by their records and follow the written law, unless there is clear and cogent proof of reconciliation and resumption of

connubial relations, or of some other legal ground for denying dissolution of the marriage.

[5] Reconciliation, like condonation, is a state of mind to be determined from all the evidence including rational inferences. Drew v. Drew, 250 Mass. 41, 45, 144 N. E. 763.

The trial judge did not find the evidence sufficiently convincing to support a finding of reconciliation, and we must be governed by his decision upon the facts.

The judgment is affirmed.

We concur: KNIGHT, Acting **P. J.**; CASHIN, **J.**

215 Cal. 421

SMITH et al. v. STATE BOARD OF CONTROL et al.

S. F. 14515.

Supreme Court of California.

April 20, 1932.

1. Schools and school districts 🔑75.

State board of education may purchase text-books for elementary schools outright (Const. art. 9, § 7).

2. Schools and school districts 🔑75.

State board of education need not have all text-books adopted by it printed at state printing office (Const. art. 9, § 7).

3. Constitutional law 🔑15.

Courts must construe constitutional provisions so that some effect shall be given to every part, if reasonably possible.

4. Schools and school districts 🔑80(2).

Where state board advertised and received no bid for text-book entirely written and published in state, board properly concluded that it was necessary to purchase books outside of state (School Code, §§ 6.240, 6.270).

5. Schools and school districts 🔑80(2).

State board could select certain text-books offered by one bidder and other text-books offered by another bidder (School Code, §§ 6.240, 6.270, 6.273).

6. Schools and school districts 🔑75.

Board of education was not required to inquire whether certain text-books could be printed in state printing office, where board had selected text-books published outside of state and publisher would not lease plates (School Code, §§ 6.240, 6.270, 6.273).

7. Schools and school districts 🔑75.

State board of education was under duty to provide series of text-books which in its judgment would be most suitable (School Code, §§ 6.240, 6.270, 6.273; Const. art. 9, § 7).

8. Mandamus 🔑105.

Mandate *held* proper remedy to enforce rights of sellers of schoolbooks to have claim based upon contract paid by officers of state (School Code, §§ 6.240, 6.270).

In Bank.

Application for writ of mandate by Selden C. Smith and others against the State Board of Control of California and others.

Writ issued.

Warren Olney, Jr., Allan P. Matthew, J. Richard Townsend and McCutchen, Olney, Mannon & Greene, all of San Francisco, for petitioners.

U. S. Webb, Atty. Gen., and Robert W. Harrison, Chief Deputy Atty. Gen., for respondent.

CURTIS, J.

Application for writ of mandate directed to the respondent state board of control and the individual members thereof to approve the claim of petitioners for the agreed purchase price of $2,400 for certain music text-books supplied by petitioners to the state board of education upon the latter's order. This order was given in pursuance of a written agreement or contract between the state board of education and petitioners following the formal adoption of a series of text-books printed and published by petitioners for use in the elementary schools of this state under its system of furnishing free text-books to be used in its elementary schools. A stipulation of facts has been signed by the parties and filed herein.

Petitioners are copartners and are doing business under the firm name of Ginn & Co. They are, under said firm name, engaged in the business of printing and publishing text-books and supplying the same to the schools of the various states of this country. Their principal place of business is in the city of Boston, state of Massachusetts, with a branch office and resident partner in the city of San Francisco.

In November, 1930, the state board of education advertised for bids for supplying music text-books for the elementary schools of the state up to and including the sixth grade. Said notice provided for the submission of bids, for the sale or lease of the rights to publish and distribute in this state materials for such text-books, and likewise contained a provision in the following words, to-wit: "Alternative bids for supplying completed books, as specified above, in carload lots, f. o. b. Sacramento, Los Angeles and Francisco, will also be received." In response to the notice calling for bids the state board received written proposals or bids for supplying said music text-books from the following firms: Ginn & Co., American Book Company, Silver, Burdett & Co., and Hinds, Hayden & Eldridge, Inc. None of the music text-books included in any of said bids was entirely written, compiled, printed, and published in the state of California, and none of said bids contemplated that any of the music text-books included therein, if adopted by said state board of education, would be entirely written, compiled, printed, and published in this state.

Upon receipt of said bids, the state board of education submitted the same for its investigation and approval to the curriculum commission of this state. It appears from a written report thereafter filed with the state board of education by the curriculum commission that there was a sharp difference of opinion among the members of the commission as to the respective merits of the series of text-books published by petitioners and those published by Silver, Burdett & Co. Upon a tentative vote being taken upon the question as to which of the two series would be recommended by the commission, six members thereof voted in favor of the series published by Silver, Burdett & Co., and five members voted in favor of the series published by petitioners. But upon the final vote the commission unanimously recommended to the state board of education the acceptance in part of the bid by Ginn & Co. and in part the bid of Silver, Burdett & Co. Upon the receipt and filing of this recommendation of the curriculum commission with the state board of education, the board followed the recommendation of said commission and accepted that part of the bid of Ginn & Co. and that part of the bid of Silver, Burdett & Co. which had been approved and recommended by said curriculum commission.

The bid of Ginn & Co., in so far as it was accepted, offered to compile, print, and publish text-books known as "Two-Part Music," "Intermediate Music," and "Adventures in Music" of the Music Education Series, and to deliver the same in carload lots at the points designated in the notice calling for bids, for the sum of 48 cents per copy. The bid of Silver, Burdett & Co. was made in the alternative as permitted by said notice inviting bids; that is, this firm offered to sell the text-books published by it outright to the state, to be delivered in carload lots as specified in said notice calling for bids, or to permit upon a royalty basis the use by the state of the copyright and lease of plates from which their text-books were prepared and published, with the right to the state to use said plates in the production and publication of said text-books. It might be said here that the bid of Ginn & Co. contained no such alternative right and said firm refused to permit the plates from which their text-books were produced to be used by the state for any purpose.

In conformity to the resolution adopting the bid of Ginn & Co., a written contract was thereafter entered into between the state of California and said company, embodying the accepted portions of the bid presented by said company. The state board of education also entered into a separate contract with Silver, Burdett & Co. for the rental of the plates from which were printed and published the series of text-books covered by the accepted portion of the bid of this firm. Thereafter Ginn & Co. received a written order from the state board of education for 5,000 copies of the music text-books which had been adopted by the state board of education and which were to be supplied under the terms of the written contract with petitioners. Pursuant to said order, said company delivered to the state board of education at Sacramento 5,000 copies of the specified text-books that were accepted by said state board of education.

There is no contention but that, after the delivery of said text-books to the state board of education and within the time provided by law, the petitioners duly filed with the respondent board of control its duly verified claim and statement of facts approved by the state superintendent of schools, requesting and demanding payment for the text-books delivered by petitioners as aforesaid, and requesting and demanding that said state board of control approve said claim, and that upon such approval the state comptroller draw his warrant on the state treasurer in favor of petitioners for the amount of said claim. The state board of control has refused to approve said claim, and contends that under all the facts and circumstances surrounding said transaction, and in view of the law applicable thereto, the state board of education was without the power or authority to enter into or bind the state of California by the contract entered into with petitioners.

[1] The power and authority of the state board of education to provide text-books for the use of the elementary schools throughout the state is fixed and determined by section 7 of article 9 of the Constitution and certain sections of the School Code of this state. Section 7 of article 9 of the Constitution reads as follows: "The Legislature shall provide for the appointment or election of a State Board of Education, and said board shall provide, compile, or cause to be compiled, and adopt, a uniform series of textbooks for use in the day and evening elementary schools throughout the State. The State board may cause such textbooks, when adopted, to be printed and published by the Superintendent of State Printing, at the State printing office; and wherever and how-

ever such textbooks may be printed and published, they shall be furnished and distributed by the State free of cost or any charge whatever, to all children attending the day and evening elementary schools of the State, under such conditions as the Legislature shall prescribe. The textbooks, so adopted, shall continue in use not less than four years, without any change or alteration whatsoever which will require or necessitate the furnishing of new books to such pupils, and said State board shall perform such other duties as may be prescribed by law. The Legislature shall provide for a board of education in each county in the State. The county superintendents and the county boards of education shall have control of the examination of teachers and the granting of teachers' certificates within their respective jurisdictions."

There is nothing obscure or ambiguous in the meaning of this section. By the first sentence thereof it is made the duty of the state board of education to adopt a uniform series of text-books for the use of the elementary schools of the state. The text-books adopted may either be compiled by the state board of education, or the board may cause the same to be compiled, or the board may otherwise provide said text-books for use in the elementary department of the school. Whether the books required shall be compiled or otherwise provided by the board is left to the discretion of the state board of education. Under the power given to it by this section of the Constitution, the state board of education has the authority to compile or cause to be compiled all the text-books required in the elementary department of the schools, or it may provide said text-books in some other manner than by compiling or causing them to be compiled. It may lease the plates from some person, or firm or corporation, that has compiled a suitable text-book, or it may purchase said text-books outright. There may possibly be other methods which the board may adopt in providing the required text-books, but none has been suggested by either party hereto. Whether other methods may or may not be followed is not material, as there is nothing in this section of the Constitution which makes it obligatory upon the board to pursue any particular method. On the other hand, by the plain terms of the section, the board is given the power to provide said text-books in such manner as the board in the judgment of its members may determine. Under this power it has the right to purchase such text-books for the uses and purposes designated in said section.

[2, 3] The next sentence of the section of the Constitution under consideration provides that the board "may cause such text-books, when adopted, to be printed and published by the Superintendent of State Printing, at the State printing office." Under this provision of the section is it made the duty of the board of education to cause all text-books adopted by it to be printed in the state printing office? The answer to the question depends upon whether we shall construe the word "may" to mean "must." We deem it unnecessary for us to enter into any lengthy discussion of the question as to when the word "may" is, and when it is not, to be construed to mean "must." We think, upon reading this section as a whole, that it clearly appears that it was the intention of the framers of this section of the Constitution and of the people who adopted it to give to the word "may" its ordinary meaning and not to construe it, as it is in some cases construed, to mean "must." This section of the Constitution starts out with the mandatory direction to the Legislature that it "shall provide" for a state board of education. Then follows the provision that the board of education "shall provide * * * a uniform series of textbooks." The next sentence is the one with which we are concerned, in which it is provided that the board "may cause such text-books * * * to be printed * * * at the State printing office." Then follow directions that said text-books "shall be furnished" free of cost; said text-books so adopted "shall continue" for a period of four years; the state board "shall perform" other duties; the Legislature "shall provide" for a board of education in each county; and the county boards of education "shall have control" of the examination of teachers, etc. The only reasonable conclusion to be drawn from a reading of the whole section is that the word "may" was designedly used in its ordinary meaning and not as a mandatory direction to the state board of education to have all text-books adopted by it printed in the state printing office.

This construction of this provision of the section is aided somewhat by the further requirement of the section immediately following said provision and which reads as follows: "Wherever and however such text-books may be printed and published, they shall be furnished * * * by the State free of cost." The plain inference to be drawn from the words "wherever * * * such textbooks may be printed and published" is that they are not necessarily to be printed and published in one designated place, or in one establishment, but may be printed elsewhere as the board may determine. As so construed there is nothing in this section of the Constitution which makes it mandatory upon the state board of education to have all text-books adopted by it printed and published at the state printing office. On the contrary, according to the construction which we have given said section, the board is authorized to provide by purchase completed text-books or those which have already been printed and published at the time of their purchase. This construction of the Constitution gives full force and effect to all of its terms. It is the duty of the courts in construing the Constitution as well as a statute to so construe its provisions that some effect shall be given to every part, if reasonably possible. Wheeler v. Herbert, 152 Cal. 224, 236, 92 P. 353; Marye v. Hart, 76 Cal. 291, 293, 18 P. 325; French v. Teschemaker, 24 Cal. 518, 539.

The sections of the School Code to which our attention is directed, and which it is claimed have some bearing upon the question of the power of the state board of education to enter into the contract with petitioners, are sections 6.240, 6.270, and 6.273. Section 6.240 reads as follows: "It shall be the duty of any board of education, school board, board of trustees, official, officer or any other person elected or appointed to carry out the provisions of the laws of the State of California, relating to the public schools of said state and vested with the power of designating textbooks to be used in the said public schools, in so designating such textbooks, unless otherwise provided by general law, to give preference to any textbook on any given subject of public instruction which is entirely written, compiled, printed, and published in the State of California, to the exclusion of any such textbook entirely or partly written, compiled, printed, and published outside of the State of California; provided, it shall appear to them that such textbook so as aforesaid produced in the State of California, shall be of superior or equal educational merit to, and can be procured at the same or less cost than any such textbook, so as aforesaid, entirely or partly written, compiled, printed and published outside of the State of California." This section simply provides that, in the selection of text-books for the schools of the state, the state board of education will give preference to any textbook entirely written, compiled, printed, and published in the state of California, provided the text-book produced in the state of California possesses superior or equal educational merit and can be secured at equal cost as "any such textbook" produced outside of the state. As none of the text-books included in any of said bids made to the state board of education was entirely written, compiled, printed, and published in the state of California, this section of the School Code is not called in question by any act of the state board in accepting the bid of the petitioners. Even in the case where the plates of a publishing house are leased to the state with the right to use the same in the production of text-books, as was contemplated by the alternative bid of Silver, Burdett & Co., textbooks produced from said plates by the state are not entirely written, compiled, printed, and published in this state. On the other hand, it is quite evident that such text-books are entirely written outside the state.

Sections 6.270 and 6.273 of the School Code are as follows:

"6.270. The state board of education shall have power and it shall be its duty to compile in whole, or in part, and to manufacture such textbooks as are now in use; to compile, or cause to be compiled and manufacture such other additional textbooks or books as it may deem necessary or proper for use in the elementary schools of the state, as provided by this Code; to purchase books when necessary, or lease plates, maps, engravings, or copyright matter for use in manufacturing such textbooks; contract for, or lease copyrights for use in compiling, printing, or publishing such books; to provide for the payment of royalties or for the leasing of plates or making the whole or any part of a book, and to do any or all things that may be necessary for the purpose of procuring a uniform series of textbooks for use in the elementary day and evening schools of this state."

"6.273. Whenever any plates, maps, or engravings of any publisher or author are adopted for use, or whenever any books have been purchased, as hereinbefore provided, the state board of education shall enter into a contract for not less than four years nor more than eight years for the use of the same in the elementary day and evening schools of the state, and shall require a good and sufficient bond of the owner or owners of such books, plates, maps, or engravings under a written guarantee that the same shall be kept, revised and free from all errors and up to date as may be required by the state board of education."

There is no question but that these sections of the School Code contemplate a purchase of school text-books by the state board of education. By section 6.270 the power is expressly given to said board "to purchase books when necessary," and by section 6.273 it is provided that, when "any books have been purchased," the state board of education shall enter into a contract for not less than four nor more than eight years for the use of said books in the elementary schools of the state. Respondents make the point, however, that, while the state board of education is given practically plenary power to compile and manufacture text-books required for use in the schools, when it comes to deal with the power to purchase text-books the language of the Code is "to purchase when necessary."

[4] Respondents concede that the discretion to determine when this necessity to purchase text-books arises is in the state board of education, but they contend that the board abused its discretion by entering into the contract with the petitioners for the purchase

of the text-books therein agreed to be purchased without inquiry of the state printer whether the text-books required could be printed and published in the state printing office, and without inquiry throughout the state whether this class of text-books could not be procured within the state. This contention is readily answered. As already stated, the state board of education duly advertised in all respects, as required by the laws of this state, for bids and proposals to furnish the required text-books, and although, in answer to the notice asking for bids, a number of such bids, to be exact four, were presented to the board, none of such bids proposed or offered to furnish a text-book which was entirely written, compiled, printed, and published in this state. Respondents do not suggest what further inquiry or investigation the state board could have made in order to ascertain whether said text-books could be procured in this state. After advertising for bids and receiving none for any text-book entirely written and published in this state, the state board was warranted in concluding that it was necessary for it, in order to secure the needed text-books, to purchase them outside of the state.

[5, 6] As to the necessity of the state board of education inquiring of the state printer as to whether said text-books could be printed and published in the state printing office, such an inquiry would have availed nothing, for the reason that no text-books of the character required by the board had been compiled by it, or by any other board, person, or publishing house in this state. There was nothing therefore about which the state board could inquire of the state printer. Respondents, however, take the position that, as Silver, Burdett & Company by their bid agreed to permit the state the use of copyright and lease of plates of the text-books published by that firm, it was the duty of the state board of education to ascertain from the state printer whether the state printing office was properly equipped to use said plates and by their use print and publish all the text-books required in the particular department of the state schools in which it was proposed to use the text-books for which bids were called. This position is untenable. In the first place, the bid of Silver, Burdett & Co. accepted by the state board of education did not include or cover all the text-books which the state board of education decided to purchase at that time. Each of these two companies offered in its bid a complete series of text-books as requested by the notice calling for bids. The state board selected and adopted part of those offered by Silver, Burdett & Co., and part from the series offered by the petitioners. That it had the right to make such a selection there can be no question. As to the selected text-books to be furnished by petitioners they were to be printed and published by petitioners and furnished to the state board in their completed form. As they were not to be published by the state, and could not be for the reason that the plates from which they were printed could not be leased or otherwise procured from petitioners, any inquiry as to the ability of the state printer to print them would have been futile. Then, again, the bid of Silver, Burdett & Co. did not propose to furnish books entirely written, compiled, printed, and published in this state. The text-books proposed to be furnished by this firm in the lease of its plates, as we have already seen, were entirely written outside of this state. They were not, therefore, entitled to the preference given by section 6.240 to text-books entirely written, compiled, printed, and published in this state. It is apparent, we think, that the state board of education did not abuse its discretion in deciding that it was necessary to purchase the text-books embraced in the contract with the petitioners.

While a stipulation of facts signed by the parties to this action was presented and filed herein, it is admitted that it does not cover or purport to cover all of the matters embraced within the entire pleadings of the parties herein. It covers all the issues made by the petition and so much of the return as purports to be a direct answer to said petition. It does not, however, cover certain new matters set forth in the return. This condition of the record was called to our attention at the time of the argument, and it was then agreed that the stipulation of facts already filed should be considered by the court as covering all matters to which it relates, and that, should the additional matters alleged in the return be deemed material, the court would order a reference to determine the further facts as alleged in the return and not covered by the stipulation. We have carefully gone over the stipulation of facts and the answer and return of the respondents, and we are satisfied that no reference is necessary to determine the additional issues made by the return. In brief, these new matters set up by said return and answer relate to the condition of the state printing office and show the nature of its equipment, the number of its employees, and the character of the work this office is capable of performing. In fact, the return and answer show that the state printing office is sufficiently equipped to print and publish all necessary text-books used in the schools of the state, including those ordered by the state board of education from the petitioners. The return further shows that the state printing office did in fact print and publish the text-books offered by Silver, Burdett & Co. from the plates leased to the state by said company; that the printing and publishing of said text-books by the state printing office was done in a manner entirely satisfactory to the state board of education and that the cost of said text-books, by having them printed and published in the state printing office from leased plates, was less than the cost of the same text-books had they been purchased from the firm of Silver, Burdett & Co., and less than the cost of text-books purchased from petitioners.

[7] It is manifest from the views already expressed that these allegations of the return and answer, not covered by the stipulation of facts filed herein, are concerning matters not material to any issue in this proceeding. As the Constitution of the state clothes the state board of education with the power to provide the necessary text-books for the elementary schools of the state and gives to said board the authority to either compile such text-books or to have them printed and published, or to purchase them outright in their printed and published state, and as the board of education decided, under this power to purchase text-books, that the series of text-books published by petitioners was more suitable for said schools than any other series offered in said bids, it was an entirely immaterial matter whether the state printer could print and publish some other series of text-books in the state printing office, and it was also immaterial whether the printing of this different series of text-books in the state printing office could be done for less money than it would cost the state to purchase the series published by petitioners. It was the duty of the state board of education, under the Constitution and statutes of this state governing their action, to provide for the use of the schools of the state the series of books which in the judgment of its members would be most suitable for that purpose. Having determined that question and decided in favor of text-books published by petitioners, its decision in that respect was final, and could not be affected in any manner by a showing that some other series of text-books, could have been printed and published under state direction at a less cost to the state.

[8] It follows from the views herein expressed that the state board of education had the power under the laws of this state to enter into the contract with petitioners for the purchase of the text-books covered by their contract; that said contract is in all respects legal and binding upon the state, and that petitioners are entitled to enforce the same. No question is made but that mandate is the proper remedy to enforce the rights of petitioners to have their claim based upon said contract paid by the officers of the state. In our opinion such writ should issue as prayed for by the petitioners, and it is so ordered.

We concur: WASTE, C. J.; PRESTON, J.; SEAWELL, J.; SHENK, J.; LANGDON, J.

In re DARGIE'S ESTATE.*

ST. MARY'S COLLEGE OF OAKLAND, CAL., et al. v. CHANDLER et al.

S. F. 14267.

Supreme Court of California.

April 29, 1932.

Rehearing Granted May 27, 1932.

1. Wills 🔑179.

Whether will revoked, or was codicil to, earlier one depends on wording of documents, and circumstances viewed in light of rules of construction.

2. Wills 🔑179.

That testatrix entitled will "Continuation of my last will" *held* insufficient to overthrow plain intent to revoke earlier will.

3. Appeal and error 🔑891.

Appellants' request in Supreme Court to introduce additional evidence required denial, where additional evidence was insufficient to compel judgment in their favor if case were reversed for new trial.

4. Wills 🔑179.

Record sustained finding that later will was intended to revoke, not to be codicil to, earlier will.

> Although later will was headed "Continuation of my last will and testament," it was complete in itself and contained no reference to any other will, except clause revoking all prior wills, and made complete testamentary disposition of all testatrix' property.

LANGDON, J., dissenting.

In Bank.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

In the matter of the estate of Hermina Peralta Dargie, deceased. Upon petition of Jefferson Chandler and others, a writing was admitted to probate as the last will and testament of decedent, over the objections of St. Mary's College of Oakland, Cal., and others, legatees named in an earlier instrument, and the petition of such legatees to have the earlier instrument also admitted to probate was denied, and, from such order objecting legatees appeal.

Application of appellants to produce and introduce additional evidence denied. Order affirmed.

Garret W. McEnerney and Andrew F. Burke, both of San Francisco, and Albert T. Shine, of Oakland, for appellant St. Mary's College of Oakland, Cal.

Philip C. Boardman, of San Francisco, for appellants Leonore F. Tripler and Panchita Dibblee Summers.

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*For subsequent opinion see 15 P.2d 849.

Fitzgerald, Abbott & Beardsley, of Oakland, for respondent Josefa Peralta, Wilson.

Jefferson P. Chandler and Chandler, Wright & Ward, all of Los Angeles, and Francis A. O'Connell, of San Francisco, for respondents Jefferson Chandler, William T. Summers, and Alexander Doig, executors, and Antonio Rodriguez Martin.

PRESTON, J.

Appeal from order admitting to probate a purported will of decedent dated March 27, 1929, and denying admission to probate of a purported will dated December 13, 1928. The question is whether the testatrix intended the later instrument to be a codicil to the earlier one, or whether she intended it to stand alone as her last will and testament.

The testatrix, Hermina Peralta Dargie, a resident of Alameda county, passed away on December 8, 1929, at the age of seventy-one years, leaving an estate consisting of real and personal property of an estimated value of $1,400,000. For many years she had been a widow, and she left no children. Her sister, Josefa Peralta Wilson, and the five children of said sister, survived her and were her next of kin. A Spaniard, Captain Antonio Rodriguez Martin, who had made his home with her from about the year 1920, handling her affairs, and, apparently enjoying her full confidence and trust, produced, after her death, the documents above mentioned, both of which are wholly written, dated, and signed in the handwriting of the deceased, and on their face purport to make complete testamentary disposition of her properties.

The writing of March 27, 1929, upon petition of the executors therein named, was admitted to probate as the last will and testament of decedent, over the objections of certain legatees named in the earlier instrument; their petition to have that instrument also admitted being denied. The court stated that it was convinced that the testatrix did not intend the March will, which expressly revokes all previous wills, to be a codicil to, supplement to, or part of the December will; hence it found that the December will, having been revoked, was not the last will and testament of the deceased, but that the March will was her last will and testament, as such entitled to be admitted to probate.

The document of December 13, 1928, denied probate, opens with the declaration that it is to serve as the last will and testament of the testatrix; all previous testamentary documents signed by her being declared void. It then provides that the sister of the testatrix receive an income of $1,000 a month from the estate, also certain real property and the sum of $150,000 to be paid her over a period of time; that the sister's children each receive the income from $50,000; that Captain Martin receive $250,000; that appellant Tripler receive $25,000; that appellant Summers receive $50,000, and that appellant St. Mary's College receive, in memory of decedent's brothers, $20,000. After providing for some ten additional legacies, aggregating about $106,000, the instrument names as executors, Captain Martin, Wm. T. Summers, and Alexander Doig, and, as attorney for the estate, Mr. Jefferson Chandler. Following the signature of the testatrix appears this provision: "Should Mr. Joseph R. Knowland continue as a partner in my estate affairs—I hereby demand that all rights be accorded me, after all is in order I order now, that this large Estate I am leaving back of me—be placed, into a competent Trust Co. to which my executors will agree for the benefits of my family (signed) Hermina Peralta Dargie."

The instrument of March 27, 1929, is entitled and first provides as follows: "Continuation of my last will and Testament. I. I hereby revoke any and all wills previously made by me. II. I desire that my executors as soon as they have sufficient funds in their hands pay my funeral expenses, * * *" etc. Then follow paragraphs numbered 3 to 30, naming some 37 legatees and providing for total cash bequests aggregating about $239,000 to be paid out of dividends and accumulations from the estate. Decedent's sister is left $50,000 and her children $5,000 each. Paragraph 28 appoints as a board of executors Captain Martin, Alexander Doig, Jefferson Chandler, and Wm. T. Summers. Paragraph 29 provides that said executors pay to said sister $1,000 per month from dividends derived from the assets of the estate. Paragraph 30 provides that all smaller bequests be paid as soon as possible from accumulations of dividends from the estate. The will then closes as follows: "The residuary legatees, Captain * * * Martin, to whom I give, devise & Bequeath the full half of my Estate, as I would have done had he been my son—The other half as Residuary Legatee—to my sister Josefa Peralta Wilson. It is my wish, that my Estate be kept intact, for at least twenty years after I pass from life."

An analysis of these documents shows that thirty-seven legatees are named in the March will, twenty of whom are not mentioned in the December will; twenty-one legatees are named in the December will, eleven of whom are carried over in the March will for less amounts each, four for the same amount, two for greater amounts, and the remaining four are not mentioned at all; they are appellant St. Mary's College, which would receive $20,000 under the December will, John Peralta, who would receive $1,000, "Any poor relation," etc., $10,000, and Mrs. Peralta, $1,000. Appellants here are St. Mary's College, Leonore F. Tripler, left $25,000 by the December will and but $10,000 by the March will, and Panchita Dibblee Summers, left $50,000 by the December will and but $5,000 by the March will.

[1] The controlling factor on this appeal is, of course, the intent of the testatrix, in so far as we are able to ascertain it from the wording of the documents and the circumstances under which they were made, viewed in the light of the well-established rules on the subject of interpretation of wills, which are summarized in Re Estate of Coleman, 189 Cal. 612, 620, 209 P. 571, and many other cases.

[2] The document of March 27, 1929, is in itself a complete will, disposing of all decedent's properties. Other than use of the word "continuation" in the title, there is not a shred of evidence to support the view that the testatrix might have intended it as a codicil to her former will. But for the use of that word, no one would attempt to make such a claim. But appellants do make this claim, and to support it they place great reliance upon the fact that the testatrix entitled the instrument: "Continuation of my last will and testament." In what sense the testatrix used the word "continuation," it is impossible to say, but it seems plain that she did not use it in the sense of "Codicil," as the character of the instrument refutes such a view. The word is not a part of the body of the writing, but only of the heading. It is possible that, having given grave thought to her last will during the period from December to March, the testatrix, again taking pen in hand, had in mind setting forth the final result of her continued and matured consideration of the subject and so wrote the word "continuation" in the heading, immediately thereafter taking the precaution, as shown by paragraph 1, to first revoke all previous wills. No doubt she realized that the December will omitted many whom she wished to remember, and failed to make satisfactory disposition of her residuary estate. There is evidence that she had been warned that care should be taken in drawing trust clauses and she may have feared that some defect or ambiguity existed in the so-called trust clause appended to her December will. Be this as it may, we cannot say that the mere use of the word "continuation" in the heading is sufficient to show an intent at variance with, and to overthrow, the intent plainly indicated by the character of the instrument and the wording in the body thereof.

[3] Appellants have sought to introduce in evidence a will prepared in 1916 by an attorney for the testatrix, which she apparently used as a model in drafting part of her March will and across the top of which she wrote, "Void March 27 1929 San Leandro." Appellants argue that, as she did not cancel this 1916 will until March, 1929, she had in mind until then that her December, 1928, will was incomplete and, believing that the March continuation completed it, she then wrote said cancellation clause. But on the 1916 will lines were drawn through the signature of the testatrix at the bottom of each page and her signature at the end was removed; there is nothing to show that the will, though preserved for use as a model, was not canceled prior to addition of the quoted clause in March, 1929, which confirmed the cancellation theretofore made; furthermore, the testatrix knew that her December will canceled all prior wills. In short, while this additional evidence might afford further grounds for speculation, it contains no convincing proof to sustain appellants' contentions, and certainly it is insufficient to compel a judgment in favor of appellants, were a reversal made and a new trial permitted (Tupman v. Haberkern, 208 Cal. 256, 280 P. 970); hence the request to introduce additional evidence will be denied.

Appellants cite the following circumstance in support of their contentions. Captain Martin testified that in October, 1929, on the eve of his departure for a short trip to Mexico, the testatrix gave him an envelope, with directions that he place it in his deposit box for safe-keeping. She passed away soon after his return, and, upon examination, the envelope was found to contain the December will. Why, appellants ask, was decedent so anxious in October, 1929, to preserve the will of December, 1928, if she had theretofore revoked it by the will of March, 1929? The March will was then presumably where it was found after her death, in a closet of her home in a tin box, to the value of the contents of which she called attention during her last illness. Crediting the above evidence, many explanations may be made of decedent's conduct, all of which are based upon pure conjecture. It would be no more than guess work to accept this incident as showing that decedent intended that both documents should serve as her last will and testament. Respondents ask these counter questions: If decedent considered both documents as her last will, why did she not hand both of them to Captain Martin to be placed in the deposit box? Why did she separate them? Why did she let the December will go out of her hands but carefully place the March will in a box for valuables in the closet of her own home? Did she perchance believe the envelope she handed Captain Martin contained both documents, or only the March document? To speculate upon the significance of this incident is an idle act in the determination of this cause.

Appellants claim that the two documents may consistently be interpreted as one will, and that decedent so planned; they point out that the December will (leaving out of consideration the so-called trust clause thereto appended) did not dispose of even half of her properties. But in making this contention appellants have had to place in the mind of decedent the understanding and insight of a trained lawyer as to the legal effect and probable result of construing the various conflicting provisions of the two instruments as one. It is not reasonable to believe that this aged woman so knew the law that she could foresee the manner in which these provisions might be legally harmonized in order to dispose of her entire estate under both documents.

Appellants also point out that the St. Mary's College bequest is the only remembrance made by decedent of her brothers, and that she would not have omitted it from the March will, had she intended that will to stand alone. Decedent's thought of making this bequest may have changed, or she may have inadvertently omitted it from the later will. Any weight given to appellants' observation in this behalf is also grounded upon speculation.

[4] The fact of the matter is that the wording of the instruments themselves, more than any other thing, convinces us that the March will is and was intended to be the last, separate, and complete testamentary disposition by the testatrix of all her properties, made after revocation of all her former wills. Other than the revocation clause, the March instrument contains no word of reference to any other will. It is complete in itself. It needs no outside support to carry out the testamentary scheme therein expressed. It provides, without uncertainty or ambiguity, a reasonable, rational, and entire method for the distribution of all decedent's properties. It provides for almost all of those remembered in the earlier will, and for many who were not mentioned therein. It sets forth a new and complete scheme, better worked out and showing greater thought for the care of those most dear to the deceased. For instance, although it reduces the cash bequest to her sister from $150,000 to $50,000 and makes no cash provision for Captain Martin, yet it greatly increases the value of the residuary estate, half of which is given to each of these persons. It also provides for conservation of the estate over a period of time, and for payment of cash bequests from income rather than principal. In other words, the entire plan of the March will is such as to induce the conviction that it was an effort on the part of decedent to make a more considered and sounder disposition of her properties, and to remedy possible imperfections in the earlier instrument; hence it must stand as her last will and testament.

Nothing will be gained from further discussion or citation of authorities. It is our conclusion that the court below properly disposed of this cause, and its findings have ample and abundant support in the evidence.

The application of appellants to produce and introduce additional evidence is denied. The order appealed from is affirmed.

We concur: SHENK, J.; SEAWELL, J.; CURTIS, J.

LANGDON, J.

I dissent. Two facts stand out in the record as irreconcilable with the conclusion reached in the foregoing opinion. The first is that the testatrix expressly designated the March instrument: "Continuation of my last will and testament." This designation is so clear as to defy misinterpretation. The second is that eight months after the making of the March instrument the testatrix directed that the December will be placed in a bank vault for safe-keeping. The reason for such careful preservation of an allegedly revoked document is not, in my view, satisfactorily explained in the majority opinion. The only reasonable inference from these two undisputed facts is that the testatrix believed that both instruments constituted her last will. No rule of construction prevents this conclusion. The two instruments differ considerably, but are not wholly inconsistent. Any inconsistent provisions of the earlier one may be omitted, and those not inconsistent may be permitted to remain, without injury to the basic scheme of the testatrix. Many of the bequests in the December will were changed in amount and some were changed in form; many new ones were added; and it is clear that the testatrix considered the earlier instrument to be an incomplete disposition of her property which, in fact, it was. The revocation clause in the March instrument obviously refers to any prior completed wills, and cannot be construed to apply to an instrument of which this last was expressly declared to be a continuation.

Any evidence tending to throw light upon the origin of these two instruments is material. I think, therefore, that the will of 1916, discovered after the admission to probate of the March instrument, and which was never before the trial court, should be made a part of the record. A study of the notations and changes in it is very revealing. Of particular moment is the statement at the head: "Void March 27 1929 San Leandro," in the handwriting of the testatrix. Not until the completion of the March instrument did she consider the 1916 will inoperative, and she then took the pains so to state. She made no similar statement, oral or written, at that time or any other time, about the December instrument. On the contrary, months later she committed it to her trusted friend for safekeeping.

It is my conclusion that appellants should be permitted to introduce the will of 1916 in evidence, and that the orders should be reversed, with directions to the lower court to admit to probate the instruments of December 13, 1928, and March 27, 1929, as the last will of the decedent.

215 Cal. 384

CITY OF PASADENA v. CHARLEVILLE, City Manager.

L. A. 13311.

Supreme Court of California.

April 18, 1932.

1. Municipal corporations 🔑78.

City of Pasadena *held* not controlled by any legislative enactment regarding city's municipal affairs (Pasadena City Charter, art. 1, § 3, subd. 26, as added in 1923; Const. art. 11, §§ 6, 8, as amended in 1914).

2. Municipal corporations 🔑68.

Construction of wire fence around reservoir which was part of city's municipal water system *held* "municipal affair," not controlled by general laws (Pasadena City Charter, art. 1, § 3, subd. 26, as added in 1923; Const. art. 11, §§ 6, 8, as amended in 1914).

[Ed. Note.—For other definitions of "Municipal Affairs," see Words and Phrases.]

3. Municipal corporations 🔑68.

Hiring of employees generally by city in connection with municipal affairs, and payment for services rendered, is not controlled by general laws (Const. art. 11, §§ 6, 8, as amended in 1914).

4. Municipal corporations 🔑65.

To remove city's municipal affairs from control of general laws, it is sufficient if city has availed itself of offer extended by Constitution and incorporated in charter acceptance of privilege tendered (Const. art. 11, §§ 6, 8, as amended in 1914).

5. Municipal corporations 🔑68.

City of Pasadena not being subject to general laws concerning municipal affairs, city manager's refusal to execute and perform proposed contract respecting constructing fence around water reservoir, because state wage rate law was not complied with in letting thereof, *held* not justifiable (Const. art. 11, §§ 6, 8, as amended in 1914; St. 1931, p. 910; Pasadena City Charter, art. 1, § 3, subd. 26, as added in 1923).

6. Constitutional law 🔑81.

Under police power, Legislature may provide for general welfare and comfort, health and safety of all people, including employees, without constitutional authority (Const. art. 20, § 17½).

7. Constitutional law 🔑92.

No person has vested right to work for state or its public agencies upon public work.

8. Constitutional law 🔑92.

Constitutional provision conferring certain right on foreigners does not confer vested right on any person to work for state or any of its public agencies upon public work (Const. art. 1, § 17).

9. States 🔑53.

Statute providing no alien shall be employed upon public works *held* constitutional (St. 1931, p. 913).

10. Municipal corporations 🔑78.

Alien Labor Law *held* binding on freeholders' charter municipality entering into contract for construction of fence around water reservoir, a municipal affair (St. 1931, p. 913; Pasadena City Charter, art. 1, § 3, subd. 26, as added in 1923; Const. art. 11, §§ 6, 8, as amended in 1914).

11. Constitutional law 🔑70(3).

Courts are not concerned with wisdom of laws.

In Bank.

Petition by the City of Pasadena against J. W. Charleville, City Manager of the City of Pasadena, for a writ of mandate.

Writ denied.

Harold P. Huls, City Atty., and John W. Holmes, Deputy City Atty., both of Pasadena, for petitioner.

James H. Howard, of Pasadena, Ray W. Bruce, of Los Angeles (Arthur M. Ellis, of Los Angeles, of counsel), Markell C. Baer, Port Atty., of Oakland, Roscoe R. Hess, City Atty., of Lynwood, E. P. Werner, City Atty., and Loren A. Butts, Deputy City Atty., both of Los Angeles, John J. O'Toole, City Atty., and Henry Heidelberg, Deputy City Atty., both of San Francisco, Louis J. Hardie, City Atty., of Albany, James H. Mitchell, City Atty., of Burbank, Claude L. Rowe, City Atty., of Fresno, C. Stanley Wood, City Atty., of Oakland, Norman E. Malcolm, City Atty., of Palo Alto, Eugene Best, City Atty., of Riverside, C. L. Byers, City Atty., of San Diego, J. F. Goux, City Atty., of Santa Barbara, J. Le Roy Johnson, City Atty., of Stockton, F. J. Heid, Jr., City Atty., of Tulare, A. W. Sans, City Atty., of Watsonville, and Wm. J. Locke, City Atty., of San Francisco, amici curiæ, for petitioner.

John Dean Barrick, of Pasadena, for respondent.

Everett W. Mattoon, Co. Counsel, and Ray C. McAllaster, Deputy Co. Counsel, both of

Los Angeles, Earl Warren, Dist. Atty., of Oakland, Glen M. De Vore, Dist. Atty., of Fresno, James C. Hollingsworth, Dist. Atty., of Ventura, Percy C. Heckendorf, Dist. Atty., of Santa Barbara, Thomas Whelan, Dist. Atty., of San Diego, Earl Redwine, Dist. Atty., of Riverside, Fred L. Thomas, Dist. Atty., of San Jose, James F. Hoey, Dist. Atty., of Martinez, H. Ray Bailey, Dist. Atty., of Bakersfield, Mason A. Bailey, Dist. Atty., of Madera, Henry E. Greer, Dist. Atty., of San Rafael, F. M. Ostrander, Dist. Atty., of Merced, and Edmund Scott, Dist. Atty., of Redwood City, amici curiæ on behalf of respondent.

Carl W. Mueller, H. W. Hutton, and Albert Michelson, all of San Francisco, amici curiæ for respondent California State Federation of Labor.

Arthur L. Johnson, of San Francisco, and Charles F. Lowy, of Los Angeles, amici curiæ for respondent State Division of Labor Statistics and Law Enforcement.

SHENK, J.

This is a petition for a writ of mandate to compel the respondent as city manager of the city of Pasadena to sign a contract authorized by the board of directors of said city for the construction of a galvanized wire fence around the Allen reservoir, a property owned and used by said city as a part of its municipally owned and operated water supply and distributive system.

The city manager refused to sign the contract which was duly awarded to and signed by the contractor, Crown Fence & Supply Company, Limited, on the ground that said contract did not contain the specification of a general prevailing rate of per diem wages as required by the Public Wage Rate Act of 1931 (Stats. 1931, p. 910), and did not contain a provision forbidding the employment of aliens upon the work as provided by the Public Works Alien Employment Act of 1931 (Stats. 1931, p. 913).

The burden of the petitioner's position is that the enactments aforesaid are not binding on the city of Pasadena, a city organized and existing under a freeholders' charter framed and adopted pursuant to section 8 of article 11 of the Constitution, for the reason that the improvement contemplated by the proposed contract constitutes a "municipal affair" as that phrase is used in section 6 of article 11 of the Constitution, and as provided for in subdivision 26, added to section 3 of article 1 of the city charter in 1923 (Stats. 1923, p. 1664).

The charter of the city of Pasadena was adopted in 1901 pursuant to the provisions of section 8 of article 11 of the Constitution. Section 6 of the same article as originally incorporated in the Constitution in 1879 provided that all charters of cities "framed or adopted by authority of this Constitution, shall be subject to and controlled by general laws." In 1896 this section was amended to provide that all charters of cities framed or adopted under the authority of the Constitution, "except in municipal affairs, shall be subject to and controlled by general laws." It is the settled law of this state that by the amendment of 1896 the charter city was removed from the control of enactments of the Legislature in so far as its charter made provision for the conduct of municipal affairs. "With respect to matters not municipal, or municipal affairs upon which the charter was silent, the provisions of any general law pertaining thereto would control the subject. Fragley v. Phelan, 126 Cal. 395, 58 P. 923. But when the charter which was previously silent was amended so as to make a provision upon such municipal affair, that provision would immediately suspend the general law so far as the two were in conflict. Byrne v. Drain, 127 Cal. 667, 60 P. 433. On the other hand, if the charter made provision upon a subject not municipal, upon which the general law was silent, a subsequent statute relating thereto would immediately supersede the charter, so far as it was inconsistent therewith." Civic Center Association v. Railroad Comm., 175 Cal. 441, 445, 166 P. 351, 353.

Further to extend the privilege of autonomy to charter cities sections 6 and 8 of article 11 of the Constitution were amended in 1914 to provide that cities thereafter organized thereunder and cities theretofore so organized were empowered by amendment to the charter "to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws." The city of Pasadena availed itself of the privilege thus extended by the people of the state through the Constitution by an amendment to its charter in 1923 (Stats. 1923, p. 1664). By the charter amendment the powers of the city "over municipal affairs became all-embracing, restricted and limited by the charter 'only,' and free from any interference by the state through general laws. * * * The result is that the city has become independent of general laws upon municipal affairs." Morgan v. City of Los Angeles, 182 Cal. 301, 187 P. 1050, 1052, quoting from Civic Center Assn. v. Railroad Comm., supra; In re Nowak, 184 Cal. 701, 195 P. 402; Bank v. Bell, 62 Cal. App. 320, 217 P. 538. See, also, Rand v. Collins (Cal. Sup.) 4 P.(2d) 529.

[1] It follows necessarily from the uniform line of decisions in this state that the city of Pasadena is not subject to or controlled by any enactment of the Legislature as to the city's municipal affairs.

[2, 3] It must also be concluded that the improvement contemplated by the contract in

question is a municipal affair. The sole purpose of the contract is the construction of a wire fence around a reservoir which is a part of the city's municipal water system. The supplying of water by a city to its inhabitants is a municipal affair. South Pasadena v. Pasadena Land, etc., Co., 152 Cal. 579, 93 P. 490. The building of a dam to be used for impounding water for a municipal water system is a municipal affair. Heilbron v. Sumner, 186 Cal. 648, 200 P. 409. The construction of a reservoir as a part of a municipal water system is a municipal affair. Williams v. City of Vallejo, 36 Cal. App. 133, 171 P. 834. The money to be expended for the cost of the improvement belongs to the city and the control of its expenditure is a municipal affair. Ex parte Braun, 141 Cal. 204, 74 P. 780. The hiring of employees generally by the city to perform labor and services in connection with its municipal affairs and the payment of the city's funds for services rendered to the city by its employees in the administration of its municipal affairs is not subject to or controlled by general laws. Storke v. City of Santa Barbara, 76 Cal. App. 40, 244 P. 158. See, also, Jackson v. Wilde, 52 Cal. App. 259, 198 P. 822. The charter of the city contains full provisions for the doing of the proposed work by contract or by force account and for payment therefor from municipal funds.

The Public Works Wage Rate Act of 1931 requires that the public body awarding any contract for public work on behalf of the state or of any county, city, city and county, district, or other political subdivision of the state, shall ascertain the general prevailing rate of per diem wage in the locality in which the work is to be performed for each craft or type of workman required for the performance of the contract, and shall specify such rate of wages in the call for bids and in the contract subsequently awarded. It is made a misdemeanor for any public officer willfully to omit to comply with the requirements of the statute, and it is provided that the contractor shall forfeit $10 for each day for which any workman shall be paid less than the prevailing rate of wages as established by the contract.

The foregoing statute does not purport to fix or provide for the fixation of the wage to be paid under all employment contracts, public and private. If such was the declared purpose and intent of the act, difficulties of constitutional questions would be encountered. See Adkins v. Children's Hospital, 261 U. S. 525, 43 S. Ct. 394, 67 L. Ed. 785, 24 A. L. R. 1238. The obvious purpose of the statute is to prescribe conditions upon which the statute will permit work of a public character to be performed for it or for public agencies of the state over which the Legislature may constitutionally exercise control. See Atkin v. Kansas, 191 U. S. 207, 24 S. Ct. 124, 48 L. Ed. 148; Heim v. McCall, 239 U. S. 175, 36 S. Ct. 78, 60 L. Ed. 206, Ann. Cas. 1917B, 287. The question whether this statute is a valid exercise of the power of the Legislature to prescribe the conditions incorporated therein as to public work to be performed by public agencies, other than the excluded freeholders' charter cities, is involved in another proceeding now pending in this court. It is now necessary to decide only whether this statute is operative, binding, and controlling with reference to public contracts of purely municipal concern in cities, first, which have incorporated in their freeholders' charters the subject-matter of the statute and, secondly, in other charter cities which have availed themselves of the privilege extended by sections 6 and 8 of article 11 of the Constitution as amended in 1914.

The city and county of San Francisco, a freeholders' charter city, has filed a brief as amicus curiæ supporting the contention of the petitioner to the effect that the statutes involved herein are not controlling on said city and county for the reason that the subject-matter of the statutes has been incorporated in its freeholders' charter. New Charter, § 98, Stats. 1931, p. 3038. Among other things, this section of the San Francisco charter provides that every contract for work or improvement, exclusive of purchases, to be performed at the expense of the city and county, or paid out of moneys deposited in the treasury, whether such work be performed by contract or day labor, must provide "(2) that any person performing labor thereunder shall be paid not less than the highest general prevailing rate of wages in private employment for similar work." Other conditions and restrictions are also prescribed in the section, but they need not now be referred to. It will be noted that while this charter provision covers the same subject-matter as the statute, it is not in conformity therewith in that it is not required by the charter that the prescribed prevailing rate of wages be scheduled in the call for bids or in the contract.

Likewise the port attorney for the port of Oakland, in a brief filed in support of the position of the petitioner, calls attention to a provision of the charter of the city of Oakland requiring that contracts for the performance of labor on behalf of the city shall provide that the contractor pay his employees "a salary or wage at least equal to the prevailing salary or wage for the same quality of service rendered to private persons, firms or corporations under similar employment in the city of Oakland." This provision and the method of its application and enforcement are likewise not in conformity with the 1931 statute.

[4] The city and county of San Francisco and the city of Oakland afford examples of instances where city charters have specially provided for the subject-matter of the statute to

like purpose but by different methods of application and enforcement. There may be other examples not brought to our attention where freeholders' charter cities in this state make provision to like effect. But it is not necessary that the charter specifically legislate on the subject. In order to remove the city's municipal affairs from the control of general laws it is sufficient if the city has availed itself of the offer extended to it by the Constitution as amended in 1914 and has incorporated in its charter an acceptance of the privilege tendered. Civic Center Ass'n v. Railroad Comm., 175 Cal. 441, 166 P. 351; Cole v. City of Los Angeles, 180 Cal. 617, 182 P. 436; Morgan v. City of Los Angeles, 182 Cal. 301, 187 P. 1050; Rand v. Collins (Cal. Sup.) 4 P.(2d) 529. Where in the one case the charter specifically legislates upon the subject it is deemed a grant of power; and where, on the other hand, the charter in general terms accepts the offer extended by the Constitution, the enumeration of powers is unnecessary and the general language of the acceptance becomes a limitation of the power of the city and is all-embracing so far as the removal of the municipal affairs of the city from the control of the Legislature is concerned. In re Galusha, 184 Cal. 697, 195 P. 406; In re Nowak, 184 Cal. 701, 195 P. 402.

The city of Pasadena has adopted the second course above referred to and in 1923 amended its charter by adding to section 3 of article 1 thereof the following: "The city shall have power: * * * Twenty-sixth. To make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in this charter." This amendment was adopted in strict conformity with the amendment of section 6 of article 11 of the Constitution in 1914. The charter so amended is the fundamental law of the city, subject only, as to its municipal affairs, to the restrictions and limitations of the charter itself, and, of course, subject to the provisions of the Constitution which is the authority for its creation.

[5] The necessity for or the desirability of the statute now under discussion are of legislative concern. The judicial question is: Where rests the power to enact it so as to make it binding on the city of Pasadena? The answer must be that such power rests only in the people of the state through the Constitution or in the people of the city by or under the authority of its freeholders' charter. It necessarily follows that said statute is not effective, binding, or controlling on the petitioner in connection with the execution and performance of the proposed contract, and the refusal of the respondent to sign the contract based on the ground that the provisions of the Public Wage Rate Act of 1931 were not complied with in the letting thereof is not justifiable.

The cases cited by the respondent fall into two classifications. In the first class are cases from other jurisdictions where our system of freeholders' charter municipal government directly under the authority of the Constitution and solely responsive to it in matters of purely municipal concern does not obtain. Those cases need not be referred to specifically nor be commented upon further than to state that they are not in point on this branch of the present proceeding. In the other class are cases in this state wherein generally it was determined that the particular city transactions involved were not municipal affairs as contemplated by the Constitution. In this class are Ex parte Daniels, 183 Cal. 636, 192 P. 442, 21 A. L. R. 1172, wherein it was held that the speed limit at which automobiles might be driven was a matter of general state concern and not a municipal affair, and that therefore the State Motor Vehicle Act was controlling over a city ordinance providing a less rate of speed; also, Esberg v. Badaracco, 202 Cal. 110, 259 P. 730, which had to do with a public school question, a matter, under all of our decisions, of general state concern. In none of the cases in this state has it been held that an enactment of the Legislature was controlling as to a municipal affair of a city which had in its freeholders' charter legislated on the subject or had availed itself by charter provisions of the offer of further autonomy extended by the 1914 amendment to the Constitution.

It is insisted by the respondent and by amici curiæ in that behalf that the legislation covered by this statute was enacted in pursuance of section 17½ of article 20 of the Constitution, adopted in 1914, which provides: "The legislature may, by appropriate legislation, provide for the establishment of a minimum wage for women and minors and may provide for the comfort, health, safety and general welfare of any and all employees."

If the Legislature assumed to enact the statute now under consideration under the authority of that portion of the section which purports to be a grant of power to fix a minimum wage, it is at once apparent that the grant did not contemplate that legislation thereunder should extend to the establishment of wages for any class of persons except those specifically mentioned, namely, women and minors. This is so from the unmistakable meaning of the phraseology employed, and such purpose is further disclosed by the argument submitted to the voters of the state when the constitutional amendment was proposed for ratification, wherein it was stated: "To insure the women and minors of this state a living wage it is most necessary that the voters of California vote 'Yes' on this amendment." The validity of this portion of the constitutional section under the federal Constitution need not now be discussed, as in any event it does not assume to constitute authority for the enactment of the statute.

[6] If the authority for the amendment be, as claimed by the respondent and his supporting amici curiæ, the second portion of the section of the Constitution above quoted, namely, that the Legislature "may provide for the comfort, health, safety and general welfare of any and all employees," it is again apparent that this is a grant of power to do what the Legislature, without this specific grant, obviously could do in the exercise of the police power of the state. In passing upon the extent of this grant of power this court said in Yosemite L. Co. v. Industrial Acc. Comm., 187 Cal. 774, at page 784, 204 P. 226, 230, 20 A. L. R. 994: "The arguments printed on the ballot for the election of 1914, at which this section was adopted, indicate that its main purpose was to authorize the establishment of a minimum wage for women and minors. Nothing whatever is said in the arguments upon any other subject except that there is a suggestion that all employers, bad as well as good, should be compelled to provide proper living and working conditions for their employees. The part of the section authorizing the Legislature to 'provide for the comfort, health, safety and general welfare of employees' was, as we think, intended to refer to the comfort, health, safety and welfare of employees during the time of their employment." In other words, section 17½ of article 20 of the Constitution only purports "to authorize legislation with reference to 'employees,' and its application, therefore, must be based upon the existence of an employment." Pacific G. & E. Co. v. Industrial Acc. Comm., 180 Cal. 497, 181 P. 788, 790. When thus applied the grant is specific and merely cumulative for the reason that under the police power of the state the Legislature has the authority now to provide for the general welfare as well as the comfort, health, and safety of all of its people, including employees. Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A. L. R. 1479; Id., 273 U. S. 781, 47 S. Ct. 460, 71 L. Ed. 889; In re Oswald, 76 Cal. App. 347, 244 P. 940.

We now turn to the operation and effect of the Public Works Alien Employment Act of 1931. That act provides that no alien shall be employed by any contractor or subcontractor on any public work done for or under the authority of the state, or any officer or department thereof, or for or under the authority of any county, city and county, district, or other political subdivision thereof, and makes it the duty of every public officer thereof to withhold payment to the contractor of a sum equal to $10 per day for every alien employed by the contractor or by any subcontractor under him. Failure of performance by the contractor, subcontractor, or public officer, in accordance with the statute, is made a misdemeanor.

It was held in City Street Imp. Co. v. Kroh, 158 Cal. 308, at page 326, 110 P. 933, 941, that a provision in the specifications for public road work to the effect that, except by permission of the highway commission, no unnaturalized alien should be employed in the work, was invalid and unenforceable when attempted by public authorities. The ruling was based on the ground that such a provision in the contract was in violation of sections 1 and 17 of article 1 of the Constitution of this state and in violation of treaty rights. The opinion in that case states that at that time (1910) there was no express authority for the insertion of the restriction in the specifications. However, in 1901 the Legislature passed an act providing that "no person, except a native-born or naturalized citizen of the United States, shall be employed in any department of the state, county, city and county, or incorporated city or town government in this state." St. 1901, p. 589, § 1. In 1915 a statute was enacted to the same effect, but enumerating certain exceptions in its operation, and the 1901 act was repealed. Stats. 1915, p. 690. In 1921 the 1915 act was amended principally with reference to the exceptions. Stats. 1921, p. 546. Next followed the enactment of the present statute in 1931, which enlarges the restriction against the employment of alien labor to any public work done in this state. It is worthy of note that from 1901 until 1931 none of said enactments has expressly been declared to be invalid. In fact, none has been attacked in any case called to our attention, and it is stated by counsel for the respondent and not denied that public authorities generally in this state have complied with their provisions.

[7, 8] The holding in the Kroh Case to the effect that the obnoxious specification was invalid as in contravention of section 17 of article 1 of the state Constitution would seem to have been the result of scant consideration and must be considered as overruled. Section 17 of article 1 of the Constitution provides that "foreigners of the white race, or of African descent, eligible to become citizens of the United States under the naturalization laws thereof, while bona fide residents of this State, shall have the same rights in respect to the acquisition, possession, enjoyment, transmission, and inheritance of all property, other than real estate, as native born citizens. * * *" Section 17 of article 1 of the Constitution of 1849 was to like effect so far as the problem here presented is concerned. In the case of Norris v. Hoyt, 18 Cal. 217, it was held that the purpose of this section of the Constitution of 1849 was to remove the disability, under the common law, of foreigners, bona fide residents of this state, to acquire property by descent or other operation of law. In State v. Smith, 70 Cal. 153, 12 P. 121, it was held that this section as originally incorporated in the Constitution was intended to prohibit the Legislature from depriving resident foreigners of any of the rights enjoyed by native-born citizens with respect to the acquisition, possession, enjoyment, transmission, or

inheritance of property. In 1894 the section was amended to exclude the acquisition, etc., of real estate from the benefits intended to be thereby conferred. It has never been held that this section confers upon resident aliens the constitutional right to be employed on public work. No person has a vested right to work for the state or any of its public agencies upon public work. Atkin v. Kansas, 191 U. S. 207, 24 S. Ct. 124, 48 L. Ed. 148. Such right is a privilege granted by or under the authority of the state and may be granted under such terms and conditions, not in conflict with law, as the state may see fit (Norris v. City of Lawton, 47 Okl. 213, 148 P. 123), and we do not construe section 17 of article 1 of our Constitution to confer such a right.

[9] In City Street Imp. Co. v. Kroh, supra, section 1 of article 1 of our Constitution was also cited as invalidating the specification that, except by permission of the highway commission, no unnaturalized alien shall be employed in the work; also that said specification was in violation of "treaties with almost all the nations from which this country receives immigrants." After that decision in 1910 litigation arose in the state of New York concerning the validity of a statute in that state providing that: "In the construction of public works by the state or a municipality, or by persons contracting with the state or such municipality, only citizens of the United States shall be employed; and in all cases where laborers are employed on any such public works, preference shall be given citizens of the state of New York." Labor Law (Laws 1909, c. 36) § 14. It was contended by the contractor that this enactment of the Legislature was void as in contravention of sections 1 and 6 of article 1 of the New York Constitution, as broad in effect as the same provision of the California Constitution; void under the equal protection and due process clauses of the federal Constitution; and void as a discrimination against aliens under treaty rights. The New York Court of Appeals in an exhaustive treatment of the subject, in February, 1915, held that all of those contentions were without support. People v. Crane, 214 N. Y. 154, 108 N. E. 427, L. R. A. 1916D, 550, Ann. Cas. 1915B, 1254. That case reached the Supreme Court of the United States in the same year and was affirmed on November 29, 1915. Crane v. New York, 239 U. S. 195, 36 S. Ct. 85, 60 L. Ed. 218. The reasoning and conclusions of the court of last resort are more fully disclosed in the opinion in the companion case of Heim v. McCall, 239 U. S. 175, 36 S. Ct. 78, 60 L. Ed. 206, Ann. Cas. 1917B, 287, decided on the same day. The holding in those two New York cases was grounded largely on the prior decision of the court in Atkin v. Kansas, 191 U. S. 207, 24 S. Ct. 124, 48 L. Ed. 148, where it was declared that it belongs to the state, having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf. The Atkin Case was decided in 1903 and involved the constitutionality of a Kansas statute prescribing a maximum of eight hours' labor on public works, and the enactment was held to be valid. In 1890 this court held that an ordinance of the city of Los Angeles making it a misdemeanor for any contractor with the city to employ any person to work more than eight hours per day, or to employ Chinese on the public work, was invalid. Ex parte Kuback, 85 Cal. 274, 24 P. 737, 9 L. R. A. 482, 20 Am. St. Rep. 226. The right of any legislative body in this state to prohibit the employment of alien Chinese on public work may not be questioned and the restriction of eight hours' work per day on public work has become imbedded in the Constitution by the amendment of section 17 of article 20 in 1902. Since the decisions of the Supreme Court of the United States in Heim v. McCall, supra, and Crane v. New York, supra, it must be considered as settled that it is competent for a state to exclude aliens from employment on its public work and that the statute here under attack is likewise not obnoxious to any provision of the state Constitution.

[10] It remains to determine whether the Alien Labor Law of 1931 is effective and binding on freeholders' charter municipalities in this state. In other words, is the matter of the employment of aliens on public works one of local concern and a municipal affair, or is it such a matter of general public or state concern as that the statute is binding on such freeholder charter cities? We have concluded that this statute is such an act of sovereignty as to constitute the subject-matter thereof of general state concern as distinguished from a local or municipal affair. All public works and all public property in the state in a broad sense belong to all of the people of the state. Whether the ownership or title thereof be in the state or in a municipality or in some other governmental agency of the state, such ownership and title are held in trust for the people of the state. That is to say, the state and its public agencies are the guardians and trustees of the people in the ownership, construction, and maintenance, of its public works and property. When considered in this connection the "people of the state" may be said to constitute that body of citizens who have become organized and function as the state and through whom the state derives and exercises its powers. The obligations of the state on the one hand, and of its citizens on the other, are reciprocal. Neither could exist without the other. The state exercises its sovereign power on behalf of its citizens. It likewise imposes upon them the duties of citizenship and may even require them to take up arms at the call of the Governor to execute the laws of the state, to suppress insurrections and to repel in-

vasions. Const. art. 8, § 1. By section 1895 of the Political Code aliens are permitted to claim exemption from this military service.

[11] This state has declared and enforced a policy of prohibiting the sale, etc., of agricultural lands in the state to ineligible aliens. That this policy, as a matter of general state concern, would be binding on a freeholders' charter city owning extensive areas of agricultural lands can, we think, admit of no serious doubt. Thus to interfere and prohibit the sale of its agricultural lands would be to control and limit to that extent the disposition of city property, but if the alien land law be expressive of a state policy and in pursuance of a general state concern, the municipality must yield to the paramount authority of the state. Again, since the property and funds of the state and its agencies, in a broad sense, belong to its citizens, it would seem to be a wise and beneficent state policy so to conduct its affairs that its funds be available to its citizens for services rendered on public works to the extent that it may constitutionally do so. It may and does prefer its citizens in matters of relief, and may otherwise discriminate in their favor. It is definitely settled: "No employee is entitled, of absolute right and as a part of his liberty, to perform labor for the state; and no contractor for public work can excuse a violation of his agreement with the state by doing that which the statute under which he proceeds distinctly and lawfully forbids him to do." Atkin v. Kansas, 191 U. S. 207, 24 S. Ct. 124, 128, 48 L. Ed. 148. Reasons of public policy may well be invoked against the employment of aliens on public work, in addition to the mere preferment of citizens. Assuming that the municipality be in position to raise the constitutional question, it would be of no avail and it may not rightly object to the allocation of its funds to citizens for services rendered on public work if, as we hold, such purpose be a matter of general state policy, as distinguished from a municipal affair. There are differences of opinion as to the wisdom of such a policy, but with the wisdom of such a course the courts are not concerned to the point that they may override the policy thus declared by the legislature. The duty of the courts is to see that the legislation is kept within constitutional bounds and is definite and certain in the method of its application. With this latter consideration no difficulty is encountered in this proceeding.

For the reason that the respondent was justified in refusing to sign the contract without its compliance with the Public Works Alien Employment Act of 1931, the petition for the peremptory writ is denied.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.; TYLER, Justice pro tem.

215 Cal. 400

METROPOLITAN WATER DIST. OF SOUTHERN CALIFORNIA v. WHITSETT.

L. A. 13498.

Supreme Court of California.

April 18, 1932.

1. Waters and water courses 🔑183½.

Except for constitutional restrictions, Legislature has absolute control over water district organized under Metropolitan Water District Act, and may prescribe conditions governing public work of district (St. 1927, p. 694; St. 1931, p. 910, §§ 1–5).

2. Evidence 🔑83(1).

Presumably public body awarding public works contract will determine "general prevailing rate of per diem wages" honestly, upon investigation, and with due regard to workmen's and taxpayers' rights (St. 1931, p. 910, §§ 1–5).

3. Statutes 🔑47.

"General prevailing rate of per diem wages," within act requiring it as minimum for workmen upon public works, *held* not uncertain (St. 1931, p. 910, §§ 1–5).

> "General prevailing rate of per diem wages" is defined by St. 1931, p. 910, § 4, to be the rate determined upon by the public body awarding the contract, and, since the decision of such body is made final, its decision precludes uncertainty as regards the requirement of St. 1931, p. 910, § 2, that the schedule of rates of wages be inserted in the call for bids and in the contract itself, or in entertaining complaints as to violation by the contractor of the terms of the contract, or in determining upon investigation what, if any, deductions should be made from the final payment to the contractor, as provided by section 2, for such violation.
>
> [Ed. Note.—For other definitions of "Prevailing Rate of Wages," see Words and Phrases.]

4. Statutes 🔑47.

Law relating to minimum wage for workmen on public works and providing penalties *held* not uncertain as to duties imposed, nor as to criminal liability and penalties thereunder (St. 1931, p. 910, §§ 1–5).

> Duty imposed by St. 1931, p. 910, § 2, upon the public officers, is that the public body awarding the contract shall ascertain the general prevailing rate of per diem wages in the locality in which the work is to be performed, and specify it in the call for bids and in the contract, and section 2 further provides a penalty for the contractor's failure to pay at least the stipu-

lated rate, the public body awarding the contract to take cognizance of complaints for violation and to withhold money forfeited, and section 5 provides that any public contractor who shall neglect to keep accurate record of the names, occupations, and actual wages paid laborers or shall refuse access to it to any authorized person, shall be guilty of a misdemeanor.

5. Statutes 🔑47.

Within statute requiring public works employees to be paid not less than general prevailing rate for "work of a similar character," quoted phrase *held* sufficiently definite (St. 1931, p. 910, §§ 1–5).

6. Statutes 🔑47.

Within statute requiring public contractors to pay employees not less than prevailing rate in "locality in which the work is performed," quoted phrase *held* sufficiently certain, even as regards water districts (St. 1931, p. 910, §§ 1–5).

While the phrase "locality in which the work is performed" is somewhat ambiguous as applied to water district, since St. 1931, p. 910, § 4, defines "locality in which the work is performed" as meaning the city and county, county, or counties in which the improvement is to be constructed in all cases in which the contract is awarded by the state or any public body thereof, and as the limits of any city and county, city, town, township, district, or other political subdivision on whose behalf the contract is awarded in all other cases, and a water district is a public body of the state, and is also a district, the intention is plain to fix the locality where the work is to be performed.

[Ed. Note.—For other definitions of "Locality," see Words and Phrases.]

7. Taxation 🔑183.

Minimum wage law for labor on public works, while increasing costs, is not "tax" within Constitution (St. 1931, p. 910, §§ 1–5; Const. art. 11, § 12).

[Ed. Note.—For other definitions of "Tax; Taxation," see Words and Phrases.]

8. Municipal corporations 🔑327.

Legislature may fix definite minimum wage for labor on public work.

9. Constitutional law 🔑63(2).

Power granted to public bodies to fix minimum wage for public works employees *held* not unlawful delegation of legislative power (St. 1931, p. 910, §§ 1–5).

10. Constitutional law 🔑62.

Large measure of discretion may be delegated to administrative officers and boards.

In Bank.

Application for a writ of mandate by the Metropolitan Water District of Southern California prayed to be directed to W. P. Whitsett, as chairman of the board of directors of the Metropolitan Water District of Southern California.

Writ denied.

James H. Howard, Gen. Counsel, of Pasadena, and Ray W. Bruce and Alan Patten, both of Los Angeles, for petitioner.

S. M. Haskins, Arthur M. Ellis, and Gibson, Dunn & Crutcher, all of Los Angeles, Attys. for City of San Marino, amici curiæ, for petitioner.

Robert H. Dunlap and George R. Larwill, both of Los Angeles, for respondent.

Everett W. Mattoon, Co. Counsel, and Ray C. McAllaster, Deputy Co. Counsel, both of Los Angeles, Earl Warren, Dist. Atty., of Oakland, Glen M. De Vore, Dist. Atty., of Fresno, James C. Hollingsworth, Dist. Atty., of Ventura, Percy C. Heckendorf, Dist. Atty., of Santa Barbara, Thomas Whelan, Dist. Atty., of San Diego, Earl Redwine, Dist. Atty., of Riverside, Fred L. Thomas, Dist. Atty., of San Jose, James F. Hoey, Dist. Atty., of Martinez, H. Ray Bailey, Dist. Atty., of Bakersfield, Mason A. Bailey, Dist. Atty., of Madera, Henry E. Greer, Dist. Atty., of San Rafael, F. M. Ostrander, Dist. Atty., of Merced, and Edmund Scott, Dist. Atty., of Redwood City, amici curiæ, for respondent.

SHENK, J.

This is an application for a writ of mandate to compel the respondent, as chairman of the board of directors of the petitioner district, to sign a contract for the construction of Entrance Hill road, located in Riverside county, and to be used in conjunction with the Colorado river aqueduct.

After notice inviting proposals, the contract was duly awarded to Martin Bros. Trucking Company. The particular work to be performed is the construction of about 6.45 miles of graded road, involving approximately 44,000 cubic yards of excavation, with appurtenant metal pipe culverts, concrete protection walls, and related work.

The respondent has refused to sign the contract because the petitioner did not ascertain, and specify in its notice inviting proposals and insert in the contract, the general prevailing rate of per diem wages in the locality in which the work is to be performed for each craft or type of workman or mechanic needed to execute the contract, as required by the provisions of an act passed by the Legislature and approved by the Governor in 1931. St. 1931, p. 910. This enactment is referred to as the Public Wage Rate Act of 1931.

Section 1 of the act provides: "Not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the work is performed * * * shall be paid to all laborers, workmen and mechanics employed by or on behalf of the State of California, or by or on behalf of any county, city and county, city, town, district or other political subdivision of the said state, engaged in the construction of public works, exclusive of maintenance work. Laborers, workmen and mechanics employed by contractors or subcontractors in the execution of any contract or contracts for public works * * * shall be deemed to be employed upon public works."

Section 2 provides: "The public body awarding any contract for public work * * * shall ascertain the general prevailing rate of per diem wages in the locality in which the work is to be performed, for each craft or type of workman or mechanic needed to execute the contract, and shall specify in the call for bids for said contract, and in the contract itself, what the general prevailing rate of per diem wages in the said locality is for each craft or type of workman needed to execute the contract, * * * and it shall be mandatory upon the contractor to whom the contract is awarded, and upon any subcontractor under him, to pay not less than the said specified rates to all laborers, workmen and mechanics employed by them in the execution of the contract. The contractor shall forfeit as a penalty to the state or political subdivision, district or municipality on whose behalf the contract is made or awarded, ten dollars for each laborer, workman or mechanic employed, for each calendar day, or portion thereof, such laborer, workman or mechanic is paid less than the said stipulated rates for any work done under said contract, * * * and the said public body awarding the contract shall cause to be inserted in the contract a stipulation to this effect. It shall be the duty of such public body awarding the contract, and its officers and agents, to take cognizance of complaints of all violations of the provisions of this act * * * and, when making payments to the contractor of moneys becoming due under said contract, to withhold and retain therefrom all sums and amounts which shall have been forfeited pursuant to the herein said stipulation and the terms of this act; provided, however, that no sum shall be so withheld, retained or forfeited, except from the final payment, without a full investigation by either the division of labor statistics and law enforcement of the state department of industrial relations or by said awarding body. * * *"

Section 3 provides: "The contractor and each subcontractor shall keep, or cause to be kept, an accurate record showing the names and occupations of all laborers, workmen and mechanics employed by him, in connection with the said public work, and showing also the actual per diem wages paid to each of such workers, which record shall be open at all reasonable hours to the inspection of the public body awarding the contract, its officers and agents, and to the chief of the division of labor statistics and law enforcement of the state department of industrial relations, his deputies and agents."

Section 4 provides: "Construction work done for irrigation, utility, reclamation, improvement and other districts, or other public agency or agencies, public officer or body * * * shall be held to be 'public works' within the meaning of this act. The term 'locality in which the work is performed' shall be held to mean the city and county, county or counties in which the building, highway, road, excavation, or other structure, project, development or improvement is situated in all cases in which the contract is awarded by the state, or any public body thereof, and shall be held to mean the limits of the county, city and county, city, town, township, district or other political subdivisions on whose behalf the contract is awarded in all other cases. The term 'general prevailing rate of per diem wages' shall be the rate determined upon as such rate by the public body awarding the contract, or authorizing the work, whose decision * * * shall be final. * * *"

Section 5 provides: "Any officer, agent or representative of the State of California, or of any political subdivision, district or municipality thereof, who wilfully shall violate, or omit to comply with, any of the provisions of this act, and any contractor or subcontractor, or agent or representative thereof, doing public work as aforesaid, who shall neglect to keep, or cause to be kept, an accurate record of the names, occupation and actual wages paid to each laborer, workman and mechanic employed by him, in connection with the said public work or who shall refuse to allow access to same at any reasonable hour to any person authorized to inspect same under this act, shall be guilty of a misdemeanor, * * *" and be punishable as such.

It is contended by the petitioner (1) that said act is void for uncertainty; (2) that the burden thus attempted to be imposed upon the petitioners is in violation of section 12 of article 11 of the State Constitution; and (3) that the act makes an invalid delegation of legislative power. The points will be determined in the order above named, with some preliminary discussion as to the status of the petitioner district and the purposes of the act.

The petitioner, Metropolitan water district of Southern California, is a public corporation, organized and existing under the "Metropolitan Water District Act" (St. 1927, p. 694). The purpose of its organization was to acquire the right to and to conduct waters from the Colorado river for distribution to the municipalities within and a part of the district for domestic and other useful purposes. The cities within the district are numerous, some organized and existing under freeholders' charters and some under general law. The district has broad powers in connection with the object of its creation, including the power, by vote of the electors in the district, to issue and sell bonds; to levy and collect general taxes within the participating municipalities; to acquire water and other rights and property; to perform construction work; "to enter into contracts, to employ and retain personal services * * * and employ laborers"; and generally to do and perform all things necessary to carry out the purposes of the district under the act. The governing body of the district is a board of directors, consisting of at least one representative from each municipality, the area of which shall lie within the district. The validity of the act was approved by this court in City of Pasadena v. Chamberlain, 204 Cal. 653, 269 P. 630. It was therein declared that, notwithstanding the rights and powers of the freeholders' charter, cities within the district, under section 6 of article 11 of the Constitution, the general purposes and objects to be subserved by the organization of a district under the act are not municipal affairs. Following its organization the electors thereof, at an election duly held for that purpose, approved a bond issue of upwards of $220,000,000, and the district is now proceeding to carry out its objects and purposes by the letting of contracts for public work, one of which is the particular contract in question.

[1] Under the law the petitioner finds itself a public instrumentality of legislative creation whose powers and duties may be enlarged, restricted, or abolished at the will of the Legislature, which possesses all the powers of the sovereign not expressly withheld by the Constitution. Except as restricted by the Constitution, the Legislature has absolute control over this corporation and its affairs. The legislative power of regulation and control over the affairs of the district include the power to prescribe the conditions under which the state will permit public work to be done. It is immaterial whether the state undertakes the work itself or has invested one of its governmental agencies or instrumentalities with power to do it. Atkin v. Kansas, 191 U. S. 207, 24 S. Ct. 124, 48 L. Ed. 148; Heim v. McCall, 239 U. S. 175, 36 S. Ct. 78, 60 L. Ed. 206, Ann. Cas. 1917B, 287. Indeed, it is fairly conceded by the petitioner that the district is subject to the control of legislative enactments within constitutional limitations. We then pass to a consideration of the several claims that the act under attack is unconstitutional and void.

[2, 3] It is first asserted that the enactment is void for uncertainty (a) in that the phrase "general prevailing rate of per diem wages" is not and cannot be stated as a definite amount, (b) in that the phrase "work of a similar character" is too vague to permit definition and (c) in that the phrase "in the locality in which the work is performed" is in itself uncertain and is rendered less certain by the attempt made in the act to define it. It is therefore argued that, in view of the penal provisions of the act, neither the officers of the district nor the contractors with the district may know in advance with sufficient certainty whether any act performed by them is in contravention of the statute. In this connection it is of prime importance to note what is required by the act, the nonperformance with which or the omission to do which is made a penal offense. As applied to officers of the district, it is made a misdemeanor for any officer or agent of the district willfully to violate or omit to comply with the requirements of the act. When we point to duties imposed upon such officers and agents we find that they are required to ascertain the "general prevailing rate of per diem wages in the locality in which the work is to be performed, for each craft, or type of workman needed to execute the contract." The "general prevailing rate of per diem wages" is defined to be the rate determined upon by the public body awarding the contract, and the decision of such body is made final and conclusive. When the board of directors, as in this case, has made its decision on this matter, it has performed its duty in the premises, and it must be presumed that it will perform such duty honestly, fairly, and to the best of its ability upon investigation, in good faith, and with due regard to the rights of the workmen to be employed and the taxpayers of the district. When this final decision is made, no uncertainty would arise in the requirement that the schedule of rates of wages be inserted in the call for bids and in the contract itself. Nor would any uncertainty be encountered in entertaining complaints as to violations by the contractor of the terms of the contract, nor in determining upon investigation what, if any, deductions should be made from the final payment to the contractor by reason of such violation. When these duties are performed, the statute has been complied

with by the public officers; and, when performed in good faith, no criminal or other liability may be invoked against them.

[4] The duty imposed on the contractor, subcontractor, or agent or representative thereof is that an accurate record be kept of the names, occupations, and actual wages paid to each laborer, workman, and mechanic employed by him, and that access to this record be available at any reasonable hour to the public officer or his representative authorized under the act to inspect the same. There is no uncertainty in the duties thus imposed, and an offense against the statute in this regard is clearly defined. There is no efficacy in the contention that the terms of the act relating to criminal liability and penalties are so vague that men of common intelligence must necessarily guess at their meaning and differ as to their application. The petitioner places its main reliance in this connection upon the cases of Connally v. General Construction Co., 269 U. S. 385, 46 S. Ct. 126, 128, 70 L. Ed. 322; State v. Garfield Building Co. (Ariz.) 3 P.(2d) 983, and Mayhew v. Nelson, 346 Ill. 381, 178 N. E. 921. The Connally Case involved the validity of a statute of Oklahoma which provided that laborers, workmen, mechanics, etc., on public work should be paid "not less than the current rate of per diem wages in the locality in which the work is performed." The duty was placed upon the contractor to determine, at the risk of incurring criminal liability and cumulative penalties, both the current rate of wages and the locality in which the work was to be performed. On the record in that case it was disclosed that wages in differing amounts were being paid by contractors for the same kind or class of work in the vicinity of the town of Cleveland, where the work was performed. It was held that the statute presented a double uncertainty, first as to what was the "current rate of wages," and secondly as to the "locality" in which the work was to be performed. To quote the language of the Supreme Court of the United States: "The words 'current rate of wages' do not denote a specific or definite sum, but minimum, maximum, and intermediate amounts, indeterminately, varying from time to time and dependent upon the class and kind of work done, the efficiency of the workmen, etc., as the bill alleges is the case in respect of the territory surrounding the bridges under construction. The statutory phrase reasonably cannot be confined to any of these amounts, since it imports each and all of them. The 'current rate of wages' is not simple, but progressive—from so much (the minimum) to so much (the maximum), including all between; and to direct the payment of an amount which shall not be less than one of several different amounts, without saying which, is to leave the question of what is meant incapable of any definite answer. * * * To construe the phrase 'current rate of wages' as meaning either the lowest rate or the highest rate, or any intermediate rate, or, if it were possible to determine the various factors to be considered, an average of all rates, would be as likely to defeat the purpose of the Legislature as to promote it." The court also held that the word "locality" was too indefinite, elastic, and uncertain to satisfy the requirements of a criminal statute.

The case of State v. Garfield Building Co. (Ariz.) 3 P.(2d) 983, 984, involved the validity of a criminal statute of Arizona providing that "not less than the current rate of per diem wages in the locality where the work is performed shall be paid to persons doing manual or mechanical labor so employed by or on behalf of the state or of any of its political subdivisions." The county attorney of Pima county informed against a contractor engaged in the construction and alteration of a public school building on account of his failure and refusal to pay his employees the current rate of wages. The Supreme Court of Arizona followed the ruling in the Connally Case and declared the statute unconstitutional on the ground that it was too indefinite and uncertain in its terms to impose a criminal liability on the contractor bound under its terms to determine himself what the current rate of wages was.

In the case of Mayhew v. Nelson, 346 Ill. 381, 178 N. E. 921, an Illinois statute, effective July 1, 1931, and purporting to regulate the wages of mechanics and laborers employed under contracts for public works, was attacked by a taxpayer who sought to enjoin the execution of a state highway improvement contract on the ground that the statute was vague and uncertain in its terms, incomplete and defective in its provisions, lacking in the means of enforcement, and therefore invalid; also that it delegated absolute or unlimited and arbitrary power to administrative officers and boards, and numerous other grounds not necessary to be noted. The statute is set forth in full in the opinion and is strikingly similar to the California statute in two respects: First, in that every contract in which the state or any political subdivision thereof is a party, with reference to the performance of public work, shall contain a provision that not less than the prevailing rate of wages for work of a similar nature in the city, town, village, or other civil division of the state in which the public work is located, shall be paid to the laborers and mechanics employed on said work by the contractor or the subcontractor, and that the prevailing rate of wages shall be inserted in the advertisement for bids; and, secondly, that the prevailing rate of wages shall be determined by the public body in the case of any contract let. Provision is then made for objection by the taxpayers to the wage schedule thus fixed and a determination of their complaint by the director of labor. An appeal to an appeal board from the determination of the director of labor is then provided for. The appeal board is composed of certain designated public officials and the president of the largest federated body of organized labor in the state, designated by the director of labor. The finding of the appeal board is made "subject to a review by the courts as justice may require." The statute was held invalid on the ground that it prescribed no test or standard by which the prevailing rate of wages in a particular jurisdiction may be ascertained; that no guide is offered by which wage rates may be determined when the work contemplated extends from one subdivision of the state into or through another, and that no mode or method is provided for the determination of appeals to the appeal board or for a review in the courts.

In the Connally Case and in the case of State v. Garfield Building Co., it is observed that the statutes therein involved imposed the duty on the contractor to determine at his peril the current rate of wages, and the locality in which the work was to be performed was not defined. In the California statute the prevailing rate of wages, which must be deemed the same as the current rate of wages, is determined by the public body awarding the contract, and the locality to be considered in fixing the rate of wages is also defined. The statute in the Mayhew Case provided, as here, that the public body awarding the contract should determine the rate and the "locality" was designated. The Illinois court based its decision on its own reasoning and cited as authority for its conclusion two cases in its own jurisdiction and the case of People ex rel. Rodgers v. Coler, 166 N. Y. 1, 59 N. E. 716, 52 L. R. A. 814, 82 Am. St. Rep. 605, without regard to the fact that the Coler Case was distinguished and not followed in the later case of Ryan v. City of New York, 177 N. Y. 271, 69 N. E. 599, where the New York statute, providing for the payment of "not less than the prevailing rate" of wages in the locality, was sustained. The majority of the court in the Coler Case held the statute invalid as an invasion of the constitutional rights of the city of New York and as a denial of the liberty of contract on the part of the contractors, and a denial of due process of law when the privilege of hiring labor on any terms obtainable was obstructed or withdrawn. The case was decided in 1901. In 1903 the question of the validity of a Kansas statute prescribing a limit of eight hours of labor per day on public contracts and requiring the payment of the current rate of wages on public work based on private work of a similar character came before the Supreme Court of the United States. In Atkin v. Kansas, 191 U. S. 207, 24 S. Ct. 124, 48 L. Ed. 148, is was decided that the statute was a valid exercise of the power of the state in providing the conditions under which it would permit its public work to be performed. In that case the court said, at page 222 of 191 U. S., 24 S. Ct. 124, 127: "It cannot be deemed a part of the liberty of any contractor that he be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the state." It is suggested by counsel that the eight-hour provision of the Kansas statute was the subject of most of the discussion in the opinion, but the "current rate of wages" provision was also involved and was not held invalid. It cannot be assumed that the statute would have been sustained in its entirety if the latter provision had been deemed invalid. The Ryan Case in New York then came on in 1904, in which the Court of Appeals followed the views expressed by the Supreme Court of the United States in the Atkin Case. Thereafter the Constitution of New York was amended in 1905 specifically to provide that the Legislature should have power to regulate and fix the wages and hours of labor on public work. This amendment appears to have been necessary in order to meet and overcome the effect of the holding of the Court of Appeals in the Ryan Case that the city of New York was immune from the requirements of the statute. The prevailing wage law and the effect upon it of the constitutional amendment again came before the Court of Appeals in 1927 (Campbell v. New York City, 244 N. Y. 317, 155 N. E. 628, reported and annotated in 50 A. L. R. 1473), and the law was upheld as applicable to the city as well as the city's contractors by reason of the constitutional amendment. Notwithstanding the fact that the prevailing wage law of New York (Consol. Laws, c. 31, § 220) provided that the contract for the public work should provide that the contractor should pay the prevailing wage without a predetermination by public authority of the amount thereof, and that a violation of the statute should be a misdemeanor, the court in the Campbell Case (an injunction suit) concluded that a civil liability might attach even though the Connally Case might stand in the way of a criminal prosecution. The New York prevailing wage statute was approved in Long Island R. Co. v. Department of Labor of State of N. Y. (1931) 256 N. Y. 498, 177 N. E. 17. Here we suffer no embarrassment by reason of the claim of uncertainty in the criminal phases of the California statute for the reason that the violations of the act which are made a misdemeanor are definite, certain, and unambiguous.

The doctrine of the later New York cases has been followed and approved in the state of Washington (Malette v. City of Spokane, 77 Wash. 205, 137 P. 496, 51 L. R. A. (N. S.) 686, Ann Cas. 1915D, 225), Wisconsin (Wagner v. City of Milwaukee, 180 Wis. 640, 192 N. W. 994; writ of error dismissed for want of jurisdiction, 266 U. S. 585, 45 S. Ct. 124, 69 L. Ed. 454), and Maryland (Sweeten v. State, 122 Md. 634, 90 A. 180; Elkan v. State, 122 Md. 642, 90 A. 183, affirmed in 239 U. S. 634, 36 S. Ct. 221, 60 L. Ed. 478, on the authority of Atkin v. Kansas, 191 U. S. 207, 24 S. Ct. 124, 48 L. Ed. 148; Ruark v. International Union, 157 Md. 576, 146 A. 797).

A review of the many authorities cited by counsel for the parties and by amici curiæ, too numerous to be commented upon, discloses that the great weight of authority and the distinct trend of recent judicial decision is in favor of the constitutionality of prevailing wage laws as applied to public work. The Atkin Case has never been expressly overruled by the Supreme Court of the United States. It was not referred to in the Connally Case; the latter case is not applicable to the case at bar for the reason that here we are not confronted with any uncertainty as to the nature or character of the particular offense that is declared to be a crime. The Arizona case (State v. Garfield Building Co., supra) is not applicable for the same reason. The Illinois case (Mayhew v. Nelson, supra) did not discuss or notice the more recent decisions upholding prevailing wage statutes. No doubt it was correctly decided, for there is in that statute a provision not found in our own, an unlawful delegation of authority to determine the current wage by a board composed in part by one not a public officer; and the reference by the court to the Coler Case in New York was in reliance upon a case in that state which had long since been repudiated by its highest court.

But, say counsel, what is a prevailing wage? No court has attempted, and properly so, to fix one in a definite amount. Precise definition of the term for all time and place is impossible. The Supreme Court of the United States has pointed out the difficulties of definition and held it too indefinite in a criminal prosecution. Other courts have indicated perhaps a workable definition as a matter of business administration. Its definition is relation to time and place, both of which are within the preview and cognizance of the administration board in each case. In the Ruark Case, 157 Md. 576, 146 A. 797, at page 801, the Court of Appeals of Maryland said: "The clause, 'the current rate of per diem wages in the locality where the work is performed,' may therefore be held to mean the charge for or valuation of the daily toil of a laborer, workman, or mechanic, as the case may be, at a given labor, according to a scale or standard of money compensation then generally received or established by common consent or estimation throughout an area which includes, not only the actual site where the public work is to be performed, but also such adjoining territory within which the compensation does prevail. The construction adopted will assure the fulfillment of the legislative intention without being violative of any constitutional right or rule of law. In short, labor has its market value. [Citing cases.] The determination of this value is a familiar problem in a suit on a quantum meruit for work and labor; and its solution is by testimony establishing the usual price paid for like services at the time and place of performance. * * * It is common knowledge that every contractor undertakes a public work upon the basis of the then cost of labor at the place of performance. The labor cost is usually the principal item of construction. So it is not unreasonable to impute to a contractor the knowledge which the nature of his business and its prosecution, required him to possess, or which might have been obtained by reasonable investigation."

In the Campbell Case, 244 N. Y. 317, 155 N. E. 628, 631, 50 A. L. R. 1473, the Court of Appeals of New York said: "This is not the time to attempt a definition of 'the prevailing rate of wages' with its background of legislative history and 20 years or more of practical construction. One finds it hard to believe that a cliche so inveterate is devoid of meaning altogether. Learned judges have said (citing Haight, J., in the Coler Case), that it is synonymous with market rate. This might not exclude altogether the possibility of fluctuations and diversities at a given day and place. There can be little doubt that it would furnish us with criteria of conduct adequate for civil, if not for criminal, liability." In Morse v. Delaney, 128 Misc. Rep. 317, 218 N. Y. S. 571, 576, after reviewing certain cases on the subject, the court concluded: "We thus have a range of opinion, which, while varying in expression, substantially points, with but one exception, to an interpretation of the 'prevailing rate' as the 'fair market rate.'" It is for the board of directors to ascertain that value as it would the value of any other services of which the district might be in need. When it has done so, that which may have been subject to variation has become definite by the action of constituted authority.

[5] The contention that the phrase "work of a similar character" is too vague to permit definition would seem to be without substantial merit. The character of the work to be performed on the proposed road or on any of the construction work to be done by the district in carrying out the object of its creation would not appear to be so extraordinary as not to permit a ready classification of the employees by resort to means of common knowledge and experience in this state. The law was intended for the benefit of the great body of laborers and mechanics to be employed on the job. There would seem to be no difficulty in classifying such employees as blacksmiths, bricklayers, carpenters, concrete mixer operators, crane operators, hod carriers, iron workers—structural, reinforcing, and ornamental—laborers, lathers, marble workers, mechanics, painters, pile driver men, plasterers, powder men, traction operators, truck drivers,

teamsters, etc. The mention of the foregoing does not, of course, exclude others, but the classification would necessarily include those workers who, by common experience, are numerous enough that a prevailing wage may be applied to them. Just why the phrase is too vague is not specifically pointed out. The fact that the phrase is used in most of the statutes which have come to our attention and been complied with without the necessity of judicial decision on the subject is persuasive that it is not subject to the objection raised.

[6] Nor do we find the phrase "locality in which the work is performed" to be so uncertain as to justify noncompliance with the act. As applicable to the petitioner it must be conceded that the definition is somewhat ambiguous. As so applicable it is defined to be the city and county, county, or counties in which the improvement is to be constructed in all cases in which the contract is awarded by the state, or any public body thereof, and the limits of any city, county, city and county, city, town, township, district, or other political subdivision on whose behalf the contract is awarded in all other cases. It is at once apparent that the petitioner is a public body of the state as indicated in the first portion of the definition, and it is also a district as indicated in the latter portion. The intention is plain to fix the locality where the work is to be performed. When the work is to be done partly in city and partly in county territory, or in adjoining cities or in different counties, administration of the act in this respect may become complicated and of difficult performance, but if it can be done with reasonable certainty no judicial question is presented. It is a burden placed upon the petition by the authority of its creation which is all embracing and all powerful in its exactions, subject only to constitutional restraints.

[7,8] The next point made in support of the petition is that the burden imposed by the statute on the petitioner is in violation of section 12 of article 11 of the Constitution which provides that: "The Legislature shall have no power to impose taxes upon counties, cities, towns or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes." It is argued that "the burden of increased cost of the public works of such district, which is bound to be caused by compliance with the prevailing wage act, is the imposition of a tax on the inhabitants and property of the district and is expressly prohibited by this section of the Constitution." The difficulty with the argument is that it assumes that the burden imposed by the statute is a tax. If it is not, the argument necessarily fails. In our opinion the burden imposed by the statute is not a tax as contemplated by the Constitution. It is essentially a minimum wage law. When the schedule of wages is determined, not less than the amounts specified therein may be paid to employees on the work. The act provides that nothing therein shall be construed to prohibit the payment to any employee on the public work more than the prevailing rate.

Minimum wage statutes applicable to public work have been uniformly upheld on the theory that the state as the employer having full control of the terms and conditions under which it will contract may, through its Legislatures, and within constitutional limits, provide the wage which shall be paid to its employees and that the payment of a less sum shall be unlawful. In 1897, the Legislature of the state enacted a statute prescribing $2 per day as a minimum wage to be paid for labor on public works. St. 1897, p. 90. This wage may or may not have been more than the prevailing wage for labor in similar employment of that day. Apparently the validity of that statute has never been questioned, and the act was repealed in 1931. St. 1931, p. 909. Under all of the authorities cited, or which have come to our notice, it is uniformly held that the Legislature itself, unless constitutionally restrained, may fix in a definite amount the minimum wage for labor on public work. Whether it may delegate authority to fix such wage to a subordinate public body subject to its control will be considered. The fact that the minimum wage prescribed, whether by the Legislature itself or by a public body under its direction, may increase the cost of the work, is not sufficient to characterize the exaction a tax within the meaning of the Constitution. Rather, it is one of the terms and conditions upon which the Legislature, exercising its lawful power, has seen fit to impose on one of its subordinate creatures, and the fact that compliance therewith may increase the cost of the work is not a matter of which the district may complain. The same argument has been advanced in attacks upon public work eight-hour laws, but such contentions have been set at rest since the decision in Atkin v. Kansas, 191 U. S. 207, 24 S. Ct. 124, 48 L. Ed. 148. Minimum wage statutes on public work have been upheld in New York, Iowa, Washington, Colorado, Oklahoma, Maryland, and Wisconsin and have been sustained by the highest court in the land. The power of the state in this respect was recognized by the Supreme Court of Arizona and the Supreme Court of Illinois did not deny it. The controversies that have arisen were focused on the method of prescribing them rather than on the power to enact them.

[9, 10] We now pass to the contention that the statute unlawfully delegates legislative power to the board of directors of the district. The petitioner concedes that the object to be accomplished may be directed by the Legislature to be carried into effect by subordinate officers and bodies having better opportunities for accomplishing the object, or doing the thing understandingly, and that the Legislature may delegate the power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend; but it is contended that the statute under attack in effect attempts to delegate to the board of directors the power to make the law, which involves a discretion as to what the law shall be, as distinguished from the power to exercise a discretion under and in pursuance of the law. It is argued that power to do the former may not, but power to do the latter may, be delegated. Abstractly, the distinction drawn by counsel is correct. The question is, Has the statute delegated to the board power to make law? When we look to the act creating the petitioner, we find very broad powers conferred on the board of directors. The board is granted the power among other things to make and pass ordinances, resolutions, and orders not repugnant to the State and Federal Constitutions, or the provisions of the act, and is specially granted the power to establish and fix the powers and duties and compensation of the officers and employees of the district. Unless the power thus granted to fix the salary or wages of its own employees is an unlawful delegation of power to the board, and we do not intimate that it is, or that it would be conceded by the petitioner to be unlawful, the power granted by the statute under attack to fix a minimum wage for the employees of contractors with the district would not be an unlawful delegation. The difficulty urged is one of administration, that is, in fixing the minimum. While it would be within the power of the Legislature to fix in the statute a minimum in dollars and cents for the various classes of employees on public work, it would be manifestly impracticable thus to establish a scale of wages which would be fair to the state and its agencies and also to the employees affected and to remain inflexible over a period of years. If the power of the Legislature to delegate the determination of this and the many other problems of administration to subordinate bodies be denied, public work might be unreasonably curtailed or brought to a standstill. Mutual Film Corp. v. Industrial Commission, 236 U. S. 230, 35 S. Ct. 387, 59 L. Ed. 552, Ann. Cas. 1916C, 296.

It is unnecessary to cite cases to the effect that it has become a firmly established rule of law that a large measure of discretion may be delegated to administrative officers and boards. Here the determination of the board of directors is made final. This does not mean that the action of the board may be arbitrary or capricious, but the proper administration of the statute will be presumed. Difficulties in such administration are presented by way of argument, but they do not present judicial questions. It is frankly conceded by counsel for the petitioner that, because the law is difficult of application and might in some circumstances work hardship, it is not, of necessity, invalid. Whatever difficulties confront the petitioner in the application of the law have been imposed upon it by the Legislature, the power of its creation. It is not for the courts to say that the Legislature should not have so acted in a matter of so great concern. In this connection we quote the language of Mr. Justice Harlan, speaking for the court in the Atkin Case, 191 U. S. 207, at page 223, 24 S. Ct. 124, 128, 48 L. Ed. 148: "So, also, if it be said that a statute like the one before us is mischievous in its tendencies, the answer is that the responsibility therefor rests upon legislators, not upon the courts. No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and, upon grounds merely of justice or reason or wisdom, annul statutes that had received the sanction of the people's representatives. We are reminded by counsel that it is the solemn duty of the courts in cases before them to guard the constitutional rights of the citizen against merely arbitrary power. That is unquestionably true. But it is equally true—indeed, the public interests imperatively demand—that Legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution." If the statute under attack in its operation shall become too burdensome upon public agencies over which the statute is controlling, the remedy is at the hands of the Legislature and not through the courts.

The peremptory writ is denied.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.; TYLER, Justice pro tem.

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GILLETTE et al. v. GILLETTE et al.

Civ. 4554.

District Court of Appeal, Third District, California.

April 18, 1932.

1. Action ⚷6.

Statutes providing declaratory relief *held* not to authorize jurisdiction to approve account and to fix compensation of trustees of express "private trust," where no actual controversy exists (Code Civ. Proc. § 1060).

> "Private trusts" are those created by some written instrument, deed, or will, or in some trusts of personal property by a mere oral declaration without any writing for the benefit of certain and designated individuals, in which the cestui que trust, or beneficiary, is a known and certain person or class of persons.
>
> [Ed. Note.—For other definitions of "Private Trusts," see Words and Phrases.]

2. Trusts ⚷178.

Petition to approve account and fix compensation of trustees of express private trust *held* not "special proceeding" authorizing court to instruct trustees similar to manner provided in Probate Code in respect of trusts created by will (Probate Code, § 1120; Code Civ. Proc. §§ 22, 23).

> "Special proceeding" is a mere generic term to designate character of all civil remedies which are not included within the ordinary characterization of actions. In the absence of statutory provisions authorizing "special proceedings," the mere fact that a private transaction does not involve the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense, does not necessarily constitute it a "special proceeding" over which a court may exercise jurisdiction.
>
> [Ed. Note.—For other definitions of "Special Proceeding," see Words and Phrases.]

3. Action ⚷6.

Superior court *held* without jurisdiction to approve account and fix compensation of trustees of an express private trust where no actual controversy exists.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Proceeding by King C. Gillette and Edwin B. Root, trustees, under that certain trust known as Fanny Gillette Stevens Trust, against Hedvig Gillette and others. From judgment for defendants, plaintiffs appeal.

Affirmed.

Conant Wait and Vernon Bettin, both of Los Angeles, for appellants.

Loeb, Walker & Loeb, and Earle M. Daniels, all of Los Angeles, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from a judgment which was rendered pursuant to an order sustaining a demurrer without leave to amend, on the ground that the court is without jurisdiction to approve an accounting in a private trust. The action is based upon a voluntary accounting of an express private trust which was created by a written declaration thereof. The sole object of this accounting appears to have been to secure an order of the chancellor compensating the trustees and their attorneys for services performed in the execution of the trust.

The petition alleges that King C. Gillette and Edwin B. Root are the duly appointed trustees who were designated in a written declaration of trust, the essential terms of which are recited; that the fund is termed the "Fanny Gillette Stevens Trust"; that as such trustees, they were possessed of certain stock of the Gillette Safety Razor Company, together with the dividends and income accruing therefrom, having full power to sell and convey the same and to reinvest in other securities according to their best judgment; that they were authorized to pay all taxes, assessments, and "expenses of the management of the trust"; that they were directed to distribute monthly to four named beneficiaries during their natural lifetime specified portions of the net income and profits derived from the securities, and at the death of the beneficiaries they were to transfer to their representatives designated portions of the remaining principal sum of the trust fund; that on January 1, 1929, there remained in this fund the sum of $2,480,758.08; that one of the beneficiaries died leaving surviving him certain heirs, including one minor child. A complete verified and detailed schedule of accounts for the year 1929 was attached to the petition. It is alleged the declaration of trust fails to specify the amount of compensation which the trustees may retain for services performed. The petition prays for an order of court approving the account and fixing the compensation of the trustees and their attorneys for services rendered on account of the trust estate. No controversy between the interested parties regarding the account or the compensation is alleged.

Separate demurrers to this petition were filed in behalf of the various beneficiaries, challenging the jurisdiction of the court to settle the accounting of this private trust on the ground that it appears there is no controversy or dispute regarding the trust estate or the accounting thereof. These demurrers were properly sustained without leave to amend. A judgment was rendered accordingly, from which this appeal was perfected.

The trust which is involved in this proceeding is an express private trust which was created by a duly executed written instrument. "Private trusts" are defined as "those created by some written instrument, deed or will, or in some trusts of personal property by a mere verbal declaration without any writing, for the benefit of certain and designated individuals, in which the cestui que trust, or 'beneficiary' is a known and certain person or class of persons." 1 Pomeroy's Eq. Jur. (9th Ed.) 185, § 152.

[1] Section 1060 of the Code of Civil Procedure with relation to declaratory relief furnishes no authority for the maintenance of the present proceeding. That section provides in part: "Any person interested under a deed, will or other written instrument * * * may, *in cases of actual controversy* relating to the legal rights and duties of the respective parties, bring an action in the superior court for a declaration of his rights. * * *"

The petition in this case does not present any actual controversy relating to the legal rights and duties of the parties involved in the trust. Jurisdiction is therefore not conferred upon the court by this proceeding for declaratory relief under the provisions of section 1060, supra. No declaratory relief may be awarded where no controversy exists and when no one complains regarding the construction of a document.

[2, 3] It is asserted the petition herein constitutes a special proceeding authorizing the court to instruct the trustees regarding the administration of their trust similar to the manner provided by section 1120 of the Probate Code. We are not in accord with this theory. Jurisdiction is specifically conferred upon the probate court by the provisions of section 1120, supra, to render "instructions as to the administration of the trust" which is created by will, when the trust survives the distribution of the probating of the estate. It is there said: "When a trust created by a will continues after distribution, the superior court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction for the purpose of determining to whom the property shall pass and be delivered upon final or partial termination of the trust, to the extent that such determination is not concluded by the decree of distribution, of settling the accounts and passing upon the acts of the trustee."

In the present case the trust was not created by will.

The phrase "special proceeding" is a mere generic term to designate the character of all civil remedies which are not included within the ordinary characterization of actions. Sections 22, 23, Code Civ. Proc.; Words and Phrases, First Series, vol. 7, 6587; In re Central Irrigation Dist., 117 Cal. 382, 387, 49 P. 354; In re Herman, 183 Cal. 153, 156, 191 P. 934. Jurisdiction in special proceedings is generally conferred by statute. Part III of the Code of Civil Procedure authorizes the maintenance of certain special proceedings. Among others which are thus provided for are the contest of elections, the dissolution of copartnerships, a change of names, the operation of sole traders, and the establishment of official newspapers of general circulation. In the absence of statutory provisions authorizing special proceedings, the mere fact that a private transaction does not involve "the enforcement or protection of a right, the redress or prevention of a wrong or the punishment of a public offense," does not necessarily constitute it a special proceeding over which a court may exercise jurisdiction. If this were true our courts would be overwhelmed with a multitude of duties such as adjusting private accounts and furnishing advice upon law and facts where no controversy exists. No principle is better established than that courts are without jurisdiction and will refuse to determine mere abstract moot questions which involve no real or substantial controversy. In 39 Cyc., at page 316, it is said: "Except where an intention of the settlor that the execution of the trust shall be under the supervisory control of the court is manifest in the instrument creating the trust, will it, of its own motion, or at the instance of interested parties, interfere with the performance of his duties by the trustee, and the exercise of the discretionary powers conferred upon him, unless there is shown bad faith on his part, or a gross and arbitrary abuse of discretion, or a complete refusal to act in the premises."

In the latter portion of section 104 of 21 Corpus Juris, at page 130, it is said: "The trustee has no right to come into a court of equity without some reasonable ground therefor, and a case must be presented where the action of the court is invoked as distinguished from an abstract opinion."

In the present case, since there is no dispute between the trustees and the beneficiaries concerning the account which they rendered or respecting the amount of their compensation, we must assume the interested parties will have no difficulty agreeing upon a settlement of the affair. If the court is required to determine the compensation of the trustees in the present case when no controversy exists, a multitude of moot questions may overwhelm our courts. The case of Collier v. Lindley, 203 Cal. 641, 266 P. 526, presents a situation similar to the one which is involved in this proceeding. In that case Haynes and his wife created a charitable trust by a written declaration under the name of "The John Randolph and Dora Haynes Foundation." Paragraph 16 of the trust document contained this language: "In the event that this instrument does not create a valid, charitable trust * * * the sum of $500 out of the corpus of the estate shall belong to, and be forthwith paid to, John Collier."

Collier instituted proceedings under the provisions of section 1138 of the Code of Civil Procedure to construe the document on the theory that it contained "a question in difference" affecting the validity of the instrument. The court said: "The provision for the payment to him of the sum of $500 conditioned upon said trust or some portion thereof being invalid is nothing more nor less than a thinly veiled attempt to engage the attention and compel the labors of the several courts of record of this state in order to effectuate a judicial determination of the validity or invalidity of said trust at once and in advance of any real contest or controversy between the parties in interest. * * * We hold it to be in plain violation of the spirit and intent * * * of the general principle that courts should only be employed in the adjudication of actual as distinguished from moot questions and controversies when these are brought before them in the regular and orderly course of litigation by those parties only who are directly interested in their adjudication."

In that case, however, the court assumed jurisdiction for the sole reason that the charitable trust involved a matter of public interest. No such public interest is involved in the present action. This proceeding involves only a private transaction where no controversy or dispute exists. The foregoing language of the Supreme Court is therefore pertinent and controlling.

If a court of equity has jurisdiction to settle a trustee's account and allow compensation for his services, it may be required to supervise and control all of the acts of the trustee irrespective of the absence of controversy. These are not among the duties imposed upon courts.

In the case of Murphy v. Union Trust Company, 5 Cal. App. 146, 89 P. 988, it was held a court had no jurisdiction to confirm the sale of real estate which was made under a delegation of authority contained in a declaration of trust.

There appears to be nothing in the authorities which are cited by the appellant in conflict with the foregoing conclusion that in the absence of controversy a court of equity has no jurisdiction to settle accounts or fix compensation of a trustee who is given full power to act under an express private trust which is not associated with the terms of a will in the process of probating the instrument. In the New York cases cited by appellant it appears the statute of that state specifically authorizes the maintenance of such an action for the accounting of a trustee. This may be true in other jurisdictions. California has no such statute. The appellant has incompletely quoted from 26 Ruling Case Law 1372, § 233. The omitted portion of that section enables us to reconcile that text with the foregoing conclusions. It reads in part: "A court of chancery has power to direct and control the manner of the execution of an active trust, and there can be no doubt of the general power and authority of a court of chancery to entertain jurisdiction of cases in which trustees ask for protection and guidance in the performance of their duties. *But the cases which fall under this head of equity are those in which there are conflicting claims to the trust estate* * * *."

In the case of Megginson v. Turner, 6 Cal. Unrep. Cas. 208, 55 P. 795, 796, the court says: "There was no occasion for an accounting, as defendant did not allege or claim that plaintiff had disposed of any of the property or converted any of it to his own use or benefit."

In Buchner v. Wait (Tex. Civ. App.) 137 S. W. 383, 388, the court says: "The petition shows no necessity for invoking the equity powers of the court to require an accounting by the trustee, nor does it show any matters in dispute between the parties. * * * It is expressly alleged in the petition that the trustee has rendered an account to the plaintiffs, and the correctness of that account is not questioned, and there is no issue between the parties as to their respective interests in the estate."

We are persuaded the superior court was without jurisdiction to settle the account or award compensation for services of the trustees or their attorneys in the present proceeding, and that the demurrers were therefore properly sustained without leave to amend.

The judgment is affirmed.

We concur: PRESTON, P. J.; PLUMMER, J.

122 Cal.App. 732

DU ROSS et al. v. TRAINOR.

Civ. 4550.

District Court of Appeal, Third District, California.

April 20, 1932.

1. **Pleading** ⚷36(5).

Allegation in complaint identifying property referred to in agreement on which action was based, not denied in answer, is deemed true.

2. **Injunction** ⚷128.

In action to enjoin occupancy of real property by negro, evidence *held* to show that adjoining lot had been owned and occupied by colored people for 15 years.

3. **Injunction** ⚷128.

Finding that certain lots were covered by restrictions against occupancy by negroes *held* not supported, where based solely on oral testimony.

4. **Injunction** ⚷128.

In action to enjoin occupancy of premises by negro, evidence showed negro was not personally notified that property was restricted against occupancy of other than Caucasians.

5. **Vendor and purchaser** ⚷231(15).

Record of instrument acknowledged by two of 23 signers constituted constructive notice of its execution by such two only (Civ. Code, § 1161).

> Civ. Code, § 1161, provides that, before an instrument can be recorded, its execution must be acknowledged by the person executing it.

6. **Vendor and purchaser** ⚷231(13).

Deed of conveyance cannot be held to give grantee notice of contents of any instrument not entitled to record (Civ. Code, § 1161).

Appeal from Superior Court, Los Angeles County; C. P. Vicini, Judge.

Action by Neil Du Ross and others against Sally Trainor. From an adverse judgment, defendant appeals.

Reversed.

Leland J. Allen and Hugh E. Macbeth, both of Los Angeles, for appellant.

Victor L. Bentson, of Los Angeles, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

A judgment was issued in this cause whereby the defendant was "enjoined, restrained and prohibited from entering, using or occupying Lot 10, Block 3 of the Oswald Home Tract, a Subdivision of the City of Los Angeles, County of Los Angeles, State of California, otherwise known as and called '160 E. 45th Street, of the City of Los Angeles', until March 16, 2025." From this judgment the defendant appeals.

The action is based upon a certain writing introduced in evidence, whereby the plaintiffs and others, owners of lots and parcels of land situate in the Oswald Home tract, and other named tracts, being additions to the city of Los Angeles, in which writing it was set forth that the parties thereto covenanted, one with the other: "1. That no part or portion of any of the real estate hereinafter set forth shall be leased or rented to any person or persons other than of the White or Caucasian race, for a period of 99 years. 2. That no part or portion of any of the real estate described shall be used or occupied, or permitted to be used or occupied, by any person other than of the White or Caucasian race."

Prior to the beginning of this action, the record shows that the defendant had been the owner and an occupant of lot 10 in block 3 of the Oswald Home tract for a period of about 28 months, and that lot 11, adjoining lot 10, had been owned and occupied by a member of the colored race for more than 15 years. The lots mentioned in the agreement to which we have referred do not constitute a solid mass, and are separated by unrestricted lots, and also include lots in other than block 3.

Upon this appeal it is contended that the agreement referred to does not sufficiently identify the property, in that there is no statement of the county, city, or state in which the respective lots are situate; that it does not restrict a solid mass or block of lots, but attempts to restrict for 99 years lots interspersed with unrestricted lots; that the agreement contains no date and no phrase stating or indicating when the 99 years begins or when it ends. The contention is also made that the agreement was not properly acknowledged so as to entitle it to be recorded.

It is further contended that the provisions of the agreement are unconstitutional and void, as being contrary to the provisions of the Federal Constitution, in that it attempts to prevent a negro citizen of the United States from occupying and using land of which such person is the owner. A considerable portion of the appellant's brief is made up of argument and citation of authorities in support of this contention. From the views hereinafter set forth, it is unnecessary for us to express an opinion upon this question.

As to the contention that the agreement fails to state a time for the beginning of the 99-year period, or a date for its ending, it must be admitted that there is nothing in the agreement or writing set forth in the transcript indicating either the time for the beginning or the ending of the 99-year period. The court adopted the date of the recording of the writing as the date for the beginning of the 99-year period. As between the parties, we do not very well perceive any basis for the adoption of the date of recording of the writing, for the beginning of the 99-year period. If it began at all, it began at the time of the signing of the instrument, if the instrument itself is valid. But from the views hereinafter expressed it is unnecessary to pass upon the question whether the failure of the parties signing the agreement to fix a time for the beginning of the 99-year period renders it ineffective.

[1] As to the property involved in this action, the description is contained in one line, and reads as follows: "Martha M. Young, 160 E. 45 St., Lot 10, Block 3. Oswald Tr." Other lots referred to in the agreement are similarly described. No city, no map of any city, no county, and no state are mentioned to locate the lot referred to. The complaint in the action, however, alleges that the property referred to in the writing is situate in the city and county of Los Angeles, and is not denied in the answer. This being true, we need not give further attention to the indefinite description of the property involved.

If the agreement set out in the transcript were otherwise binding upon the defendant, the first restriction set forth therein would necessarily have to be held void by reason of it being in violation of the statute restraining alienation. This has been definitely determined in the case of Title Guarantee & Trust Co. v. Garrott, 42 Cal. App. 152, 183 P. 470, and the cases following the holding had therein. The only question that would otherwise be left for our consideration would be the distinction drawn in the case of Wayt v. Patee, 205 Cal. 46, 269 P. 660, between conditions in restraint of alienation and conditions in restraint of occupancy. However, we need not follow the argument of the appellant or the reasons set forth why in this case restraint against occupancy should be held void the same as restraint against alienation as from what we are about to say there is nothing in the agreement binding upon the appellant.

The court found in finding No. 5 that the agreement signed by the plaintiffs and other landowners was properly recorded in the office of the county recorder of Los Angeles county, prior to the purchase of lot 10 in block 3 by the defendant, and that the defendant had constructive notice thereof. The court also found that the appellant was personally notified that said lot was restricted against the occupancy of other than Caucasians. This finding is challenged by the appellant, and we think is well taken. The court also found that all of the property immediately adjacent to, and surrounding lot 10, except lot 11, in block 3, of the Oswald Home tract, is restricted against the use or occupancy of non-Caucasians. It suffices to say that this finding is not supported by the testimony. The agreement mentions only lots 6, 7, 8, 9, 10, and 12, of block 3. The transcript shows that there are 22 lots in the block.

[2-4] The court also found that lot 11 in block 3 of the Oswald Home tract had not been owned or occupied by colored people for the 15 years preceding the beginning of this action. This finding is contrary to the undisputed evidence. The testimony of a witness by the name of Allen shows that lot 11 in block 3 has been owned and occupied by colored people ever since some time during the year 1913, and this testimony is wholly uncontradicted. This finding, however, in and of itself, we would not think material, nor do we consider the fact that a number of lots in block 3 are not shown to be restricted. In this particular we may state that oral testimony was admitted over the objection of the appellant that many of the other lots in block 3 were restricted; but no attempt was made to introduce any agreements showing such restrictions. Consequently, any conclusion that such lots were covered by restrictions is not supported by competent testimony. The vital defect as shown by the record in this cause is in that the agreement signed by the respective lot owners was not entitled to record, and there is no pretense that the contents of the agreement was brought home to the appellant prior to her purchase of the property. All that appears in the record is that a witness by the name of Du Ross testified that, about the time the appellant was negotiating for the purchase of the lot, he told her it was restricted against the use of any but people of the Caucasian race. No intimation was given that any such agreement had been entered into, or that any such agreement was of record in the recorder's office nor was any explanation made to her of its contents.

The record shows the agreement bears the names of twenty-three persons, only two of whom acknowledged the same. Neither one of these persons stands in the line of grantor to the appellant. After the names of the twenty-three persons had been affixed to the agreement, it appears that one Neil Du Ross went before a notary public and purported to acknowledge the same. The certificate of the notary is as follows: "State of California, County of Los Angeles. On this 16th day of March, A. D. 1926, before me, F. C. Watson, a notary public in and for the County and State, residing therein, duly commissioned and sworn, personally appeared Neil Du Ross, witness to all of the signatures herein signed, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same. In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written. (Signed): E. C. Watson, Notary Public," etc. There is not one word of actual proof of the signing of the agreement by the persons therein named.

Section 1161, Civil Code, provides that in such cases, in order to entitle the instrument to record, there must be proof that the subscribing witnesses actually signed the same. Du Ross was one of the signers, and therefore his acknowledgment that he executed the instrument binds only himself, and goes no further. Meeting this objection, the respondent calls our attention to the amendment of section 1207, Civil Code, approved May 14, 1927 (St. 1927, p. 828), wherein it is provided that, where there is a defect in the execution of the instrument, or in the certificate of acknowledgment, or the absence of such certificate, and the instrument has been of record one year, notice is imparted to subsequent purchasers, etc. This amendment, however, did not take effect until after the transactions herein referred to had been consummated and the appellant had become the owner of lot 10 in block 3 of the Oswald Home tract. The section of the Civil Code as it stood prior to the amendment referred only to instruments defectively executed prior to the year 1921.

[5, 6] This court, in the case of Bell v. Sage, 60 Cal. App. 149, 212 P. 404, 406, in a case where an instrument had been recorded without proof or acknowledgment, held that constructive notice was not thereby given to subsequent purchasers, etc. The court likewise held that an effective execution or attestation by one grantor could not supply the lack of execution or attestation by another grantor, but that grantees of a grantor who had not acknowledged the instrument or whose signature had not been properly proved was not bound by the contents of the instrument. A hearing of this case was denied by the Supreme Court. The opinion prepared by Presiding Justice Finch is so complete and well fortified by authorities that we take therefrom the following excerpt and adopt it as the basis of this opinion: "Section 1161 of the Civil Code provides: 'Before an instrument can be recorded, * * * its execution must be acknowledged by the person executing it.' Of course, the singular includes the plural, and where there are several grantors the acknowledgment of one of them is effective only as to his own grant and not as to those of the other grantors, in the absence of special statutory provision, and the record thereof is constructive notice only of the conveyance of the one who made the acknowledgment. Webb on Record Titles, § 58. All of the decisions cited or discovered, with the exception of the early Massachusetts cases, support the rule as stated by the author. The statute of Illinois relating to chattel mortgages provides that 'such instruments shall be acknowledged before a justice of the peace or the county judge where the mortgagor resides.' In Snite v. Gehrke, 189 Ill. App. 382, the court held that 'where a chattel mortgage is not acknowledged by one of the mortgagors, it will not be effective as against the claim of a third party.' In People v. Donegan, 226 N. Y. 84, 123 N. E. 71, four persons executed a deed and all acknowledged it, but the acknowledgment of one of them was defective. The law provided that 'a conveyance may be recorded on being duly acknowledged by the person executing the same.' The court said: 'As to the grantor whose acknowledgment was defective, the record would not be notice to subsequent purchasers.' In Lancaster v. Flowers, 198 Pa. 614, 48 A. 896, it was held that 'a deed by W. and wife of his property, acknowledged by her, but not shown by it to have been acknowledged by him, is not good as against a subsequent purchaser for value, without notice.' In Hall v. Redson, 10 Mich. 21, in construing a statute requiring two witnesses to the execution of a deed to entitle it to record, the court said: 'We are all of opinion * * * that when a deed from several grantors is recorded, as to only a part of whom it is properly executed and witnessed, the record can only be evidence of the deed as to those parties by whom it has been properly executed, and whose execution of it has been duly witnessed, so as to entitle it to record had they been the only grantors named. In other words, a defective execution or attestation as to one grantor, cannot be aided by a perfect execution and attestation as to other parties. To hold otherwise would be to defeat the manifest object of the registry laws, and to open a wide door to fraud.' See, also, Bradley v. Walker, 60 N. Y. Super. Ct. 324, 17 N. Y. S. 383; Id., 138 N. Y. 291, 33 N. E. 1079; Coal Creek Min. Co. v. Heck, 15 Lea (Tenn.) 497; Duke v. Markham, 105 N. C. 131, 18 Am. St. Rep. 889, 10 S. E. 1017; and Sanders v. Pepoon, 4 Fla. 465." This case is supported by a like holding had in Keese v. Beardsley, 190 Cal. 465, 213 P. 500, 26 A. L. R. 1538. It necessarily follows that the court erred in admitting the agreement to which we have referred known as Plaintiff's Exhibit No. 2, in testimony, and also in holding that the instrument constituted constructive notice. Nor can the deed of conveyance under which the appellant claims be held to give notice of the contents of any instrument not entitled to record.

In view of the errors which we have just pointed out, it is unnecessary for us to consider the question presented and argued at length, that equity will not do a vain thing and uphold an injunction in a case where the circumstances show that the block or district involved is not wholly restricted in its occupation, to members of the Caucasian race; in other words, that it would be inequitable to uphold an agreement providing for restricting the occupation of certain lots in a block to the Caucasian race, while the occupancy of other lots in the same block is not so restricted. Nor do we need to answer the contention of the appellant that, if ownership is a constitutional right, occupancy is also a constitutional right. Nor need we further consider the contention that the 99 years mentioned in the writing admitted in evidence has neither beginning nor ending designated therein. Neither is it necessary for us to consider the fact that the appellant had, owned, and occupied lot 10 in block 3 for more than two years prior to the commencement of the action, and therefore the plaintiff should be held estopped by reason of laches, as what we have said heretofore is determinative of this case.

The judgment is reversed.

We concur: PRESTON, P. J.; R. L. THOMPSON, J.

122 Cal.App. 760

PEOPLE v. WILLISON.

Cr. 2160.

District Court of Appeal, Second District,

Division 1, California.

April 21, 1932.

Rehearing Denied May 2, 1932. Hearing Denied by Supreme Court May 19, 1932.

1. **Criminal law 🔑1202(6).**

Judgment on conviction of burglary and prior convictions *held* not erroneous in failing to fix punishment as habitual criminal (Pen. Code, §§ 644, 666, 1168).

2. **Indictment and information 🔑114.**

Prior conviction of petit larceny may be set up in information or indictment for burglary (Pen. Code, §§ 666, 667).

3. **Criminal law 🔑1202(7).**

Verdict of prior convictions, sustained by sufficient evidence, is conclusive as to certainty of defendant's identification as person previously convicted.

4. **Criminal law 🔑1119(1).**

Transcript *held* not to show that defendant was absent from court during part of examination of one witness.

> The transcript showed only that court requested defendant's counsel, during cross-examination of witness, to wait because defendant was not in court, stated that counsel dropped something on floor, and told him to proceed after defendant appeared.

5. **Criminal law 🔑139.**

Appellate court cannot take additional evidence of facts occurring after jury trial and make fact findings (Const. art. 6, § 4¾; Code Civ. Proc. § 956a).

Appeal from Superior Court, Los Angeles County; William T. Aggeler, Judge.

James J. Willison was convicted of burglary and prior convictions, and he appeals.

Affirmed.

James J. Willison, in pro. per.

U. S. Webb, Atty. Gen., and Frank Richards, Dep. Atty. Gen., for the People.

CONREY, P. J.

The defendant was convicted of burglary in two cases which were consolidated for trial. The informations charged certain prior convictions. Upon appeal to this court it was determined that the verdicts of conviction should be sustained, but that the defendant was entitled to a new trial upon the issues with respect to certain former convictions. Therefore, it was ordered that the order denying defendant's motion for a new trial, with respect to the alleged prior convictions in the superior court of the county of Sonoma, and in the superior court of the county of Alameda, and defendant's service of terms of imprisonment thereon, and as to those matters only, be reversed. It was directed that, upon completion of the disposal by new trial or otherwise of said issues relating to former convictions in the county of Alameda and in the county of Sonoma, the trial court pronounce and enter judgment as prescribed by law. People v. Willison (Cal. App.) 2 P.(2d) 543.

Thereafter, in due course, said issues thus sent back for trial were again tried in the superior court, and verdicts were returned finding that said charges of prior conviction and of service of terms of imprisonment therefor were true. Thereupon, the court pronounced judgment in accordance with the instructions given by this court in its decision of the former appeal. Appellant again moved for a new trial, which motion was denied, and he now appeals from the judgment and from the order denying the said motion for a new trial.

The grounds of appeal as set forth in the brief for appellant are as follows: (a) That the judgment is erroneous in failing to fix the punishment as an habitual criminal; (b) that the accused cannot be charged with the crime of prior conviction of "petit larceny with prior conviction," and that said prior conviction cannot be set up in the information or indictment; (c) that the identification of defendant as the person convicted in the two prior cases is uncertain; (d) that the defendant was absent from court during a part of the examination of one of the witnesses at the trial.

[1-4] The judgment was in correct form in accordance with the provisions of the Penal Code in relation to such matters. Sections

644, 666 and 1168. We think that there is no merit in the point that accused could not be charged with the crime of prior conviction of "petit larceny with prior conviction," or the claim that it was error to set up such prior conviction in the information or indictment. The right and duty of the court to determine such an issue is established by provisions of sections 666 and 667 of the Penal Code. Moreover, the proceeding was directly in obedience to the judgment of this court on the former appeal. The third point, wherein appellant claims that his identification as the person convicted in the two prior cases is uncertain, is also without merit. The evidence was sufficient to sustain the verdict, and that is conclusive of the matter. We have read those pages of the transcript to which appellant refers in relation to his claim that he was not present in court while the witness Nuremberg testified. The only record relating to this matter apparently is contained on page 68 of the reporter's transcript. During the time of cross-examination of the witness by defendant's counsel this occurred:

"The Court: The defendant is not in court. Wait. The defendant is not in court.

"Mr. McKay: These are which ones?

"The Court: One dropped on the floor.

"Mr. McKay: These are which ones individually?

"The Court: You dropped something on the floor. Proceed. The defendant is in court."

This does not show that any proceedings in the trial occurred during absence of the defendant.

[5] In connection with his appeal appellant has filed herein an application to be permitted to take additional evidence concerning facts occurring, as he claims, and discovered, after the trial and prior to the decision of this appeal. He contends that by the provisions of article 6, section 4¾, of the Constitution of California, and section 956a of the Code of Civil Procedure, this court is authorized to take such evidence in this case. We do not so understand the law. The said section of the Constitution is limited by its own terms to cases "where trial by jury is not a matter of right or where trial by jury has been waived." Section 956a, Code of Civil Procedure, follows the Constitution in the use of these same words. It was not intended that the Court of Appeal or the Supreme Court should be permitted to make findings of fact and thereby change verdicts rendered in jury trials. Cal. Jur., 1930, supp., p. 87; Syfert v. Solomon, 95 Cal. App. 228, 272 P. 810; Kirk v. Culley, 202 Cal. 501, 508, 261 P. 994.

The application of appellant for permission to take additional evidence is denied. The order denying defendant's motion for a new trial is affirmed. The judgment from which defendant appeals is affirmed. The appeal from the verdicts of the jury is dismissed. The appeal from the "order of the court denying to defendant to reopen the cause in chief and allowing him to introduce witnesses in that behalf" is dismissed.

We concur: HOUSER, J.; YORK, J.

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123 Cal.App. 33

PEOPLE v. SNOW.

Cr. 1198.

District Court of Appeal, Third District, California.

April 23, 1932.

Rehearing Denied May 7, 1932. Hearing Denied by Supreme Court May 23, 1932.

1. **Criminal law** ⚷1208(9).

Indeterminate sentence is in legal effect sentence for maximum term.

2. **Criminal law** ⚷1218.

Confinement in state prison *held* proper for one given indeterminate sentence for attempt to commit burglary in second degree (Pen. Code, § 1168; § 664, subds. 1, 2; § 461, subd. 2).

> Accused was properly confined in the state prison, for Pen. Code, § 461, subd. 2, specifies punishment by imprisonment for not less than one, nor more than fifteen, years, for burglary in the second degree, and Pen. Code, § 664, subd. 1, in defining that the maximum punishment is for one-half the period of time of imprisonment that could be imposed as a punishment for the offense attempted in the event that it had been actually committed, made accused's indeterminate sentence seven and one-half years, and thus accused was not entitled to be sentenced to the county jail under Pen. Code, § 664, subd. 2, since the sentence of seven and one-half years came within the provisions of Pen. Code, § 1168, giving jurisdiction to the state prison board of sentence and paroles to determine that, upon the expiration of a lesser number of years, the defendant will become entitled to his discharge.

Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

W. J. Snow was convicted of attempt to commit burglary in the second degree, and he appeals.

Affirmed.

Archibald M. Mull, Jr., of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

The defendant in this action was charged by the district attorney of the county of Sacramento with the crime of burglary. Upon arraignment the defendant entered a plea of guilty of attempt to commit burglary in the second degree, and was thereupon sentenced to imprisonment in the state prison. From this judgment the defendant appeals.

Only one point is relied upon for reversal, to wit, that under subdivision 2 of section 664 of the Penal Code the defendant should have been sentenced to the county jail. Subdivision 2 of section 664, supra, reads: "If the offense so attempted is punishable by imprisonment in the state prison for any term less than five years, the person guilty of such attempt is punishable by imprisonment in the county jail for not more than one year." Subdivision 2 of section 461 of the Penal Code, relative to punishment for burglary in the second degree, specifies punishment by imprisonment for not less than one, nor more than fifteen, years. There is no limit specified in either of the sections referred to that the punishment shall be less than five years.

[1] Under the rule announced in the case of In re Lee, 177 Cal. 690, 171 P. 958, a sentence such as we are considering in this case is for the maximum period of the sentence. One-half of fifteen years is seven and one-half years. Thus, subdivision 1 of section 664, supra, is applicable here in defining that the maximum punishment is for one-half the period of time of imprisonment that could be imposed as a punishment for the offense attempted, in the event that it had been actually committed.

This case is readily distinguishable from the case of People v. Sama, 189 Cal. 153, 207 P. 893, where it was held that the Indeterminate Sentence Law did not apply, for the simple reason that one-half of one's natural life could not be accurately determined preceding the ending of that life. Here, one-half of fifteen years is, of course, only a matter of calculation, and, being a sentence for one-half of that period, it comes within the provisions of section 1168 of the Penal Code, giving jurisdiction to the state prison board of sentence and paroles to fix a term of imprisonment at a lesser number of years, or, rather, to determine that, upon the expiration of a lesser number of years, the defendant will become entitled to his discharge.

[2] The question with which we are dealing is, however, not an open one in this state. In the case of In re Bellis, 75 Cal. App. 146, 241 P. 910, this court, in Division No. 1 of the First District, in an opinion written by Presiding Justice Tyler, sets forth the law which we think determinative of this case. We quote therefrom the following: "It is claimed that under subdivision 2 of section 664 of the Penal Code petitioner could only be imprisoned in the county jail for the offense to which he pleaded guilty. The Code prescribes punishment for burglary as follows: (1) Burglary in the first degree for not less than five years; (2) burglary in the second degree for not less than one or more than fifteen years. Pen. Code, § 461. Every person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable, where no provision is made by law for the punishment of such attempts, as follows: (1) If the offense so attempted is punishable by imprisonment in the state prison for five years, or more, or by imprisonment in the county jail, the person guilty of such attempt is punishable by imprisonment in the state prison or in a county jail, as the case may be, for a term not exceeding one-half the longest term of imprisonment prescribed upon the conviction of the offense so attempted. (2) If the offense so attempted is punishable by imprisonment in the state prison for any term less than five years, the person guilty of such attempt is punishable by imprisonment in the county jail for not more than one year. Pen. Code, § 664. An indeterminate sentence is in legal effect a sentence for the maximum term. In re Lee, 177 Cal. 690, 171 P. 958. The crime of which petitioner pleaded guilty being punishable for not less than one nor more than fifteen years, one-half of the longest term is greater than five years and the crime is, therefore, punishable by imprisonment in the state prison."

The judgment is affirmed.

We concur: PRESTON, P. J.; R. L. THOMPSON, J.

122 Cal.App. 701

CIERLEY et al. v. UHALT.

Civ. 384.

District Court of Appeal, Fourth District, California.

April 19, 1932.

1. Automobiles 🔑**244(43).**

In action for damages when truck collided with automobile at obstructed intersection, evidence showed truck driver was both negligent and contributorily negligent (St. 1923, p. 553, as amended by St. 1927, p. 1436).

2. Appeal and error 🔑**1011(1).**

Appellate court cannot reverse judgment because of conflict in evidence.

3. Automobiles 🔑**227(3).**

In action for damages when truck collided with automobile at obstructed intersection, last clear chance doctrine *held* inapplicable (St. 1923, p. 553, as amended by St. 1927, p. 1436).

4. New trial 🔑**99.**

Motion for new trial based on newly discovered evidence of two witnesses *held* properly overruled, where one witness had testified at trial and no due diligence was shown in seeking presence of other, and proposed testimony of both was cumulative.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action by H. L. Cierley and another, doing business under the fictitious name of the Golden Crust Bakery Company, against Bernard Uhalt. From a judgment for defendant, plaintiffs appeal.

Affirmed.

Calvin H. Conron, Jr., and Harry M. Conron, both of Bakersfield, for appellants.

Aldrich & Mack, of Bakersfield, for respondent.

MARKS, J.

Baker street is a public thoroughfare running north and south in the city of Bakersfield. It is crossed at right angles by Eleventh street. This crossing is an obstructed intersection as defined by section 113 of the California Vehicle Act (St. 1923, p. 553, as amended by St. 1927, p. 1436).

At about noon on September 6, 1929, a Whippet delivery truck, belonging to appellants and being driven by their employee upon their business, came into collision with an automobile driven by respondent at or near the northerly line of the intersection produced across Baker street. Appellants instituted this action to recover the resulting damages. The trial court found both drivers concurrently negligent, and that the driver of appellants' truck was guilty of contributory negligence, and awarded no damages.

Appellants state three grounds upon which they maintain the judgment should be reversed: First, that the finding that the driver of appellants' truck was guilty of negligence and contributory negligence is not supported by the evidence; second, that respondent had the last clear chance to avoid the accident; and, third, that the trial court erred in denying appellants' motion for new trial on the ground of newly discovered evidence.

[1, 2] There is no merit in the contention that the finding, that appellants' driver was guilty of negligence and contributory negligence, finds no support in the evidence. Respondent testified that he entered the intersection from the west and proceeded to make a left turn to go north on Baker street; that there was no vehicle within 150 feet of the intersection when he entered it from Eleventh street; that there were at least two cars approaching from the north on Baker street at more than that distance; and that when he reached a point at about the north line of the intersection, with his automobile on or east of the medial line of Baker street, he realized that a collision with appellants' truck was imminent and stopped his car. His account of the course of appellants' truck may be summarized as follows: There were two automobiles traveling south on the westerly half of Baker street followed by the truck, which started to pass them more than 150 feet north from the intersection. The truck swung easterly to the driver's left-hand side of Baker street, traveling at a high rate of speed. It continued traveling at a high rate of speed southerly on the wrong side of Baker street until just before the impact, when its driver turned sharply to his right, bringing the left rear portion of the truck into collision with the left front wheel of respondent's automobile. When the truck was between 80 and 100 feet distant from him, respondent brought his automobile to a full stop, and it did not again move until it was towed from the road. This evidence amply supports the finding of the trial court that the driver of the truck was both negligent and contributorily negligent. This testimony was contradicted by other evidence, but we cannot reverse a judgment because of a conflict in the evidence.

[3] The doctrine of the last clear chance is not necessarily applicable to the facts of this case. The rules governing this doctrine are announced in the article entitled "Automobiles," 1928 Supplement to California Jurisprudence, pages 233 et seq., and the many cases there cited. By inference the trial

court found this doctrine inapplicable to the facts of this case, and we cannot disturb this implied finding.

[4] Appellants presented the affidavits of two witnesses in support of their motion for new trial on the ground of newly discovered evidence. One of the affiants appeared at the trial and testified in their behalf. The other continuously resided close to the scene of the accident from the time of its happening to the time of the trial. No due diligence was shown by appellants in seeking the presence of this witness at the trial. The proposed testimony of both these witnesses was merely cumulative of other evidence introduced. The affidavits furnished no legal ground for an order granting a new trial.

The judgment is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

122 Cal.App. 725

Ex parte GAMO.

Cr. 2198.

District Court of Appeal, Second District,
Division 2, California.
April 20, 1932.

1. **Criminal law** 🔑92.

Superior Court has original jurisdiction to try and determine all criminal cases, misdemeanors, and felonies, save that jurisdiction as to misdemeanors may be taken from Superior Court (Const. art. 6, § 5).

2. **Statutes** 🔑158.

To determine whether statute has been repealed by implication, intent of Legislature is important factor for consideration.

3. **Infants** 🔑20.

Superior Court *held* to have jurisdiction to try accused for contributing to delinquency of a minor and to sentence him on conviction (Const. art. 6, §§ 5, 11, 13; St. 1925, p. 648, § 1, and p. 658, § 28, as amended by St. 1929, p. 837, St. 1915, p. 1246, § 21, as amended by St. 1921, p. 773; Pen. Code, § 1462, as amended by St. 1929, p. 837).

Application by Fermin Gamo for a writ of habeas corpus to be directed to the Sheriff of Los Angeles County.

Writ denied, and petitioner remanded.

Dudley R. Furse, of Los Angeles, for petitioner.

Buron Fitts, Dist. Atty., Tracy Chatfield Becker, Deputy Dist. Atty., and Florence M. Woodhead, all of Los Angeles, for respondent.

FRICKE, Justice pro tem.

Petitioner was on March 2, 1932, tried and convicted in the Superior Court of Los Angeles county of the crime of contributing to the delinquency of a minor (section 21, Juvenile Court Act [as amended by St. 1921, p. 773]), and sentenced to serve two years in the county jail, the last year of such sentence to be suspended.

The sole contention of petitioner is that the Superior Court had no jurisdiction of the subject-matter, and that the jurisdiction of the offense charged is vested exclusively in the municipal court of the city of Los Angeles.

[1] The state Constitution declares that "the superior courts shall have original jurisdiction * * * in all criminal cases amounting to felony, and cases of misdemeanor not otherwise provided for. * * *" Article 6, § 5. This language has remained unchanged since the adoption of the Constitution. Its effect is to confer upon the Superior Court original jurisdiction to try and determine all criminal cases, misdemeanors as well as felonies, with the proviso that as to misdemeanors jurisdiction thereof may be taken from the Superior Court. When, therefore, the Legislature has conferred upon a court other than a Superior Court original jurisdiction of certain misdemeanors, such other court has exclusive jurisdiction of such misdemeanors, and, as to them, the Superior Court is without jurisdiction. Green v. Superior Court, 78 Cal. 556, 21 P. 307, 541; Ex parte Wallingford, 60 Cal. 103; Union Ice Co. v. Rose, 11 Cal. App. 357, 104 P. 1006; People v. Cory, 26 Cal. App. 735, 148 P. 532; People v. Y. Wong, 61 Cal. App. 497, 215 P. 409; In re Luna, 201 Cal. 405, 257 P. 76; In re Leach, 99 Cal. App. 645, 279 P. 157. The legislature has this power. Green v. Superior Court, supra; In re Westenberg, 167 Cal. 309, 139 P. 674; In re Luna, supra.

Section 11 of article 6 of the Constitution provides for the establishing of municipal courts, and as to their jurisdiction in criminal cases declares: "Municipal courts shall have original jurisdiction, except as hereinafter provided * * * in all criminal cases amounting to misdemeanor punishable by fine and imprisonment in the city or city and county or county jail, or punishable by fine or such imprisonment." Section 28 of the Municipal Court Act (Stats. 1925, pp. 648, 658) made the same provision. Section 1462 of the Penal Code as originally adopted (Stats. 1925, p. 948, § 1) conferred original jurisdiction of all misdemeanors upon the municipal court, and provided that, in cases of misdemeanor committed within the city in which such a court should be established, the jurisdiction should be exclusive. Section 11 of article 6 of the Constitution also provided that "the legislature shall provide by general law for the constitution, regulation, government and procedure of municipal courts, and for the jurisdiction thereof except in the particulars otherwise specified in this section." Section 13 of the same article provided: "Notwithstanding any provision contained in this article, the legislature may fix by law the jurisdiction of municipal courts and inferior courts in cities having municipal courts which may be established in pursuance of this article, and may fix by law the powers, duties, qualifications and responsibilities of judges thereof."

Such was the status of the law at the time that the jurisdiction of the Superior Court to try a case of misdemeanor was challenged in the case of In re Luna, 201 Cal. 405, 257 P. 76. The petitioner there was convicted in the Superior Court of a sale of liquor in violation of the Wright Act (Stats. 1921, p. 79), and the Supreme Court sustained the contention that the constitutional and statutory provisions conferring jurisdiction of *all* misdemeanors upon the municipal court, followed by the establishing of such a court in Los Angeles county, "otherwise provided for" the jurisdiction over misdemeanors and divested the Superior Court of that county of all its former jurisdiction over such offenses. Under the law as there declared, the decision would have been the same had the petitioner been convicted of any other misdemeanor punishable by fine or imprisonment in the city or county jail.

Following the decision of In re Luna, the Legislature in 1929, under its constitutional authority to provide by law for the jurisdiction of municipal courts, amended section 1462 of the Penal Code by adding to the former provision conferring upon municipal courts jurisdiction in all cases of misdemeanor the qualification, "except those of which the juvenile court is given jurisdiction" (chapter 476, p. 837, Stats. 1929), and amended section 28 of the Municipal Court Act to read: "Each municipal court shall have such jurisdiction in criminal cases as is now provided in section 1462 of the Penal Code of California; or as may hereafter be determined by the Legislature" (chapter 477, p. 837, Stats. 1929). The law has since remained unchanged. The only decision of an appellate court since 1929 passing upon the question of jurisdiction here involved is that of People v. Superior Court of San Bernardino County, 104 Cal. App. 276, 285 P. 871. The court there, in holding that justices' courts have no trial jurisdiction of a prosecution for contributing to the delinquency of a minor, also held that, while the juvenile court has jurisdiction in such a case to impose a penalty where the defendant enters a plea of "guilty," the jurisdiction to try the cause in the event of a plea of "not guilty" is in the Superior Court. The case, however, does not dispose of the point here raised by petitioner, who contends that, since, under the Municipal Court Act as originally adopted, all jurisdiction over misdemeanors is taken from the Superior Court of Los Angeles county, it being a county in which municipal courts were established (In re Luna, supra), the effect of the adoption of that act was to repeal all provisions in the Juvenile Court Act giving the juvenile court jurisdiction over certain misdemeanors, and that, when the Legislature later amended the law so it provided that municipal courts shall have jurisdiction of all misdemeanors "except those of which the juvenile court is given jurisdiction," the attempt of the Legislature to create an exception was ineffectual because the exception referred to a jurisdiction of the juvenile court which had ceased to exist because of such repeal.

[2, 3] It is elementary that in dealing with an alleged repeal of a statute by implication the intent of the Legislature is an important factor for consideration. The history of the legislation here involved most strongly tends to show that the effect of the Municipal Court Act, to take from the jurisdiction of the juvenile court those misdemeanors, which had long been assigned to it by law, was wholly unintended by the Legislature, and that, as soon as the inadvertence was discovered, no doubt through the medium of the Luna Case, prompt action was taken by that body to return to the juvenile court the jurisdiction, which it never was the legislative intent to transfer to any other tribunal. Certainly there is nothing to indicate any intent to repeal any part of the Juvenile Court Act, especially since municipal courts can, under the law (Stats. 1925, p. 648, § 1), be established only in cities having a population in excess of forty thousand and the Municipal Court Act could operate to deprive the juvenile court of jurisdiction only in those counties where municipal courts were lawfully established. The adoption of the Municipal Court Act did not, therefore, repeal any portion of the Juvenile Court Act, but had the effect only of superseding the jurisdiction of the juvenile court to try misdemeanors in counties where municipal courts were established. In all other counties the provisions of the Juvenile Court Act were not in any degree affected. The legislation of 1929, excepting from the jurisdiction of municipal courts the misdemeanors "of which the juvenile court is given jurisdiction," removed from the jurisdiction of municipal courts the latter class of misdemeanors, and, there being no longer any other provision therefor, the jurisdiction returned to the Superior Court, of which the juvenile court is a division, and which, under the Constitution,

has jurisdiction of all misdemeanors "not otherwise provided for." Const. art. 6, § 5. This the Legislature clearly had power to do under its authority to fix by law the jurisdiction of municipal courts. Const. art. 6, § 13. The intent of the Legislature of 1929 to restore to the juvenile court and Superior Court the entire jurisdiction over misdemeanors, which it possessed prior to the adoption of the Municipal Court Act is clear, and must be given effect. The juvenile court, therefore, had jurisdiction to conduct the proceedings herein up to the time that petitioner entered his plea of "not guilty," and therefore the Superior Court had jurisdiction to try and sentence petitioner upon his conviction. People v. Superior Court of San Bernardino County, supra.

The writ is denied, and the petitioner is remanded.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

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122 Cal.App. 41

JOHNSON v. MUTUAL BEN. HEALTH & ACCIDENT ASS'N.

Civ. 8349.

District Court of Appeal, First District, Division 2, California.

April 25, 1932.

Rehearing Denied May 25, 1932. Hearing Denied by Supreme Court June 24, 1932.

Insurance ⚷634(1).

Under allegations of plaintiff's complaint, accident and health policy *held* not in force at insured's death because of nonpayment of premium.

> Policy required advance payment of $26 and quarterly payments of $16, each beginning April 1, 1928. Plaintiff alleged insured had paid $74 consisting of $26 as initial payment and $16 quarterly installments thereafter. Policy was not in force at insured's death on January 3, 1929, because under allegation of amount of premium paid only the quarterly installments due April 1, July 1, and October 1 had been paid, leaving another installment due on January 1, 1929, and the policy provided that it would terminate on day installment payment was due if not paid.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Helen Beryl Johnson against the Mutual Benefit Health & Accident Association. From a judgment for defendant, plaintiff appeals.

Affirmed.

Vincent W. Hallinan, Felix M. Cunningham, and C. K. Bonestell, all of San Francisco, for appellant.

Decoto & St. Sure, and Burton L. Walsh, all of Oakland, for respondent.

NOURSE, P. J.

Plaintiff sued as beneficiary of a policy of insurance issued by defendant. Demurrer to the second amended complaint was sustained, and plaintiff, declining to amend, appeals from the judgment thereafter entered.

The complaint alleges that on January 14, 1928, the defendant issued a policy of insurance to C. A. Russell, naming plaintiff as beneficiary; that the policy was issued in consideration of the payment "of an annual premium of seventy-four ($74.00) dollars as follows: the sum of twenty-six ($26.00) dollars as initial payment and as the first quarterly instalment and the sum of sixteen ($16.00) dollars as quarterly instalments thereafter"; that, on the 3d day of January, 1929, while said "policy was in full force and effect," the insured died; and that the insured fully paid each installment as it became due and fully paid "the annual premium" upon said policy. The policy of insurance is made a part of the complaint and is pleaded in full as an exhibit. This policy discloses that it was issued upon these express terms: "The payment in advance of twenty-six ($26.00) dollars as first payment; and the payment in advance of premiums of sixteen ($16.00) dollars quarterly or sixty-four ($64.00) annually thereafter, beginning with April 1st, 1928." The term of the policy is declared to begin at 12 o'clock noon on date of issue against accident and to end "at 12 o'clock noon on date any renewal is due." It is also declared that if any installment shall be unpaid on the day such payment is due "the policy shall terminate on the day such payment is due."

The parties agree that the plaintiff is bound by the terms of the policy pleaded and it is not necessary to cite authorities to that point. It is apparent that the policy gave the insured the option of paying an annual premium of $64.00, or a quarterly premium of $16.00. If he chose the former plan the full annual premium was due April 1, 1928, and this, if paid, would extend the policy to April 1, 1929. If he chose the latter plan, quarterly payments were due April 1, 1928, July 1, 1928, October 1, 1928, and January 1, 1929. If he had paid the annual premium on April 1, 1928, or the quarterly premium on January 1, 1929, the policy would have been in force at the time of his death on January 4, 1929; otherwise it would have lapsed under the plain terms of the policy.

The complaint alleges that the policy was issued upon payment of the sum of $74 *as an annual premium* and the sum of $16 as quarterly installments thereafter and follows this with an allegation that the insured complied with all the terms of the policy. We can take this allegation as meaning nothing more than that the insured complied with the terms of the policy as interpreted by plaintiff in her complaint. But it is apparent that plaintiff has incorrectly interpreted the plain terms of the policy. If the assured paid, as alleged, the sum of $26 "as initial payment" upon an *annual* premium, then he was required to pay the sum of $64 on the first day of April following. He could not have kept his "annual premium" in good standing by making "quarterly instalments thereafter." On the other hand, it is clear from the pleading that the insured paid in $74 all told—$26 as an initial payment and $16 as quarterly installments on April 1st, July 1st, and October 1st. Under the plain terms of the policy another installment was due on January 1, 1929. If this installment had been paid it would have been a simple matter to have alleged it. The fact that the plaintiff filed three complaints, and thus had ample opportunity to meet this objection, would indicate that it was not a fact which could be pleaded.

The proper interpretation of the policy is governed by Methvin v. Fidelity Mutual Life Ass'n, 129 Cal. 251, 256, 257, 61 P. 1112. The question whether the law of the place where the policy was issued or of the place where payments were to be made is not involved. There is nothing in the pleadings or in the briefs which would call for an interpretation different from that sanctioned by our own court. Stinchcombe v. N. Y. Life Ins. Co., 46 Or. 316, 80 P. 213, 215, is not inconsistent with the ruling in the Methvin Case. There the policy was issued upon payment of a premium which expressly carried the term of the policy two full years. In the policy here involved the termination of the policy was expressly fixed as of a certain date, which was prior to the death of the insured.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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123 Cal.App. 60

COLLINS et al. v. TEXAS CO. et al.

Civ. 742.

District Court of Appeal, Fourth District, California.

April 25, 1932.

1. Limitation of actions 🔑179(2).

As respects limitation, complaint in action seeking reconveyance of land because of grantees' fraud did not contain necessary allegations showing circumstances of discovery of fraud (Code Civ. Proc. § 338, subd. 4).

Complaint, as amended, after alleging conveyance under profit-sharing agreement on resale, and grantees' statement that land was resold without profit, alleged that the resale was a sham, and then alleged that plaintiffs first learned at some time within the year preceding the commencement of the action that defendants had received large sums of money from oil and gas leases of the land.

2. Limitation of actions 🔑179(2).

As respects limitation, complaint, in action seeking reconveyance because of grantee's fraud, did not allege diligence in seeking to discover fraud nor excuse for not sooner discovering it (Code Civ. Proc. § 338, subd. 4).

Complaint to compel reconveyance of land, as amended, alleged that a conveyance was made under a profit-sharing agreement on a resale; that the grantees informed the grantors that they had resold the land without profit; that the sale was a sham, and that subsequent grantees took the land without consideration and held title for the benefit of the original grantees; that large sums had been received as royalties on oil and gas leases; and that the former owners were deceived by the misrepresentations of the original grantees, and had no information or belief that they had rights under the profit-sharing agreement until within a year preceding the commencement of the action. The action was commenced about fourteen years after the resale and report thereof to the grantors.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by H. F. Collins and others against the Texas Company and others. From a judgment sustaining a demurrer to their second amended and supplemental complaint, plaintiffs appeal.

Affirmed.

Brittan & Brittan, Ulysses A. Gribble, and Harvey & Heard, all of Bakersfield, for appellants.

Bert Schlesinger, of San Francisco, C. V. Anderson, of Bakersfield, and Jerome H. Bayer, of San Francisco, for respondents.

JENNINGS, J.

This appeal is taken from a judgment entered upon an order sustaining a demurrer without leave to amend to appellants' second amended and supplemental complaint.

The complaint seeks specific performance of an agreement alleged to have been entered into on March 17, 1913, between appellants and respondents L. A. Blochman and E. A. Fano, predecessors in interest of respondent Etta A. Fano. This action was commenced September 14, 1927. Appellants seek to evade the statute of limitations, which would have long since barred the action, on the theory that it was commenced within three years after the discovery of the fraud which constitutes an important element of the action.

The principal facts alleged in the second amended and supplemental complaint and amendments thereto are as follows: In the year 1913 appellant Collins was the owner of certain real property in Kern county, California. Collins held legal title to the property for the benefit of himself and appellants Reynolds and Whitaker, to the extent of an undivided one-third interest in each of the three appellants. On March 17, 1913, appellants entered into an agreement with respondent L. A. Blochman and one E. A. Fano whereby appellants agreed to sell the property to Blochman and Fano for the sum of $12,000, upon condition that, if the purchasers, Blochman and Fano, should sell the property within one year from the date of the agreement, they would pay to appellants one-third of any profit that they might receive from a resale of the land, and that, if Blochman and Fano did not consummate a sale of the premises within the period of one year, they would convey to appellants an undivided one-third interest in the property. It is then alleged, on information and belief, that Blochman and Fano, for the purpose of defrauding appellants, conveyed the property to one W. R. Rogers, without consideration, and reported to appellants that they had made a bona fide sale to Rogers and had received no profit therefrom and that appellants, relying on the representation thus made, did not seek to compel Blochman and Fano to pay them one-third of the profits or to convey to appellants a one-third interest in the property.

It is then further alleged on information and belief that the purported sale to Rogers was a sham transaction, and that Rogers held title to the property for the sole benefit of Blochman and Fano, and that Rogers shortly thereafter conveyed an undivided one-half interest in the property to respondent Etta A. Fano, without any consideration therefor, and two weeks thereafter Rogers conveyed the remaining one-half interest in said property to C. R. Parker, who held title to said one-half interest for the sole benefit of respondent L. A. Blochman, and that on September 21, 1918, Parker conveyed said one-half interest to Haidee G. Blochman, who likewise held title for the sole benefit of respondent L. A. Blochman; that E. A. Fano died during the year 1919, and it is stated, again on information and belief, that respondents Etta A. Fano and L. A. Blochman thereafter caused the land to be divided so that Etta A. Fano became the owner of the north half and L. A. Blochman and Haidee G. Blochman became the owners of the south half of said premises, and that thereafter title to the south half was acquired by respondents Nathalie Blochman, Palmyra G. Blochman, and Lawrence G. Blochman, but that these last-named respondents paid no consideration for the transfer to them and hold title to the property for the benefit of respondent L. A. Blochman. Allegations respecting the execution of oil and gas leases to various corporations by respondents Etta A. Fano and L. A. Blochman and the receipt of unknown sums of money as bonuses and royalties then follow. The prayer of the complaint is for specific performance of the agreement of March 17, 1913, for conveyance of an undivided one-third interest in the property and for an accounting of moneys received by Etta A. Fano and the Blochmans, and that these parties be required to pay to appellants one-third of all moneys received by them as bonuses and royalties from the oil and gas leases.

By amendments to the second amended and supplemental complaint permitted by the court during the argument of the demurrers interposed by various respondents, it is alleged that the reasonable value of the property on March 17, 1913, the date of the agreement of sale between appellants and L. A. Blochman and E. A. Fano, was $16,000, and that the agreement of Blochman and Fano to pay one-third of the profit received by them from any sale of the property within one year, or, in case no sale was made, to convey a one-third interest in the property, was made in consideration of the sale to them of the property at a price which was $4,000 less than the reasonable value of said premises. It is further specifically alleged by amendment as follows: "That relying upon said representations and statements of said E. A. Fano and L. A. Blochman, and being deceived thereby, these plaintiffs, and each of them, took no action for the purpose of enforcing their rights under their said contract, and that these plaintiffs, and each of them, had no information or belief that they had any rights under said contract, or any right to compel a conveyance of an undivided one-third (⅓) interest in and to said premises until within one year prior to the commencement of this action, at which time these plaintiffs learned for the first time that said defendants had received large sums of money as bonuses and royalties in connection with the leases hereinafter set forth."

As hereinabove stated, the trial court sustained demurrers interposed by respondents without leave to amend this complaint. It is conceded by appellants that there was no abuse of discretion by the court in refusing permission further to amend. The grounds of demurrer were both general and special, and particularly that the action was barred by the provisions of various designated statutes of limitation. There can be but little doubt that the particular statute of limitations applicable to this case is that found in section 338, subdivision 4 of the Code of Civil Procedure, which provides that an action for relief on the ground of fraud or mistake must be brought within three years of the time the cause of action accrued, but "the cause of action in such a case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

[1] The principal questions presented on this appeal are whether the above-quoted allegation of facts contains a sufficient showing of absence of actual or presumptive knowledge of the fraud on the part of appellants, and whether the facts therein stated are sufficient to excuse the failure to have discovered the alleged fraud at an earlier date.

In Original Mining & Milling Co. v. Casad, 210 Cal. 71, 290 P. 456, 457, the leading authorities in California upon the questions involved in the present appeal are reviewed, and the court thereupon made the following declaration: "It will be discovered upon an analysis of the above cases that there are three major allegations that must be contained in the complaint before it will be held sufficient: (1) The complaint must allege when the fraud was discovered; (2) the circumstances under which it was discovered; and (3) facts must be alleged to show that plaintiff is not at fault for failing to discover the fraud sooner, and that the plaintiff has no actual or presumptive knowledge of facts sufficient to put him on inquiry." When the allegations of appellants' second amended complaint with reference to the time of discovery of the fraud complained of and the circumstances under which it was discovered are examined, it appears, first, that there is no allegation of any specific date when it is said discovery was made. All that is said in this regard is that some time within the year preceding the commencement of the action appellants first learned that respondents had received large sums of money as bonuses and royalties in connection with the oil and gas leases described in the complaint. It is doubtful whether this constitutes a sufficient allegation of the time of discovery. Wood v. Carpenter, 101 U. S. 135, 25 L. Ed. 807; Lady Washington C. Co. v. Wood, 113 Cal. 482, 45 P. 809, 810. In the second place, there is apparent a striking failure of the pleader to allege the circumstances under which the fraud was discovered. All that is alleged in this connection is that appellants first learned at some time within the year preceding the commencement of the action that respondents had received large sums of money from the oil and gas leases. This amounts at most to no more than a statement of what they learned without in any manner pointing out the circumstances under which the information was received by them. The language of the court in Lady Washington C. Co. v. Wood, supra, is pertinent in this connection: "He must also show the times and the circumstances under which the facts constituting the fraud were brought to his knowledge, so that the court may determine whether the discovery of these facts was within the time alleged."

[2] It remains to examine the allegations of the complaint, having in mind particularly the requirement that a plaintiff, in an action of this character, must allege facts relieving him from blame for his failure to have discovered the fraud at an earlier date and that he had no actual or presumptive knowledge of facts sufficient to put him on inquiry.

The second amended complaint, together with its amendments, shows that the fraud was committed at some time during the one-year period beginning on March 17, 1913, the date of the execution of the agreement between appellants and L. A. Blochman and E. A. Fano, and ending on March 17, 1914. As above suggested, the exact date when the fraud, which consists in the false representation by Blochman and Fano to appellants that the sale of the premises to W. R. Rogers was a bona fide sale resulting in no profit to them, was committed, is not disclosed; the language of the pleading being that the conveyance to Rogers occurred during the one-year period, "and thereupon" the false representation was made. The word "thereupon" is not definite, particularly in view of the uncertainty as to the time when the conveyance to Rogers was made. Assuming that the pretended sale to Rogers took place near the close of the one-year period, it may reasonably be inferred that the false representations were made shortly after March 17, 1914. The action was commenced on September 14, 1927. More than thirteen years, therefore, must have elapsed from the time the fraud was committed before the suit was brought. What reason is given by the allegations of the complaint for the failure to have discovered sooner the perpetration of the fraud? Simply and solely that appellants relied upon the representations made to them by E. A. Fano and L. A. Blochman and that they were deceived thereby. But the second amended complaint also shows that from October 5, 1917, to September 21, 1918, there were three separate conveyances, each of a half interest in the property, and that the effect of these conveyances was to place the legal title to one-half of the property in Etta A. Fano and title to the remaining half in Haidee G. Blochman. It is not alleged that these various conveyances were secretly made or that they were in any way concealed from appellants. The trial court was therefore warranted in assuming that appellants had either actual or constructive knowledge of them. It is true that the complaint does not allege that respondent Etta A. Fano bore any relationship to E. A. Fano or that Haidee G. Blochman was in any way related to L. A. Blochman. Nevertheless, the fact that almost nine years prior to the commencement of this action the title to the land had been conveyed to persons bearing the same names as the original purchasers, who had reported to appellants a sale without profit to a third person, is a circumstance which it would seem would have naturally put the appellants upon inquiry as to whether the representation of a no profit sale was true. However, appellants stood by, saw the various transactions that took place with reference to the property, made no inquiry, instituted no investigation until they were finally aroused to action by the quickening influences which, through the development of the property as oil-bearing land, materially appreciated the value of the land and brought it into prominence. In the meantime, at some date in the year 1919, between four and five years after the alleged fraud was committed, E. A. Fano, one of the two individuals who is charged by appellants with the perpetration of the fraud, died. This circumstance alone at least seriously affected, if it did not destroy, the means of a full, fair, and satisfactory investigation in a court of justice. Burling v. Newlands, 112 Cal. 476, 500, 44 P. 810. It is true that, as was said in Victor Oil Co. v. Drum, 184 Cal. 226, 241, 193 P. 243, 249: "The courts will not lightly seize upon some small circumstance to deny relief to a party plainly shown to have been actually defrauded against those who defrauded him on the ground, forsooth, that he did not discover the fact that he had been cheated as soon as he might have done." But where, as here appears, appellants and those who they assert defrauded them dealt at arm's length, with no relation of confidence between them, a showing of at least some diligence in seeking to discover during so long a period whether or not they were entitled to demand the relief they now seek is required. Del Campo v. Camarillo, 154 Cal. 647, 98 P. 1049; Bradbury v. Higginson, 167 Cal. 553, 140 P. 254; Phelps v. Grady, 168 Cal. 73, 141 P. 926; Denike v. Santa Clara Valley Agr. Soc., 9 Cal. App. 228, 98 P. 687. There is an entire lack of such showing and no allegations that excuse the failure of appellants to have discovered, at an earlier date, the fraud which is a necessary element to the cause of action, since it is conceded by appellants that the action was barred, unless the statute of limitations was suspended by the alleged fraud.

The opinion hereinabove expressed renders unnecessary a consideration of the contention of respondents that the consideration received by them for their agreement to convey to appellants a one-third interest in the property was inadequate, and therefore, under the provisions of section 3391, Civil Code, the remedy of specific performance is not available to appellants.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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123 Cal.App. 67

MODINE v. MODINE.

Civ. 763.

District Court of Appeal, Fourth District, California.

April 25, 1932.

1. Appeal and error ⚿931(1).

Affidavits in behalf of successful party must be deemed on appeal to establish facts directly stated and all facts reasonably inferable therefrom.

2. Appeal and error ⚿1024(1).

Trial court's findings on conflicting evidence in affidavits that defendant resided in county of suit could not be disturbed on appeal (Civ. Code, § 129).

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Action by Hjlmer Lawrence Modine against Mary Modine. From an order denying defendant's motion to change the place of trial, defendant appeals.

Affirmed.

Henry B. Lister, of San Francisco, for appellant.

Feemster & Cleary, of Visalia, for respondent.

JENNINGS, J.

The appeal herein is from an order of the superior court denying the motion of defendant to change the place of trial from Fresno county to Alameda county. The ground of the motion was that, at the commencement of the action, the defendant was and ever since has been a resident of Alameda county. The motion was based upon the demand and affidavit of the defendant. The action is for divorce on the ground of desertion.

The motion for change of place of trial was presented to the trial court upon affidavits. The affidavit of defendant contains the following statement: "All the parties defendant in this action reside in the County of

Alameda, State of California, and did so reside at the time of the commencement of this action and ever since."

Plaintiff's affidavit filed in opposition to the motion for change of place of trial contains the following statement: "That defendant has never at any time established a residence in any county other than the County of Fresno, State of California; that the legal residence of defendant has at all times been the legal residence of plaintiff, namely, the county of Fresno, State of California."

[1, 2] There was thus presented to the court conflicting evidence upon the question of fact which the court had to determine, viz., the residence of defendant. The familiar rule that a finding of fact of a trial court will not be disturbed when the record discloses a conflict in the evidence relating to the finding applies as well when the evidence is presented in the form of affidavits as when it is produced by way of oral testimony. McKenzie v. Barling, 101 Cal. 459, 462, 36 P. 8; Doak v. Bruson, 152 Cal. 17, 91 P. 1001, 1002; Gordon v. Perkins, 203 Cal. 183, 263 P. 231; Henderson v. Cohen, 10 Cal. App. 580, 102 P. 826; Smilie v. Smilie, 24 Cal. App. 420, 141 P. 829, 830; Sourbis v. Rhoads, 50 Cal. App. 98, 194 P. 521. Furthermore, as was said in Doak v. Bruson, supra, "as error is not presumed, and all intendments are in favor of the action of the lower court, it follows that the affidavits in behalf of the successful party are to be deemed to establish not only the facts directly stated therein, but also all facts which may reasonably be inferred or presumed from the direct and positive statements." In Smilie v. Smilie, supra, in which the appeal was from an order of a superior court denying a motion for change of place of trial in a divorce action, the appellate court quoted the above language, remarking that it was "important to be observed in controversies of the present character." The court then proceeded to note that a concurrence of act and intent is required to establish residence. Appellant points out that section 129 of the Civil Code provides that in actions for divorce neither the domicile nor residence of the husband shall be deemed to be the domicile or residence of the wife and that for the purpose of such an action each may have a separate domicile or residence depending upon proof of the fact and not upon legal presumptions. Unquestionably, defendant might have established the fact that her residence was in a county other than that in which the action was instituted and upon demand and proper showing of such fact she would have been entitled to an order changing the place of trial. Warner v. Warner, 100 Cal. 11, 34 P. 523. The only showing made by her in this regard, however, is the bald statement that all parties defendant in the action resided in Alameda county when the action was commenced and have ever since resided there. Opposed to this declaration is the equally bald statement in plaintiff's affidavit that defendant has never at any time established a residence in any county other than that in which the action was commenced and that her legal residence has at all times been the legal residence of plaintiff, namely, the county of Fresno. In support of the trial court's order denying defendant's motion for change of place of trial, it must be assumed that the court found from the slender evidence presented that defendant's residence was not, as she declared, in Alameda county, and since there was some evidence to support such a finding it may not be disturbed.

The order is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

123 Cal.App. 29

J. & W. C. SHULL v. AMERICAN SURETY CO. OF NEW YORK.

Civ. 7199.

District Court of Appeal, Second District, Division 1, California.

April 23, 1932.

Rehearing Denied May 23, 1932. Hearing Denied by Supreme Court June 20, 1932.

1. **Insurance** ⚷665(4).

In action on bond indemnifying lumber company against loss by larceny or embezzlement of employees, evidence showed no shortage of lumber existed.

2. **Insurance** ⚷665(4).

In action on bond indemnifying plaintiff against loss by larceny or embezzlement of employees, evidence showed plaintiff's manager committed neither offense.

Appeal from Superior Court, Los Angeles County; C. P. Vicini, Judge.

Action by J. & W. C. Shull, a corporation, against the American Surety Company of New York and another. From a judgment in favor of plaintiff, named defendant appeals.

Reversed.

Lawler & Degnan, of Los Angeles, for appellant.

Richard J. O. Culver, of Los Angeles, for respondent.

HOUSER, J.

This appeal is from a judgment which was rendered in favor of the plaintiff in an action brought by it against the defendant on a bond, by which, in effect, the defendant bound itself to reimburse the plaintiff for any pe-

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

cuniary loss which the latter might sustain "by any act or acts of larceny or embezzlement" of any of the employees of the plaintiff.

The judgment included a recovery as to each of two separate items set forth in the complaint: First, as to an item for the value of a shortage of lumber, etc.; and, secondly, as to the amount of certain cash alleged to have been either stolen or embezzled by the defendant Filger.

The first contention of the appellant is that the evidence conclusively establishes the fact that no shortage of lumber existed. In that connection, it appears that, although the single witness, upon whom plaintiff relied to establish the facts necessary to prove the shortage of lumber, testified from a general memorandum which theretofore, after an examination by him of the account books of the plaintiff, he had prepared and which purportedly showed that such shortage existed; on being recalled as a witness for the defendants, at which time said account books were personally examined by the witness in the presence of the court, the said witness testified, and said books affirmatively showed, that no shortage existed as to said lumber.

[1] It is clear that the mere original conclusion of the witness, as determined by him from a memorandum which he had made on a former examination of the account books of the plaintiff, should not be permitted to prevail over the actual facts as established by such books of account. It follows that such item in the judgment of the trial court cannot be permitted to stand, but that in that particular the judgment should be reversed.

As to the second contention of the appellant, to wit, that on the trial of the action, especially with reference to defendant Filger, "no proof was offered of acts of larceny or embezzlement or any misappropriation whatsoever," from the allegations of the complaint herein it is disclosed that the alleged misappropriation of the cash of the plaintiff was charged to Filger personally, who was the manager of the lumber yard owned by the plaintiff; but, from the transcript of the proceedings in the trial of the action, it appears that other than evidence of the fact that certain moneys were paid by various individual debtors of the plaintiff to some unidentified employee or employees of the plaintiff and for its account, and that such moneys were neither accounted for by the manager of the plaintiff nor credit given to the respective accounts of such debtors, no evidence was adduced which showed or tended to show that such moneys had ever been personally used or misappropriated by Filger, or by any other employee of the plaintiff. To the contrary, the most that appeared in evidence was the fact that a discrepancy existed between the total cash which should have been received by the plaintiff, and the amount of cash which it actually did receive. But, even in such a situation, no evidence was introduced which tended to connect either Filger personally, or any other designated employee of the plaintiff, with the disappearance of any amount of cash. Certainly no evidence was presented from which a felonious asportation by Filger of the funds of the plaintiff could be inferred. Furthermore, as far as Filger was concerned, the evidence was ample that, although one item of a shortage of $27.71 occurred during a time when he had charge of the "cash," such item was not shown to have been anything more than a discrepancy which might have arisen from, or was properly attributable to, some act of negligence, rather than to any criminal intent necessarily elemental to either the crime of larceny or the crime of embezzlement. At all times thereafter in question, by the order or direction of the superior officers of the plaintiff corporation, the "cash" was placed within the "exclusive" control of an employee of the plaintiff other than defendant Filger. As a matter of practice thereafter, the "cash" was available to, and actually was handled by, any one of six or eight different employees of the plaintiff.

[2] Aside from the lack of other elements necessary to the existence of the corpus delicti of either of the offenses of larceny or of embezzlement, it is most apparent that, especially in the element of felonious intent, the facts herein are insufficient to establish that either of said crimes was committed either by defendant Filger personally or by any other employee of the plaintiff corporation. Even assuming that the crime of larceny or the crime of embezzlement was committed by some one connected with the business of which Filger was the manager, this could not have the effect of convicting Filger of its commission. If such a doctrine should prevail, should it appear that a teller or other subordinate clerk in a bank had stolen or had embezzled any of the funds of which the bank was either the owner or the custodian, the president or the cashier of such bank would necessarily be guilty of the commission of the offense. Then, too, in the instant case, for aught that appears, acting in the capacity of manager of the business of the plaintiff, or under the direction or order of his superior officer, Filger may lawfully have used the cash in question for any one or more of many lawful purposes, or Filger may have used the money with the consent or under the direction of the plaintiff.

Since the bond of the defendant covered a "larceny or embezzlement" situation only, since by the allegations in the complaint in the action the plaintiff limited the commission of either of such offenses to Filger, and since no sufficient evidence was adduced to justify the conclusion that Filger was guilty of either of the offenses specified in the bond, it follows that, as pleaded and attempted to be proved, the facts do not justify the recovery of the second item in question.

The judgment is reversed.

We concur: CONREY, J.; YORK, J.

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123 Cal.App. 57

JAMISON v. HOBBS BATTERY CO.

Civ. 7165.

District Court of Appeal, Second District, Division 2, California.

April 25, 1932.

Rehearing Denied May 25, 1932. Hearing Denied by Supreme Court June 24, 1932.

Landlord and tenant ⚷231(8).

Evidence in action for rent due under written lease *held* to support finding that plaintiff did not orally agree to reduce rent.

Appeal from Superior Court, Los Angeles County; Frank Lamberson, Judge.

Action by W. H. Jamison against the Hobbs Battery Company, a corporation. Judgment for plaintiff, and defendant appeals.

Affirmed.

D. Brandon Bernstein and Franklin J. Cole, both of Los Angeles, for appellant.

Perry F. Backus, of Los Angeles, for respondent.

IRA F. THOMPSON, J.

The plaintiff brought action to recover the balance due under the terms of a written lease of real property. The defendant set up an executed oral agreement modifying the terms of the original lease whereby the amount of rental was reduced from $100 per month for the second and third years of the term, and from $125 for the remaining two years, to $50 per month for the entire four years. The court found contrary to the allegations of the answer, and rendered judgment for plaintiff for the sum unpaid according to the terms of the lease. This is an appeal from the judgment so rendered.

In effect, the reason assigned why we should order a reversal is that the evidence is insufficient to support three findings, as follows, to wit:

"VIII. That the plaintiff and defendant did not enter into any oral agreement subsequent to the making of the said written agreement concerning any matters or things set forth in said written agreement.

"IX. That at no time has there been a dispute existing between plaintiff and defendant respecting the amount of rental to be paid for the said term covered by the said written agreement of lease.

"X. That the plaintiff did not orally or otherwise agree to accept the sum of fifty and no/100 dollars ($50.00) per month as rental in lieu of the sums set forth in said written agreement and that the plaintiff did not orally or otherwise agree to accept any lesser amount of rent than the full amount of six thousand and no/100 dollars ($6,000.00)."

The testimony discloses that only the sum of $50 per month was paid to the respondent by the appellant, and that the respondent received and cashed checks sent to him monthly in that sum. It is argued that this evidence is sufficient to compel the finding that an oral agreement was made and executed. A witness for the appellant testified that, after he had mailed a check for $50 for what he assumed to be the thirteenth month of the lease, the respondent called upon him to ascertain why he had not been sent $100. The witness, who was then president of the appellant corporation, told respondent that the rent was excessive, and that "the neighborhood trade was not patronizing the location." To this the respondent, according to the witness, replied "that it was not the fault of the location but the fault of the man running the shop," and further "that we (the appellant company) would continue to pay the $50 per month and hold the lease. He would not cancel the lease but would hold the lease as a club over Steve" (the man who, according to the witness, was subleasing from appellant for the purpose of handling its material) "and any time Steve apparently neglected his work that we would demand the rent and put him out." However, the respondent gave the conversation a little differently. He testified: "Mr. P—— (the witness just quoted) seemed quite exercised in regard to the matter and he said 'Well I can't pay any $100 a month there,' and I said, 'How much business have you been doing down there this past year?' He said, 'I don't know.' 'Well,' I said, 'I have got to go East and I won't be back for at least two months. My tickets are bought and I have not time to bother with this matter at this time. You gentlemen get me up a statement as to the amount of the gross receipts of that business, we will look into the matter and try and fix up something satisfactory.' I did not care to have anybody lose any money on the premises I owned." He also swore: "I told him that, and he said that he would have Steve get it up. He gave a check for $50. I told him we would let the matter ride until I returned and received this statement."

The respondent followed this testimony by positive declarations that no statement was ever furnished him and that no satisfactory arrangement was ever made. Conceding all the weight to the payments of $50 per month to the respondent and acceptance by him to which they are entitled, yet here is positive testimony that no agreement was arrived at, and the trial judge was vested with the duty of deciding upon the conflict, if in fact there was any. The last clause is added for the reason that the testimony of the witness for the appellant fails to disclose any agreement supported by any consideration.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; FRICKE, Justice pro tem.

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122 Cal.App. 480

COULTER et al. v. SAUSALITO BAY WATER CO. et al.

Civ. 8184.

District Court of Appeal, First District, Division 1, California.

April 12, 1932.

Rehearing Denied May 12, 1932. Hearing Denied by Supreme Court June 9, 1932.

1. Evidence 🔑83(1).

In absence of attack on validity of transfers of water system and property by public utility water company, it will be presumed that proceedings were regularly authorized by railroad commission (Code Civ. Proc. § 1963, subds. 20, 33).

2. Judgment 🔑713(2).

Judgment concludes parties and privies not only as to matters actually decided but as to all matters belonging to subject of controversy within scope of issues which might have been decided.

3. Appeal and error 🔑994(3), 1012(1).

Question of credibility of witnesses and weight to be given to their testimony is for trial court.

4. Limitation of actions 🔑197(1).

Finding that action for specific performance of utility's agreement to furnish water to particular lots was not barred by fact that street contractors had in 1915 removed pipes supplying lots *held* justified.

5. Waters and water courses 🔑154(1).

Any easement acquired by owner of lots, over lands of water company, under contract of company to furnish water, *held* not extinguished by act of street contractors in removing water pipes.

6. Waters and water courses 🔑201.

Right to water under contract *held* not affected by user's renewal of connection after disconnection by third parties by removing water pipes.

7. Waters and water courses 🔑201.

That water company ceased to pump from wells, and that well on user's property was consequently capable of supplying owner's needs as before, *held* not to constitute failure of consideration for covenant supported by monetary and other considerations to furnish user with water.

> The evidence disclosed that the covenant was entered into as a result of deepening of water company's wells so as to tap underground sources of well on user's property, which well had furnished water for domestic and other purposes.

8. Damages 🔑62(4).

One threatened with injury from breach of contract need not assume burden of such contract nor incur more than slight expense in attempt to prevent damage.

9. Damages 🔑189.

Evidence *held* to show that water user, connecting property with mains established by town, did all that was reasonable to minimize damages resulting from breach of water company's contract to furnish him with water.

10. Evidence 🔑558(1).

That witness, testifying to value of property with and without free water, admitted on cross-examination that estimate of increased valuation was based on charges for water made by town, *held* not to detract from competency or relevancy of testimony.

11. Waters and water courses 🔑201.

Water company's inability through loss of charter and destruction of mains to specifically perform contract *held* no bar to action for damages for failure to furnish water (Civ. Code, § 400, as amended by St. 1921, p. 574).

12. Contracts 🔑309(1).

Party who has agreed without qualification to perform act is not excused by difficulty or inability to perform, unless performance depends on existence of thing assumed as basis of agreement.

13. Waters and water courses 🔑188(2).

Prior contracts of water company will be recognized and enforced, until intervention of public authorities, though company and its system have been dedicated to public use (Const. art. 14, § 1).

14. Covenants 🔑68.

Water company's agreement to provide certain lots owned by another with water *held* not a covenant running with water company's land, so as to bind purchaser thereof to perform contract (Civ. Code, §§ 1460–1462, 1468).

15. Covenants 🔑21.

Parties desiring to create mutual rights in real property must provide therefor in written instruments exchanged between them.

16. Easements 🔑12(1).

Any doubt as to whether instrument creates servitude will be resolved in favor of free use of land (Civ. Code, §§ 1460–1462, 1468).

17. Appeal and error 🔑878(4).

Appellees cannot obtain additional relief in absence of appeal from judgment.

Appeal from Superior Court, Marin County; R. L. Thompson, Judge.

Action by W. A. Coulter and others against the Sausalito Bay Water Company and others. From a judgment for plaintiffs, defendants appeal.

Reversed as to defendant Kate Gleason, and affirmed as to other defendants.

George H. Harlan, of San Rafael, for appellant Kate Gleason.

Chris. B. Fox and L. W. Jefferson, both of Oakland, for appellants Mary Hickman and others.

Tum Suden & Tum Suden, of San Francisco, for respondents.

PER CURIAM.

An action for the specific performance of a contract or in lieu thereof for damages.

On August 4, 1905, the plaintiffs W. A. and Harriet A. Coulter were the owners of lots 11, 12, 13, and 14 in block 10 in the town of Sausalito. They continued in such ownership until May 10, 1923, when they conveyed the same to plaintiff James Valentine Coulter. Said block is bounded by Valley, Third, and Fourth streets, and on the date first mentioned the Sausalito Bay Water Company, a corporation, owned a portion of block 6, which was directly across Third street from the Coulter property, and, among other parcels, lot F in block 21, and lot 60 in block 20, all as delineated upon the map of the town. This corporation was then operating a waterworks, which supplied a portion of the town with water. Upon lot F was a spring called the Yacht Club spring, from which the water was piped across an avenue known as Lower Crescent avenue to a tank on said lot 60. From this tank ran a pipe to Main street, where it entered one of the mains of the water company. All of the waterworks of this company was, with two exceptions, supplied by springs on the various lots mentioned and owned by it. These exceptions were two wells on said block 6 which, due to the low elevation, required pumps to raise the water therefrom into the tanks. In the summer of 1905 these wells were deepened and tunnels constructed therefrom, which tapped the underground sources of a well located on said lot 11 owned by plaintiffs, and which well had theretofore supplied sufficient water for their domestic uses, the irrigation of a garden, and also enabled them to sell some water to their neighbors. As a result the water company entered into an agreement in writing with plaintiff W. A. Coulter which is as follows:

"For and in consideration of the sum of one (1) dollar and other valuable consideration in hand paid by the undersigned W. A. Coulter to The Sausalito Bay Water Company, a corporation, the undersigned The Sausalito Bay Water Company, a corporation, does hereby covenant and agree to supply with such a quantity of pure and wholesome water lots numbered 11, 12, 13, 14 and 1 and 2, and 3 in block 10, Map No. 3, Sausalito Bay Land Co. Town of Sausalito, Marin County, California, as may be necessary for domestic use and for the irrigation of the grounds and garden; and likewise for the use of any private stable or houses which may be located upon said lots, without any charge, such water to be delivered upon said land through one single 1½ inch pipe; this covenant to run with the land and to inure to the benefit of said W. A. Coulter and his successors and assigns. It is furthermore covenanted and agreed on the part of the said W. A Coulter that he will not supply water to other persons or any other lot or lots of land either from any well now sunk upon said premises or any other well that may hereafter be driven thereon. Nor will he sell or deliver or permit any water supplied by the undersigned, The Sausalito Bay Water Company, to be used by any person not living upon or occupying said lots of land hereinabove described. Hereby the said W. A. Coulter furthermore releases the undersigned The Sausalito Bay Water Company from any claims for damages of any nature whatsoever alleged to have been sustained by him by reason of any tunnels or wells driven or bored or dug by the said Sausalito Bay Water Company, either under or alongside or in the neighborhood of the lots of land hereinabove described.

"In witness whereof the said W. A. Coulter has hereunto set his name, and The Sausalito Bay Water Company, a corporation, has caused its corporate name to be subscribed, and its corporate seal to be hereunto affixed by its president thereunto duly authorized by resolution of its board of directors this 4th day of August, 1905.

"W. A. Coulter,
"Sausalito Bay Water Company,
"By L. M. Hickman, President,
"By Geo. W. Hollister, Secretary."

This agreement was duly acknowledged by the parties and recorded on September 13, 1905.

Thereafter the water company connected its Valley street main by means of a 1½-inch pipe with a tank on the Coulter property, and continued to supply plaintiffs with water without charge until December 8, 1905, when its entire system with the lands mentioned was sold to the Sausalito Spring Water Company, a corporation, which continued to supply water to plaintiff in the same manner and in accordance with the contract. In the meantime the town of Sausalito commenced to supply water to its inhabitants. On February 27, 1915, the corporation last mentioned forfeited its charter for nonpayment of its franchise tax, and on September 27, 1924, by a decree of the superior court it was declared to be a dissolved corporation, and defendants Hickman, Costigan, and Jefferson were appointed trustees for its stockholders and creditors. S. N. Dallas, named as a defendant, was later appointed one of the trustees; but it appears that he died before this action was brought. The pipes placed by the company remained in the streets, but after 1915 no pumping was done from the wells mentioned, and plaintiffs continued to receive water which flowed by gravity from said Yacht Club spring on lot F into a tank on said lot 60 and thence into the water company's main on Main street. This main extended therefrom southerly along West street to Valley street, and thence easterly on the latter street past the Coulter property, at which point, as stated, a pipe led therefrom to a tank on the property.

In 1915 the water main on Valley street was removed. Plaintiffs' tank was then connected with the water main on Main street by running a pipe from their property westerly on Valley street and northerly on West street. By this means they continued to receive water without cost until about November 21, 1925. On or about this date the mains on Main street were removed. This resulted in depriving the plaintiffs of their source of supply, and they were thereafter compelled to obtain water from the town and pay regular rates therefor.

On March 6, 1926, the Sausalito Spring Water Company—which, as stated, had ceased to function as such—through its former directors as trustees, conveyed to defendant Kate Gleason all of its land mentioned above.

[1] That both companies were public utilities is undisputed, and that they possessed a franchise to use the streets of the town is clear from the evidence. South Pasadena v. South Pasadena Land, etc., Co., 152 Cal. 579, 586, 93 P. 490. As a general rule a utility cannot lawfully transfer its system or property without securing an order from the railroad commission authorizing it to do so (Public Utilities Act, § 51 [St. 1915, p. 149]), but no attack upon the validity of the transfers mentioned has been made by the parties here. Consequently we must presume that the law was obeyed and that the proceedings were regular. Code Civ. Proc., § 1963, subds. 20, 33.

The action was commenced in 1925. The amended complaint alleged in substance the above facts, among others, and prayed for a decree specifically enforcing the written contract dated August 4, 1905, and directing the defendants to continue to supply water thereunder in the quantities as therein provided; further, that the court find that said agreement constituted a covenant running with the land of both plaintiffs and defendants; and that in lieu of specific performance, if such relief could not be had, plaintiffs be awarded damages against the defendants.

The complaint did not allege that the pipes connecting plaintiffs' property with the water supply were severed or disconnected by any act of the defendants or that they caused the severance. It was alleged that the same was done without plaintiffs' fault and over their objection, and that thereupon defendants ceased to furnish water as agreed, and that although demand had been made therefor they have failed and refused to do so.

Defendant Gleason by her answer alleged, among other matters, that the severance of the pipes as averred by plaintiffs was without fault on her part, and that the same was not done by her or by her consent, but by persons acting for the town of Sausalito; furthermore, that the easement claimed was extinguished by the destruction of the distributing mains of the water company; that she was an innocent purchaser of the lands conveyed by the company and that no easement was imposed thereon by the agreement mentioned; that plaintiffs' easement, if any, was confined to parts of lots 59 and 60 in block 20; and that plaintiffs' action was barred by the provisions of section 318 of the Code of Civil Procedure. She also filed a cross-complaint to quiet her title as against plaintiffs, alleging that they had no easement, right, title, or interest therein or against the property described. The other defendants alleged substantially the same defenses, including the bar of the statute of limitations; and all the defendants by amendments to their pleadings alleged that they had no franchise or other permission by public authority to furnish water and were without means or ability to do so.

The trial court found the facts stated above and, in addition, against the denials, affirmative allegations, and defenses contained in defendants' pleadings except that the latter have no franchise or permission of the public authorities to use the streets of the town for pipes or conduits, and are not public utilities.

Defendant Gleason was found to be the owner in fee simple of the lands described in her cross-complaint, but that she purchased with notice, that her lands are subject to the covenants and easements provided in the contract mentioned, and that plaintiffs by reason of the facts have been damaged in the sum of $2,000. The court concluded from its findings that the contract mentioned "created a covenant or easement running with the lands of plaintiffs and defendants herein," and that plaintiffs were entitled to recover the above sum from defendant Gleason individually, and from the other defendants as trustees, stockholders, and creditors of the Sausalito Spring Water Company; furthermore, that defendant Gleason take nothing by her cross-complaint.

[2] The decree adjudged only that plaintiffs recover the sum of $2,000 from defendant Gleason and from the remaining appellants as trustees. There was no finding that the contract mentioned could not be specifically enforced, nor was the question expressly adjudicated except so far as the finding that defendants had no franchise or permission of the public authorities to lay pipes in the streets of Sausalito and that they are not public utilities would necessitate such conclusion. However, this question was put in issue by the pleadings, and it is the rule that a judgment concludes the parties to an action and their privies not only as to all matters actually decided, but as to all matters belonging to the subject of controversy and properly within the scope of the issues which might have been decided. 15 Cal. Jur., Judgments, § 189, p. 136; In re Estate of Bell, 153 Cal. 331, 95 P. 372; Southern Pacific Co. v. Edmunds, 168 Cal. 415, 143 P. 597; Horton v. Goodenough, 184 Cal. 451, 194 P. 34.

Said defendant Gleason and the other defendants sued as trustees have appealed from the judgment, claiming that certain findings are unsupported; that a covenant running with the lands of the water company was not created by the contract; and that they committed no breach of duty for which a cause of action for damages arose.

The record discloses no evidence that any of the defendants removed from the streets the water pipes by which plaintiffs were supplied or were in any way responsible for such removal; in fact, plaintiff W. A. Coulter testified that he knew as a fact that the removal was by certain contractors acting for the town. In this connection appellants claim that such removal having been made in 1915, plaintiffs' action was barred by sections 318, 338, and 359 of the Code of Civil Procedure.

[3, 4] It was testified by one of the witnesses that the work and material necessary to make connection with the water company's pipe on Main street in 1915 was furnished by plaintiff Coulter; and by a former employee of the company that this work was not done by it. Plaintiff Coulter was unable to recall the circumstances under which the new connection was made. It is the rule that the question of the credibility of the witnesses and the weight to be given their testimony is one for the trial court, which here concluded that the statute had not run. But whatever the weight to which this testimony is entitled, it is clear from the evidence that the company in no way interfered with the use of its pipes or conduits by plaintiffs, and that the severance and removal was by third parties whose actions were not controlled by the company or by any of the defendants. It is also clear that there was no repudiation of the contract by the company at that time or any intention to violate it; nor, so far as shown, was there a demand that it make the necessary changes and repairs, or any refusal to do so or to further deliver under the contract. Even if it could be said that the company's omission might at the election of plaintiffs have been treated as a breach, it does not follow that the statute commenced to run against the latter. As the rule is stated in Williston on Contracts, § 2027: "After a material breach by the defendant of a contract sounding in damages it may be supposed either that the wrongdoer wishes to continue performance or that he does not wish to do so. In the first case the injured party may always elect to continue performance if he so desires, and if thereafter another breach occurs an action may be maintained for entire damages suffered by the defendant's failure to complete the performance of the contract, or for recovery of the consideration paid by plaintiff on the theory of rescission and restitution, although more than the statutory period has elapsed since the first breach." 16 Cal. Jur., Limitation of Action, § 110, p. 512; Richter v. Union Land, etc., Co., 129 Cal. 367, 62 P. 39; Ross v. Tabor, 53 Cal. App. 605, 200 P. 971. It has been held that one cannot be deprived of an incorporeal hereditament by the act of strangers (Smith v. Worn, 93 Cal. 206, 28 P. 944); and in view of all the circumstances the finding of the trial court that the action was not barred is, we think, fully sustained.

[5, 6] Nor is there any merit in the claim that any easement plaintiffs might have acquired over the lands of the water company was extinguished by the acts of the street contractors in 1915. As held in Smith v. Worn, supra, such was not the effect of these acts, nor did the fact that the plaintiffs renewed the connection waive performance by the company or otherwise limit plaintiffs' rights under the contract.

[7] The same is true of the contention that, it having been shown that the company

ceased to pump from the wells in block 6 and that the well on plaintiffs' property is now capable of producing the same amount of water as before the execution of the agreement of March 4, 1905, the consideration for this agreement failed. The agreement recited that a monetary and other valuable considerations had been received by the water company. If there be a consideration —which here is undisputed—the fact that it subsequently diminishes in value or becomes of no value cannot relieve a promisor from liability on his promise. 13 Cal. Jur., Contracts, § 244, p. 369, and cases there cited.

[8, 9] It is further contended that plaintiffs suffered no damage by reason of defendants' failure to continue performance under the contract. This claim is based upon evidence that the said well on the Coulter property is now capable of producing a sufficient supply of water, and that the evidence adduced in support of the alleged damage was speculative and the method of computing the same erroneous. As to the first contention, it will be sufficient to say that while it is the duty of one who knows that he is threatened with detriment to do all he reasonably can to prevent or minimize it, he is under no obligation to assume the burden of a contract which has been violated, or to incur more than slight expense in an attempt to prevent damage. Ash v. Soo Sing Lung, 177 Cal. 356, 170 P. 843; Sargent v. North End Water Co., 190 Cal. 512, 213 P. 33; Chambers v. Belmore Land & Water Co., 33 Cal. App. 78, 164 P. 404. The cost of restoring the original supply from the Coulter well is not shown, nor does it appear that this source since the construction of the tunnels which drain the water into the wells of the water company would be certain to afford an adequate supply in the future. Under these circumstances it would be unreasonable to compel plaintiffs to do more than was done, namely, to connect their property with the mains established by the town.

[10] A real estate dealer testified to the value of plaintiffs' property with and without the right to water free of charge. This witness was shown to be familiar with values in the neighborhood and the cost of water service. The fact that the witness testified on cross-examination that the estimate of increased valuation with free water was based upon the charges for water made by the town did not detract from the competency or relevancy of his testimony, and the finding as to the damage was fully sustained.

[11, 12] Appellant trustees further urge that the water company having forfeited its charter, specific performance of the contract could not be had either as against it or against themselves as trustees. Conceding this, an action for damages would nevertheless lie against the trustees for a breach of the corporation's contract, the judgment being payable out of its assets if sufficient (Civ. Code, § 400, Stats. 1921, p. 574; 7 Cal. Jur., Corporations, §§ 650, 660, 662, pp. 167, 172, 175); and the fact that through no fault of the plaintiffs specific performance could not be decreed does not preclude monetary relief in a proper case. 23 Cal. Jur., Specific Performance, § 67, p. 511.

There is likewise no merit in the claim that specific performance of the contract having become impossible by reason of the retirement of the water company from business and the destruction of its mains, further performance was thereby excused. Where a party has agreed without qualification to perform an act which is not in its nature impossible of performance, he is not excused by the difficulty of performance, or by the fact that he becomes unable to perform, unless performance depends upon the existence of a given thing and such existence was assumed as the basis of the agreement. In such case performance is excused to the extent that the thing ceases to exist or turns out to be nonexistent (Mineral Park Land Co. v. Howard, 172 Cal. 289, 156 P. 458, L. R. A. 1916F, 1), but no fact has been shown which brings the present case within the above rule, nor do the facts bring the case within the rules declared in Southern Pacific Co. v. Spring Valley Water Co., 173 Cal. 291, 159 P. 865, L. R. A. 1917E, 680.

[13] It is also claimed that the distributing system and water of the company were dedicated to public use, its rates until 1911 being subject to regulation by the authorities of the town and thereafter by the railroad commission (Const. art. 14, § 1), and that consequently, the agreement being one to furnish plaintiffs with water without charge, was discriminatory and void.

Although the distribution and sale of water to the public is subject to regulation and control by the state, and this notwithstanding contracts for such sale have been entered into (Leavitt v. Lassen Irrigation Co., 157 Cal. 82, 106 P. 404, 29 L. R. A. (N. S.) 213; Limoneira v. Railroad Commission, 174 Cal. 232, 162 P. 1033; Sutter Butte Canal Co. v. Railroad Commission, 202 Cal. 179, 259 P. 937), nevertheless until public authority has intervened and modified prior contracts the same will be recognized and enforced. Southern Pacific Co. v. Spring Valley Water Co., supra. And this is true although the system and water of the company have been dedicated to a public use. Fresno Canal Co. v. Park, 129 Cal. 437, 62 P. 87. In the present case there is no evidence of an attempt to fix or regulate the rates of the water company by any public authority, and so far as shown the contract was valid.

Plaintiffs contend that the contract created a servitude upon the lands and water system of the company, that the same was a covenant running with the land, that its recordation was notice, and that defendant Gleason, the purchaser of the lands of the company, took subject to and was bound to perform the agreement.

[14-16] Section 1460 of the Civil Code provides that "certain covenants, contained in grants of estates in real property, are appurtenant to such estates, and pass with them, so as to bind the assigns of the covenantor and to vest in the assigns of the covenantee, in the same manner as if they had personally entered into them. Such covenants are said to run with the land." According to section 1461 of title 3, part 1, division 3, of the Civil Code, the only covenants which run with the land are those specified in that title and those which are incidental thereto; and section 1462 of the same Code provides: "Every covenant contained in a grant of an estate in real property, which is made for the direct benefit of the property, or some part of it then in existence, runs with the land." It has been held that a covenant to furnish and pay for water to be used on land is not a grant of an estate within the last section, and does not run with the land although the instrument declares such to be the intention. Fresno Canal & Irrigation Co. v. Rowell, 80 Cal. 114, 22 P. 53, 13 Am. St. Rep. 112; Fresno Canal & Irrigation Co. v. Dunbar, 80 Cal. 530, 22 P. 275.

Section 1468 of the Civil Code, found in the same title, reads as follows: "A covenant made by the owner of land with the owner of other land to do or refrain from doing some act on his own land, which doing or refraining is expressed to be for the benefit of the land of the covenantee, and which is made by the covenantor expressly for his assigns or to the assigns of the covenantee, runs with both of such parcels."

Plaintiffs claim that the agreement in question was more than a personal covenant and created a covenant within the above section which ran with the lands of the water company. But the water company made no agreement to do or to refrain from doing anything on its own land, and its right to furnish the water from any source was unrestricted. Further, it appears that during the whole period no water was conveyed directly from any spring on the land of the company to the plaintiff's property, but first to the street mains, from which plaintiffs with others obtained their supply. As has been said with respect to the provisions of contracts creating building restrictions claimed to be covenants running with the land, if parties desire to create mutual rights in real property they must say so and must say it in the only place where it can be given legal effect, namely, in the written instruments exchanged between them, which constitute the final expression of their understanding (Werner v. Graham, 181 Cal. 174, 183 P. 945; Title Insurance, etc., Co. v. Miller & Lux, 183 Cal. 71, 190 P. 433; Mapel v. Canady, 189 Cal. 373, 208 P. 280; McBride v. Freeman, 191 Cal. 152, 215 P. 678); and a provision in an instrument claimed to create such a servitude is strictly construed, any doubt being resolved in favor of the free use of land. 7 Cal. Jur., Covenants, § 19, p. 733. As stated, the agreement contained no reference to the lands of the company, and the method of supply indicates no intention to impose more than a personal obligation to furnish water.

It has been held, however, that covenants to furnish water which has been appropriated from a stream for irrigation purposes constitute a contract for the sale of an interest in real property, and the right to have the water flow from the canal through a lateral ditch is a servitude upon the ditch and canal, and is an appurtenance to the land to be irrigated (Stanislaus Water Co. v. Bachman, 152 Cal. 716, 93 P. 858, 15 L. R. A. (N. S.) 359; Henrici v. South Feather Land, etc., Co., 177 Cal. 442, 170 P. 1135; Const. art. 14, § 1); and the rule has been applied to a public utility where the plaintiff's land was purchased from the water company or its predecessor together with the water right. Hunt v. Jones, 149 Cal. 297, 86 P. 686; Graham v. Pasadena Land, etc., Co., 152 Cal. 596, 93 P. 498. In Henrici v. South Feather, etc., Co., supra, it was said that the agreements under consideration in the above cases conveyed a specific right in real property affecting the system of the water company, and that any one purchasing such system with notice, actual or constructive, of the landowner's interest took subject to it.

If a covenant runs with the land, the covenantor together with his heirs, devisees, assignees, or subsequent purchasers will be liable for its breach (7 R. C. L., Covenants, § 37, pp. 1122, 1123); but it is not essential to relief in equity that this be so, as it has been held that whether covenants of the character of those considered in the foregoing cases are such as run with the land or are personal covenants equity will enforce them against purchasers from the covenantor who take with notice. Henrici v. South Feather, etc., Co., supra; Bryan v. Grosse, 155 Cal. 132, 99 P. 499; Marton v. Holm, 197 Cal. 733, 242 P. 718; Pomeroy, Equity Jurisprudence, § 1295. While the doctrine appears to be now restricted by the English courts to negative covenants (see Haywood v. Brunswick, etc., Building Society, 8 L. R. [Q. B. Div.], 403; Austerberry v. Oldham, 29 L. R. [Ch. Div.], 250, where Cooke v. Chilcott, 3 L. R. [Ch. Div.] 694, which extended the rule established by Tulk v. Moxhay, 2 Ph. 774, 41 English Reports Reprint, 1143, is criticized), in this country it has been applied generally to both affirmative and negative covenants (Pomeroy, Equity Jurisprudence, § 1295). Likewise pecuniary relief has been granted in equity in cases of this character. Thus in Relovich v. Stuart, 211 Cal. 422, 295 P. 819, the owner of a tract of land developed by means of a pumping plant water for use thereon. A portion of the tract was sold to plaintiff, the owner agreeing to furnish sufficient water for its irrigation. Later the defendant purchased the remainder of the tract with notice but refused to deliver water. It was held, citing the above cases, that regardless of whether the covenant ran with the land it would be enforced against one taking with notice, and that damages were recoverable.

The proprietor of a public utility is bound to provide and maintain the service in accordance with the requirements imposed by law, custom, or special contract (22 Cal. Jur., Public Utilities and Service, §§ 41, 42, pp. 50, 52); and in the Henrici Case, supra, where the defendant's predecessor, both water companies being public utilities, had sold land to the plaintiff with a water right, the defendant, which purchased the water system with notice, was held to be bound to perform the contract and to be liable in damages for its failure to do so. Also where a system to supply water for public use is established, all persons to whose use the water is appropriated or dedicated are vested with a right to have the supply continued by whomsoever may be in control, and may enforce the right against such persons, whether a municipality or a private corporation or an individual. South Pasadena v. South Pasadena Land, etc., Co., supra. However, no cases in which pecuniary relief has been awarded, where the duty sought to be enforced is purely equitable and relief in equity was denied, have been brought to our attention. Such relief has been asked in actions to specifically enforce contracts to convey real property where the vendor subsequently transferred the same to a third party who did not assume the contract but who took with notice; and it has been held that notwithstanding the impossibility of specific performance, in the absence of a conspiracy between the vendor and his grantee to defraud the plaintiff no judgment for pecuniary relief could be recovered against the grantee, this for the reason that damages in lieu of specific performance are, in the absence of fraud, based upon a breach of contract to which the grantee was not a party and which he had not assumed. Leinbach v. Dyatt, 112 Kan. 782, 212 P. 894; Mueller v. Wall (Mo. App.) 251 S. W. 119; 7 Bancroft's Code Pleading and Remedies, § 5577.

But whatever may be the rule when, as suggested in the Henrici Case, an equitable property right is created, when the covenant to deliver water is one which does not run with the land of the covenantor but is merely the ordinary agreement by a public utility to deliver water, it is the rule that notwithstanding the distributing system and the water have been dedicated to a public use the right of a consumer is not a water right in the sense of a private freehold interest in the real estate of the distributing company, but simply a right of service so long as the utility controls the instrumentality rendering the service. Such a contract cannot attach to the land of the consumer as an appurtenance, its effect being merely to bring the land within the territory to which the public use extends and establish its status as land entitled to share in the public use. Fresno, etc., Co. v. Park, supra; Hildreth v. Montecito Creek Water Co., 139 Cal. 22, 72 P. 395; Glenn-Colusa Irrigation Dist. v. Paulson, 75 Cal. App. 57, 242 P. 494. See, also, Leavitt v. Lassen Irrigation Co., supra, explaining the effect of Hunt v. Jones and Stanislaus Water Co. v. Bachman, supra.

The facts of the case at bar make applicable the rules declared in the cases last cited, and nothing has been shown which sustains the claim for damages against appellant Gleason. As stated, the agreement made no reference to the land of the utility nor did it purport to create an easement, and the court concluded in effect that specific performance thereof could not be had. It is conceded that Mrs. Gleason had not acquired the status or assumed the duties of a public utility; and while she acquired the land upon which were sources of supply, she did not succeed to the franchises or acquire the distributing system of the company. Moreover, she in no way interfered with the use of the water or the operation of the system, nor, so far as appears, has she ever objected to such use, either by the company, its trustees, or by plaintiffs. There was no assumption by her of plaintiffs' contract with the water company, nor was she directly or indirectly responsible for the removal or destruction of the company's mains or the pipes through which plaintiffs had derived their supply.

In view of the foregoing, the question whether she took with notice is not material, nor was the question whether plaintiffs by their use of the water after the company ceased to operate in 1915, acquired a prescriptive right to pipe the same from any of the springs on the lands of the company to their property.

[17] Plaintiffs claim that judgment should have been entered against defendant Mary Hickman individually as well as against her as a trustee, it being alleged that Louis M. Hickman, a corporation, was substantially the sole stockholder of the water company, and said Mary Hickman the principal and controlling stockholder in the first mentioned

corporation; but, as pointed out by appellants, plaintiffs have not appealed from the judgment and are bound thereby. Cherney v. Johnson, 72 Cal. App. 725, 735, 239 P. 150.

We are satisfied that the conclusions of the trial court as respects the liability of the water company for damages and the amount thereof were correct, but that as to defendant Gleason no cause of action was shown. Accordingly, the judgment as to Kate Gleason is reversed, and as to the other appellants is affirmed.

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122 Cal.App. 599

MANWELL v. BOARD OF HOME MISSIONS AND CHURCH EXTENSION OF METHODIST EPISCOPAL CHURCH et al.

Civ. 8299.

District Court of Appeal, First District, Division 1, California.

April 16, 1932.

1. Wills 🔑88(3).

Deeds executed to convey present title and deposited by grantor with third party for delivery to grantee at grantor's death without reserving power to recall or modify same *held* not testamentary disposition but conveyance of title qualified by life tenancy in grantor, depositary becoming trustee of grantee.

2. Deeds 🔑61.

Delivery of deed is lacking where grantor deposits deed with third party for delivery to grantee on grantor's death but retains power to otherwise dispose of property until death.

3. Deeds 🔑58(4).

Whether deed deposited with third party has passed beyond control of grantor is determined by grantor's intention.

4. Deeds 🔑66.

Whether grantor intended deeds to pass beyond his control by depositing them with third party *held* question of fact, where grantor's instructions were not entirely in writing, otherwise a question of law.

5. Deeds 🔑200.

Where written instruments do not fully express grantor's intention in depositing deeds with third party, evidence of circumstances attending their preparation and acts and statements of grantor during period of escrow *held* admissible.

6. Deeds 🔑61.

Instruction of grantor depositing deeds with third person for recording at grantor's death *held* not to show that deeds were not intended to be immediately effective.

> Letter of instruction which the grantor gave to the party with whom she deposited the deeds was as follows: "You are hereby instructed to file said deeds for record with the county recorder promptly upon my death."

7. Deeds 🔑200.

Understanding of depositary as to effect of grantor's deposit of deeds with him for recording at grantor's death *held* relevant in determining intention of grantor only as bearing on value of testimony at time of alleged delivery.

8. Deeds 🔑208(5).

Subsequent statement and execution of will by grantor of deeds deposited with third party for recording at grantor's death *held* to show that no effective delivery of deeds was intended.

> Grantor, after having deposited deeds with instructions they should be recorded at her death, drew a will in which she disposed of the property described in the deeds, and, when reminded of the fact that she had already disposed of the property by deed, she showed that she considered the deeds a testamentary disposition, and hence ineffective, by stating, "No, it is the last one that counts."

9. Witnesses 🔑363(1).

In determining credibility of witness, court may consider his interest in result of case or bias at trial.

10. Appeal and error 🔑994(2, 3).

Notwithstanding unimpeached testimony of witness may not be arbitrarily disregarded, jury or trial court is exclusive judge of his credibility (Code Civ. Proc. § 1847).

11. Appeal and error 🔑994(3).

Trial court being judge of weight to be given testimony, its conclusion that witness was interested will not be set aside, where there is evidence to support it (Code Civ. Proc. § 2061).

12. Appeal and error 🔑996.

Where inferences drawn are fairly and reasonably deductible from circumstances and testimony, findings of trial court must stand, notwithstanding evidence would support contrary finding.

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by Allen D. Manwell, administrator with the will annexed of the estate of Clementine H. Manwell, deceased, against the Board of Home Missions and Church Extension of the Methodist Episcopal Church and another. From a judgment for plaintiff, defendants appeal.

Affirmed.

Dryer, Castle & Richards, and Frank G. Tyrrell, all of Los Angeles, for appellants.

Raymond G. Thompson, of Pasadena, for respondent.

PER CURIAM.

An appeal taken by defendants from a judgment declaring certain deeds signed and acknowledged by Mrs. Clementine H. Manwell in her lifetime to be null and void, and that the administrator of her estate is entitled to the possession of the real property described therein.

Mrs. Manwell on January 23, 1923, signed and acknowledged two deeds describing the property involved in this action, upon which she resided, and delivered the same into the possession of C. V. Sturdevant. One of the deeds in terms gave a life estate in the property to defendant Elizabeth Y. Felts, and the other the remainder to defendant the Board of Home Missions and Church Extension of the Methodist Episcopal Church, a corporation. With the deeds she signed and delivered to Sturdevant the following letter:

"Pasadena, Calif., Jany. 23, 1923.

"Sturdevant-Swink Co., 744 E. Colorado street, Pasadena, Cal.

"I hand you herewith deed from myself to Elizabeth Y. Felts, my niece, conveying a life estate to my property at #245 South Euclid avenue, Pasadena; also a deed in favor of the Board of Home Missions and Church Extension of the Methodist Episcopal Church, a corporation, of 1701 Arch street, Philadelphia, Pa., covering my said property and subject to the above mentioned deed of life estate. You are hereby instructed to file said deeds for record with the county recorder of Los Angeles county promptly upon my death.

"Yours truly, Clemon H. Manwell."

In March, 1923, on account of her age and increasing debility, and at her own request, a proceeding for the appointment of a guardian for Mrs. Manwell was instituted, and a guardian of her estate was duly appointed.

On March 3, 1923, she executed a will, which refers to the same property and contains the following devise: "To my nephew Wilbur Mowry and his wife, Alice, of Warsaw, Indiana, I give one half of my home, with one half of its furnishings, at 245 South Euclid avenue, Pasadena, California; to Mr. Manwell's nephew, Allen D. Manwell, and his wife Ella, or their son Lural A. Manwell, of Pasadena, California, I give the remaining one-half of my home at 245 South Euclid avenue, Pasadena, California, with the other half of the furnishings."

The following bequest was made to defendant Felts: "I give to my niece, Lizzie Y. Felts, the interest on my annuity for $7,000.00 in the University of Southern California for her life. This with what she already has is more than her share."

The will made no provision for defendant corporation, and after providing for a bequest to a sister of the testatrix the residue of the estate was bequeathed to the Parent Home Missionary Society of the Methodist Episcopal Church of Philadelphia, Pa.

Mrs. Manwell died on October 30, 1927, and the above will was admitted to probate, the plaintiff being the duly qualified administrator of her estate with the will annexed.

Following Mrs. Manwell's death Sturdevant caused the deeds to be recorded and delivered to the respective grantees.

The court found:

"That on or about the 23rd day of January, 1923, said Clementine H. Manwell executed and acknowledged a grant deed to said real property purporting to convey a life estate therein to defendant Elizabeth Y. Felts on certain terms and conditions therein recited, to wit, 'for and during the natural life of the grantee herein. It is the intention of the grantor herein to convey to the grantee herein a life estate only in and to the above described property. It is a part of the consideration in this conveyance that said grantee shall cause the necessary painting and repairing to be done once in three years, to keep said demised premises in good repair and pay all taxes and assessments against said property before same shall become delinquent during the existence of this life estate. To have and to hold said grantee during her natural life,' a copy of which deed setting forth said terms and conditions is annexed to the complaint on file herein, marked 'Exhibit A,' and made a part thereof; that on the same day, to wit, January 23rd, 1923, said Clementine H. Manwell executed and acknowledged a second grant deed to said real property, purporting to convey the fee title therein to defendant The Board of Home Missions and Church Extension of the Methodist Episcopal Church, a corporation, with and subject to a life estate therein to defendant Elizabeth Y. Felts, a copy of which deed is annexed to the complaint on file herein, marked 'Exhibit B' and made a part thereof.

"That said C. V. Sturdevant was then, and for a long period of time prior thereto had been, the confidential business advisor of said Clementine H. Manwell, and that he prepared said deeds and a letter of instructions to himself, reciting that said deeds should be recorded upon the death of said Clementine H Manwell, and advised and counseled said Clementine H. Manwell to sign and execute said deeds and said letter of instructions, and she did thereupon sign and execute the same pursuant thereto. That said C. V. Sturdevant did not explain to said Clementine H. Manwell or advise her at said time of the legal effect of said instruments or their delivery, or tell her that the same could not be revoked. That after said deeds were signed and executed by said Clementine H. Manwell and on or about the 23rd day of January, 1923, said Clementine H. Manwell handed said deeds to said C. V. Sturdevant. That said C. V. Sturdevant took said deeds and kept them in his possession until the death of said Clementine H. Manwell, and thereafter, to wit, on the 1st day of November, 1927, said C. V. Sturdevant caused the said deed to said defendant The Board of Home Missions and Church Extension of the Methodist Episcopal Church, a corporation, to be recorded in book 6771 at page 390 of Official Records of said county of Los Angeles, and said deed to Elizabeth Y. Felts to be recorded in book 7917 at page 284 of Official Records of said county of Los Angeles. That the recording of said deeds was contrary to and in violation of the wishes, instructions and intention of said Clementine H. Manwell, and that the same were recorded by said C. V. Sturdevant without any right or authority.

"That on January 23rd, 1923, at the time said deeds were signed and acknowledged by said Clementine H. Manwell and handed to said C. V. Sturdevant, as hereinbefore mentioned, said Clementine H. Manwell was a widow of advanced years, to wit, at the age of eighty-nine (89) years, and inexperienced and unfamiliar with the transaction of business. That she at that time believed that in so giving said deeds into the possession of said Sturdevant that the same operated and had the legal effect of a will, and that she could at any time during her lifetime recall said deeds and destroy the same. That said Clementine H. Manwell by the execution and handling of said deeds to said C. V. Sturdevant intended and believed that thereby she was making and effecting a testamentary disposition of her property. That defendant Elizabeth Y. Felts and said C. V. Sturdevant, as agent and escrow holder for said grantees named in said deeds, were fully aware of such belief and understanding on the part of said Clementine H. Manwell at the time of the execution and receipt by said C. V. Sturdevant of said deeds, but did not rectify the same or inform her of her mistake, and but for such belief and understanding on the part of Clementine H. Manwell she would not have executed or acknowledged said deeds or either of them, or handed the same or either of them to C. V. Sturdevant. That thereafter, to wit, on or about March 31st, 1923, said Clementine H. Manwell duly executed a will disposing of and devising said real property described in said deeds to persons other than said defendant The Board of Home Missions and Church Extension of the Methodist Episcopal Church, a corporation, and Elizabeth Y. Felts, to wit, one half thereof to Wilbur Mowry, nephew of said Clementine H. Manwell, and Alice Mowry, his wife, and the remaining half interest to Allen D. Manwell, nephew of said deceased husband of said Clementine H. Manwell, and Ella Manwell, his wife, which said will has been duly admitted to probate, as herein set forth.

"That it was not the intention of said Clementine H. Manwell when she handed said deed to said C. V. Sturdevant, or at any other time, to divest herself of the present title to said described premises, nor was it then nor at any other time her intention to vest a present title to said premises in the grantees, or either of said grantees, named in said deeds.

"That said deeds were never delivered to said grantees or to either of them or to anyone for or on behalf of either of them, and said Clementine H. Manwell did not thereby part with her title in fee simple or otherwise to said described real property.

"That there was no consideration passing from defendants or either of them to said Clementine H. Manwell for said deeds."

And concluded therefrom: "That there was not a valid delivery of either of said deeds dated January 23, 1923, executed by said Clementine H. Manwell, granting respectively a life estate to Elizabeth Y. Felts and a fee title to The Board of Home Missions and Church Extension of the Methodist Episcopal Church, a corporation, subject to said life estate, and that neither of said deeds conveyed any title to the grantee therein, and that each of said deeds is null and void and of no force or effect."

Upon the foregoing a decree was entered canceling both deeds, and adjudging the property to be a part of decedent's estate.

Defendants, who have appealed, contend that the findings are unsupported, and that the undisputed facts show a valid delivery of the deeds.

According to Sturdevant's testimony he had been engaged in the real estate business in Pasadena for about 27 years, and had been acquainted with Mrs. Manwell for nearly 20 years. During that period she frequently consulted him regarding her business matters. In 1918 the witness prepared and she executed a deed to the same property to Mattie M. Sturdevant, a sister of the witness. Following this the last-named grantee reconveyed the property to Mrs. Manwell and defendant Elizabeth Y. Felts in joint tenancy, and both deeds were recorded on April 2, 1918. At the same time defendant Felts signed and acknowledged a quitclaim deed to the property, in which Mrs. Manwell was named the grantee. According to the witness, the purpose of the transaction was to vest the record title to the property in defendant Felts as a joint tenant, and at the same time to permit Mrs. Manwell to terminate the same if she desired. It appears that the quitclaim deed was left with the witness, and on May 9, 1921, recorded by him at Mrs.

Manwell's request. He testified that he then explained to her the legal effect of the deposit in escrow of a deed to be delivered upon the grantor's death, where control over the instrument is parted with, and that to avoid this result the matter was handled in the manner stated; that before the deeds involved in this action were executed Mrs. Manwell stated to the witness in substance that she wished defendant Felts to have the property as long as the latter lived, and that the same should then go to the missionary society, and asked if it could be arranged in that way; that he explained to her that she could convey a life estate to Mrs. Felts, and the fee to the missionary society subject to the life estate, and deposit the deeds with a third person; that she approved, and the deeds with the letter were prepared by the witness, and submitted to her. A mistake was made by the scrivener in the name of the missionary society intended, but the error was discovered by Mrs. Manwell and corrected; that thereupon she executed both deeds, signed the accompanying letter, and delivered the same to the witness. This witness when first examined was not certain whether on the last occasion he again explained to Mrs. Manwell that under the proposed arrangement a delivery of the deed to himself or another in escrow could not be revoked. On the following day, however, he testified that he then recalled that the same explanation was made to her before the execution of the deeds in question. He also testified that he had previously said, in reply to a question as to whether he was interested in the litigation, "that he had a professional pride in making his advice stick," or words to that effect. Other witnesses testified to statements by Mrs. Manwell, before and after the execution of the will, that she wished her property to go to the nephews named as beneficiaries in the will, and that she "had not been treated right" by Mrs. Felts, who had already received more than her share, and that she was "through with her." According to one of these witnesses, with whom Mrs. Manwell was discussing the terms of her proposed will, she replied in response to a question whether she had not already disposed of her home property, "No, it's the last one that counts;" and it was further testified, that Mrs. Manwell claimed that Sturdevant had promised to return certain papers, but refused to do so. Whether the papers referred to were those involved in the present case does not appear. Other than this, there was no testimony that she at any time requested the return of the deeds. Statements by Mrs. Manwell that Sturdevant was not her friend, to a friend of Mrs. Felts, were testified to, and also that Sturdevant had stated, referring to the property, that Mrs. Manwell "has that fixed just as she wants it, and Lizzie (meaning Mrs. Felts) will not get it."

[1-5] The rule is well settled that if a deed, fully executed and so drawn as to convey a present title, is deposited by the grantor with a third person, with directions to deliver it to the grantee after the death of the grantor, and the grantor in making such deposit reserves no power to recall or modify the same, or thereafter to control in any way the disposition of the deed, the deed is not an attempted testamentary disposition, but is effective as a conveyance of title, qualified only by a life tenancy in the grantor, and the depositary becomes the trustee of the grantee. Bury v. Young, 98 Cal. 446, 33 P. 338, 35 Am. St. Rep. 186. Williams v. Kidd, 170 Cal. 631, 151 P. 1, Ann. Cas. 1916E, 703. But if the grantor intends to retain control of the deed, or of his rights of property, including the right of disposition and control until his death, with the intention that the depositary shall deliver the deed to the grantee upon the death of the grantor, only in the event the grantor shall not have recalled it, or made other disposition of the property, delivery is lacking (Northern California Conference Ass'n, etc., v. Smith, 209 Cal. 26, 285 P. 314, 317); and whether a deed, which has been placed in the hands of a third person, has passed beyond the control of the grantor is to be determined by the latter's intention (Bury v. Young, supra; Williams v. Kidd, supra). This has been held to be a question of fact (Bury v. Young, supra; Williams v. Kidd, supra; In re Estate of Cornelius, 151 Cal. 550, 91 P. 329; Hotaling v. Hotaling, 193 Cal. 368, 224 P. 455, 56 A. L. R. 734; Kimbro v. Kimbro, 199 Cal. 344, 249 P. 180), unless the instructions are entirely in writing. When such is the case, it has been held that the question is one of law, Moore v. Trott, 156 Cal. 353, 104 P. 578, 134 Am. St. Rep. 131. But, where the written instruments do not purport to be all the directions given, or the same are equivocal, evidence of the circumstances attending the preparation of the deed and the acts and statements of the alleged grantor material to the question of delivery during the entire period of escrow is admissible. Williams v. Kidd, supra; Donahue v. Sweeney, 171 Cal. 388, 153 P. 708; Tweedale v. Barnett, 172 Cal. 271, 156 P. 483; Smith v. Smith, 173 Cal. 725, 161 P. 495; Fisher v. Oliver, 174 Cal. 781, 164 P. 800; Rees v. Rees, 191 Cal. 399, 216 P. 1006.

In the present case the only direction in the letter as to the disposition to be made of the deeds was the following: "You are hereby instructed to file said deeds for record with the county recorder of Los Angeles county promptly upon my death." In Northern California Conference Ass'n, etc., v. Smith, supra, the written direction was "Give the within deed to the grantees on my death;" and it was held in effect that this was not conclusive upon the question of intention. So in Rice v. Carey, 170 Cal. 748, 151

P. 135, 137—where it was held that there was no delivery—a depositary was directed to "take these deeds, put them away with your papers, and at my death have them recorded." In each of the above cases the subsequent conduct of the grantor showed sufficiently that the transaction was an attempted testamentary disposition of the property described in the deeds, and the conclusions of the court to that effect were sustained.

[6-8] It is clear that the language of the letter was not necessarily inconsistent with the intention that the deed should not be immediately effective. In determining the question, the fact that the grantor subsequently deals with the property in a manner inconsistent with the theory of an effective delivery is a relevant circumstance (Williams v. Kidd, supra); and the understanding of the depositary, as to the effect of the previous transaction, is important only as bearing upon the value of his testimony at the time of the alleged delivery (Wilcox v. Hardisty, 60 Cal. App. 206, 212 P. 633). Whatever the understanding of the witness Sturdevant as to Mrs. Manwell's intention in the transaction, her subsequent statement referring thereto in connection with her proposed will that "it's the last one that counts," and the fact that she did execute a will disposing of the same property in a different way, support the conclusion that she understood the first transaction to be in effect a testamentary disposition of the property, and that no effective delivery of the deeds was intended. The other testimony adduced by plaintiffs also tends, though in a lesser degree, to the same conclusion.

[9-12] In determining the credibility of a witness the court may take into consideration his interest in the result of the case (Blackwell v. American Film Co., 48 Cal. App. 681, 192 P. 189; In re Estate of Ramey, 62 Cal. App. 413, 217 P. 135), or that he is biased at the time of the trial (27 Cal. Jur. Witnesses, § 96, p. 122); and while the unimpeached testimony of a witness may not be arbitrarily disregarded, nevertheless the jury or the trial court is the exclusive judge of his credibility, and the presumption of truthfulness may be overcome by the manner in which the witness testifies, the character of his testimony, or his motives (Code Civ. Proc. § 1847). Here the trial court, which is the judge of the weight to be given the evidence (Code Civ. Proc. § 2061), expressed its belief that Sturdevant's testimony was in a measure colored by his desire to have his opinion upheld. The court had the advantage of seeing the witness and hearing him testify, and we cannot say that its conclusion is unsupported. The inferences drawn were fairly and reasonably deducible from the circumstances and testimony which the court believed; and where such is the case its findings must stand (Williams v. Kidd, supra; Rice v. Carey, supra); and this is true even though the evidence would have supported contrary findings (Clopton v. Clopton, 162 Cal. 27, 121 P. 720).

We are satisfied that the findings of the court are fairly supported by the evidence, and no error is shown which would justify a reversal.

The judgment is affirmed.

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122 Cal.App. 748

VOGEL v. MARSH.

Civ. 8321.

District Court of Appeal, First District, Division 2, California.

April 21, 1932.

Rehearing Denied May 21, 1932. Hearing Denied by Supreme Court June 20, 1932.

1. Dismissal and nonsuit ⚷60(1).

Statute requiring dismissal for failure to bring cause to trial within five years after answer *held* not to control court's inherent power to dismiss for neglect in prosecution (Code Civ. Proc. § 583).

2. Dismissal and nonsuit ⚷60(6).

Court could dismiss action for unreasonable delay in prosecution, notwithstanding defendant had not filed answer (Code Civ. Proc. § 583).

3. Dismissal and nonsuit ⚷60(1).

Court, finding plaintiff's delay in prosecution of action was unreasonable, *held* not to have abused discretion in dismissing action for want of prosecution.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by E. J. Vogel against F. D. Marsh, doing business under the firm name and style of Burnham & Marsh. From an order dismissing the action, plaintiff appeals.

Affirmed.

E. J. Vogel, in pro. per.

Louis V. Crowley and Cooley, Crowley & Supple, all of San Francisco, for respondent

NOURSE, P. J.

This is an appeal from an order dismissing the above-entitled action because of plaintiff's laches and neglect in the prosecution of the proceeding.

The original complaint was filed July 21, 1920, in the county of Marin; demurrer was interposed December 24, 1920; change of venue was secured to the city and county of

San Francisco, March 19, 1921; demurrer was sustained January 12, 1923; an amended complaint was filed March 2, 1928; demurrer to the amended complaint was filed June 11, 1928; the motion to dismiss for delay in prosecution was filed September 26, 1930, and was heard October 8 and 23, 1930.

In opposition to the motion to dismiss the plaintiff made no showing tending to excuse the unreasonable delays other than that his case had been in the hands of numerous attorneys who, he now asserts, in some manner conspired to defraud him. In support of the motion it was shown by defendant that the long delay of plaintiff in filing his amended complaint (five years) was due to plaintiff's own fault and negligence and was not taken through any stipulation or understanding with the defendant.

[1] Upon the facts as they appear in the record the question is whether a court may dismiss an action for unreasonable delay and want of diligence on plaintiff's part if no answer has been filed by the defendant. The question has been answered in numerous decisions. The mandatory features of section 583, Code of Civil Procedure, requiring a dismissal for failure to bring a cause to trial within five years after answer filed, and the directory provision authorizing a dismissal under certain circumstances two years after answer filed, do not control the inherent power of the court to dismiss for the failure of the plaintiff to prosecute the action with reasonable diligence. Romero v. Snyder, 167 Cal. 216, 221, 138 P. 1002; Overad v. Keeney, 169 Cal. 628, 632, 147 P. 466; Allyne v. Superior Court, 200 Cal. 661, 666, 254 P. 564; St. Claire v. Brix, 89 Cal. App. 94, 99, 264 P. 307; 9 Cal. Jur., pp. 526, 527.

[2, 3] From these authorities it follows that the trial court was vested with discretion to dismiss. As that court affirmatively found that plaintiff's delay was unreasonable and inexcusable, it cannot be said that it abused its discretion in granting the motion.

The order is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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123 Cal.App. 48

PEOPLE v. CICERELLI.

Cr. 1651.

District Court of Appeal, First District,
Division 2, California.

April 25, 1932.

As Amended on Denial of Rehearing May 10, 1932. Hearing Denied by Supreme Court May 23, 1932.

1. Rape 🔑57(1).

In prosecution for assault with intent to commit rape, question of unlawful intent *held* for jury under evidence.

2. Assault and battery 🔑96(1).

In prosecution for assault with intent to commit rape, refusal to give charge covering simple assault *held* reversible error under evidence (Pen. Code, § 1159).

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Frank Cicerelli was convicted of assault with intent to commit rape, and he appeals.

Reversed with directions.

Nathan G. Gray, of Berkeley, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, of San Francisco, for the People.

NOURSE, P. J.

Defendant was tried before a jury upon an information charging an assault with intent to commit rape and of a violation of section 448a Penal Code. He was found guilty of the first charge and not guilty of the second.

[1] Two points are raised on the appeal: The sufficiency of the evidence to sustain the verdict of guilty and the refusal of the trial court to give the proposed instruction covering lesser offenses. The evidence is meager and is not in substantial conflict. Appellant and the prosecutrix were employed in a workroom adjoining a small factory in the city of Oakland; on the day specified in the information they took their lunches together and both consumed a considerable quantity of wine; a struggle ensued, during which appellant struck the prosecutrix on the jaw and both parties fell to the floor, where the proprietor of the factory discovered them—the appellant sitting astride the prosecutrix and tearing at her underclothing, while the prosecutrix had both hands locked in appellant's hair. This witness ordered the appellant to leave the girl alone, and the appellant thereupon set upon the witness and some blows were struck. The only conflict in the evidence is in the explanations of the two participants in the assault charged—the prosecutrix testified that she seized appellant's hair for the purpose of forcing him to stop pulling down her underclothes; the appellant testified he pulled her underclothes only to force her to stop pulling his hair. Under this state of the evidence the jury might reject appellant's explanation of the occurrence and imply the unlawful intent necessary to support the verdict.

[2] However, the evidence was such that the jury might well have found the appellant guilty of simple assault, and he requested the trial court to instruct the jury to that effect. The proposed instruction was refused, and this is assigned as error. The law applicable to the point is found in section 1159, Penal Code; People v. Demasters, 105 Cal. 669, 673, 39 P. 35; People v. Mock Ming Fat, 82 Cal.

App. 618, 620, 256 P. 270; People v. Foss, 85 Cal. App. 269, 272, 259 P. 123.

The state's answer that the proposed instruction was not proper because appellant could have been convicted of the assault charged and no other is not supported by the evidence. This disclosed that the parties were engaged in a brawl induced by the use of too much liquor. The jury could have found appellant guilty of simple assault because of the admitted striking of the girl, and, if it had accepted appellant's testimony that he had no intention of having sexual intercourse, a verdict of simple assault would have been the proper verdict to return.

The judgment is reversed with directions for a new trial.

We concur: STURTEVANT, J.; SPENCE, J.

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123 Cal.App. 44

BELLI et al. v. BOARD OF SUP'RS OF CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 8418.

District Court of Appeal, First District, Division 2, California.

April 25, 1932.

1. Municipal corporations ⚷107(1).

Mayor's veto power exists only to extent clearly granted by charter, and should not be enlarged by strained construction (San Francisco City Charter, art. 18, § 5).

2. Municipal corporations ⚷107(2).

Under charter granting mayor veto power over every "resolution * * * adopted or passed" by city planning commission, veto power *held* not conferred where approval of rezoning application automatically resulted from commission's inaction; hence proceedings were not void for failure of commission to certify inaction to mayor (San Francisco City Charter, art. 18, §§ 4, 5).

Rezoning proceeding by Mrs. Jennie Jones before the City Planning Commission of the City and County of San Francisco. To review the action of the Board of Supervisors of the City and County of San Francisco in hearing and determining an appeal from the approval of the application by the commission, which approval resulted automatically from the commission's inaction, Evangelista Belli and others, opposing such rezoning, bring certiorari.

Proceedings before the board affirmed.

Samuel T. Bush, of San Francisco, for petitioners.

Milton Marks, of San Francisco, for respondents.

SPENCE, J.

Petitioners herein seek to review the action of the respondent board in hearing and determining an appeal in a rezoning proceeding.

Petitioners had protested before the city planning commission against the granting of an application to change a piece of property belonging to Mrs. Jennie Jones from the second residential district to the commercial district. The commission took the application under advisement and thereafter failed to act thereon. The charter of the city and county of San Francisco in effect at that time provided that: "The failure of the Commission to act within ninety days * * * shall be deemed and be approval of such classification by the Commission." Article 18, § 4, San Francisco City Charter, Stats. 1929, pp. 2020, 2022. After the expiration of ninety days an appeal was taken to the respondent board by some of those who had protested against the granting of the application by the commission. Petitioners herein filed their written objections to the hearing of the appeal by the respondent board upon the ground that the approval of the application by the commission resulting under the terms of the charter from the failure of the commission to act was void, as the "mayor of said city and county was not notified of said action nor afforded an opportunity to approve or disapprove the same." Petitioners sought to restrain and prohibit respondents from hearing and determining said appeal by applying for a writ of prohibition in the superior court, but said application was denied. An appeal was taken from the judgment of the superior court, which appeal is now pending. The questions involved on that appeal have become moot, as the respondent board has since acted on the appeal in the zoning proceeding. Said board by 9 to 5 vote refused passage to a resolution which resolution had for its purpose the dissapproval of the granting of the application to rezone the property. Said proposed resolution, which was refused passage by the respondent board, was certified to the mayor, who took no action thereon. The appeal to the respondent board was thereby lost, and the result of the proceedings was to effect a rezoning of the property unless the proceedings before the commission were void for the reasons urged by petitioners.

The provisions of article 18, § 5, of the Charter of the City and County of San Francisco (Stats. 1929, pp. 2020, 2024), then in effect, read in part as follows: "Every resolution of the City Planning Commission and every ordinance of the Board of Supervisors which shall be adopted or passed relative

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

to the subject matter of this Article shall be presented to the Mayor for his approval. The Mayor shall return such resolution or ordinance to the City Planning Commission or Board of Supervisors, respectively, within ten days after receiving it. If he approves it he shall sign it and it shall thereupon become effective unless an appeal to the Board of Supervisors is pending. If such an appeal is pending, the approval by the Mayor shall not result in rendering such resolution or ordinance effective. If he disapproves it he shall specify his objections thereto in writing. If he does not return it with such disapproval within the time above specified it shall take effect as if he had approved it, unless an appeal to the Board of Supervisors is pending. * * *"

[1] It is petitioner's contention that "the inaction of the commission was equivalent to the adoption of a resolution of approval," but that the proceedings before the commission were void because of "the failure to certify to the mayor the proceedings leading to the approval of the application to rezone." Petitioners thereupon argue the respondents "had no jurisdiction, by hearing the appeal, to validate a void act of the city planning commission and certiorari will lie." Petitioners' claim of invalidity has no merit unless the charter required certification to the mayor of the proceedings before the planning commission leading to the approval of the application where such approval resulted from the failure of the commission to act. We find no such requirement in the charter. It is true that a complete scheme was provided for presenting every "resolution" which had been "adopted or passed" by the commission to the mayor for approval or disapproval. In other words, the charter expressly conferred upon the mayor the veto power over such resolutions. We search in vain, however, for any provision which confers such veto power upon the mayor in cases where the approval of the commission results from its failure to act. Petitioners make the point that, as the failure of the commission to act was equivalent for some purposes, including appeal, to a resolution of approval, it follows that the mayor had the veto power over such approval resulting from the failure of the commission to act. In our opinion, this point may not be sustained. If it was the intention of the framers of the charter to confer the veto power in such cases, they failed to express such intention in the charter. That instrument is devoid of any provision requiring certification or presentation to the mayor of the record of the proceedings where approval results from the commission's failure to act and is likewise devoid of any provision requiring the approval of the mayor in such cases. It is not the function of the courts to work out a plan for the exercise of the veto power by the mayor in those cases in which the charter neither provides such plan nor confers such power. The veto power is not an inherent power of the mayor, and the terms of the charter define the extent to which it may be exercised by him. Such power exists only to the extent that it is clearly granted and is not to be enlarged by any strained construction. Jacobs v. Board of Supervisors, 100 Cal. 121, 34 P. 630; McDonald v. Dodge, 97 Cal. 112, 31 P. 909; Brooks v. Fischer, 79 Cal. 173, 21 P. 652, 4 L. R. A. 429; 18 Cal. Jur. 913, § 203; Dillon on Municipal Corporations (5th Ed.) vol. II, p. 910.

[2] From a reading of the above-quoted section 5 we think it clear that the veto power of the mayor was conferred only in those cases where a "resolution" had been "adopted or passed" and was not conferred in those cases where approval resulted from inaction. It follows that the proceedings in the instant case were not void as contended by petitioners for failure of the commission to certify their inaction to the mayor.

The respondent board therefore did not exceed its jurisdiction in hearing and determining the appeal, and the proceedings before the respondent board are affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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123 Cal.App. 53

JESTER v. KOHLER & CHASE et al.

Civ. 7093.

District Court of Appeal, Second District, Division 2, California.

April 25, 1932.

1. Venue ⚷22(3).

That sheriff of county in which action on attachment bond was brought, but against whom no cause of action was stated and no judgment sought, was made defendant, *held* not to preclude codefendant from obtaining change of venue.

2. Venue ⚷16½.

Addition of count for malicious attachment *held* not to defeat defendant's right to change of venue to which he was entitled, in so far as action was based on attachment bond.

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by J. H. Jester against Kohler & Chase, a corporation, and others. From an order granting a motion for change of venue, plaintiff appeals.

Affirmed.

Elbert E. Hensley, of Los Angeles, for appellant.

G. C. Ringole, of San Francisco, and Jones, Hoyt & Rifkind, of Los Angeles, for respondents.

IRA F. THOMPSON, J.

The present action was brought to recover on an attachment bond and damages for a wrongful and malicious attachment. The complaint set forth that the corporate defendant Kohler & Chase, on April 18, 1929, commenced an action in the justice's court of the city and county of San Francisco, and secured a writ of attachment to be issued and directed to the defendant sheriff, directing him to attach and safely keep the property of the plaintiff here, who was the defendant in that action. Kohler & Chase signed the bond as principal, and the other defendant, Hartford Accident & Indemnity Co., signed it as surety. Pursuant to the writ there issued, William I. Traeger, as sheriff, levied upon plaintiff's automobile and kept it until June 17, 1929. It is averred that subsequently a motion to quash service of summons was granted and the action was dismissed. It is also alleged in one count that plaintiff was deprived of the use of his automobile to his damage in the sum of $530 and in the other count that the plaintiff in the former action acted maliciously and without probable cause and that plaintiff in the present case has suffered damage by the impairment of his credit and by humiliation to the extent of $5,000. The prayer of the complaint by plaintiff asked for a judgment against the two corporate defendants in the sum of $180, that being the amount of the attachment bond, and against Kohler & Chase in the further sum of $7,350. No judgment is asked against William I. Traeger. The defendant Kohler & Chase made a motion for a change of place of trial on the ground that at the time the action was commenced and for many years prior thereto it had as a domestic corporation maintained its principal place of business in the city and county of San Francisco and been a resident of that place; and that William I. Traeger was joined as a defendant fraudulently and solely for the purpose of depriving Kohler & Chase of its right to have the action tried in San Francisco. This is an appeal from the order granting the motion.

The appellant's contentions may be disposed of by determining first whether the naming of the sheriff of Los Angeles county as a defendant altered the status of the case, and, if not, whether the respondent was entitled to a change of venue.

[1] It is to be observed that no judgment is sought against William I. Traeger. A reading of the complaint demonstrates that it states no cause of action against the sheriff, which explains the reason why nothing is asked against him, and also the reason why the affidavit in support of the motion for change of venue averred that he was joined solely for the purpose of depriving the respondent Kohler & Chase of its right to have the action tried in San Francisco. Happily, we are not without authority. In Garrett v. Garrett, 178 Cal. 131, 172 P. 587, 588, a like motion was denied. The court in reversing the order says: "As no cause of action is stated against the codefendants of Garrett, his motion for a change of venue should have been granted. Remington Sewing Machine Co. v. Cole, 62 Cal. 311; Sayward v. Houghton, 82 Cal. 628, 23 P. 120; McKenzie v. Barling, 101 Cal. 459, 461, 36 P. 8."

It is said in Vesper v. Crane Co., 165 Cal. 36, 130 P. 876, 878, L. R. A. 1915A, 541: "When an attachment is sued out and levied upon the property of a defendant in the action, and the plaintiff therein has failed to maintain his action, two remedies may be open to the attachment defendant: He may sue upon the undertaking on attachment or maintain an action for malicious attachment." It is patent that in the present action the one count is "upon the undertaking" and the other for "malicious attachment." It is equally clear that had the action been confined to an action upon the bond the venue would have been in the city and county of San Francisco. In the case of Fitzhugh v. University Realty Co., 46 Cal. App. 198, 188 P. 1023, 1024, which was an action for money had and received after the rescission of a contract, and where a similar motion had been denied, the court said: "Section 16, art. 12, of the Constitution provides that a corporation may be sued in the county where the contract is made or is to be performed or where the obligation or liability arises, or the breach occurs, or in the county where the principal place of business of such corporation is situated. The quasi contract sued upon here was created by the law at Palo Alto upon the service of the notice of rescission. In the absence of other agreement, it will be assumed that it was to be performed where it was made. The liability arose in Palo Alto, and the principal place of business of the corporation defendant is situated in said place. It would appear, therefore, that there is no authority for the maintenance of this action in the city and county of San Francisco, and that the order must be reversed."

[2] The question remains: Did the addition of the count for malicious attachment change the right of the defendant? Again the answer is furnished by adjudicated cases. In Smith v. Smith, 88 Cal. 572, 26 P. 356, and in Brown

v. Happy Valley Fruit Growers, 206 Cal. 515, 274 P. 977, the Supreme Court has laid down the rule that a plaintiff cannot, by uniting in his complaint a cause of action not properly triable in the county of the defendant's residence, defeat the right of the defendant to a change of venue where the other count ought of right to be transferred.

Order affirmed.

We concur: CRAIG, Acting P. J.; FRICKE, Justice pro tem.

123 Cal.App. 1

FOSTER v. FOSTER et al.

LINGO v. SAME.

Civ. 8263, 8264.

District Court of Appeal, First District, Division 2, California.

April 22, 1932.

Rehearing Denied May 21, 1932. Hearing Denied by Supreme Court June 20, 1932.

1. **Fraudulent conveyances** 🔑**300(4).**

Evidence showing sister-in-law was indebted to debtors *held* sufficient to sustain finding that transfer of stock to sister-in-law allegedly in fraud of creditor was bona fide.

2. **Fraudulent conveyances** 🔑**86.**

Debtors' pre-existing debt to transferees *held* sufficient consideration for transfer of stock allegedly in fraud of creditor.

3. **Fraudulent conveyances** 🔑**115(1).**

One creditor could not attack debtors' transfer as fraudulent simply because debtors gave preference to another creditor, even if debtors voluntarily made transfer and thereby rendered themselves insolvent (Civ. Code, §§ 3432, 3442).

4. **Appeal and error** 🔑**1010(1).**

Trial court's findings supported by substantial evidence are conclusive.

Appeals from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Two actions, one by Bertha E. Foster against Frank W. Foster, Adell H. Lingo, and others; and the other by Adell H. Lingo against Frank W. Foster, Bertha E. Foster, and others. From the judgments in favor of Bertha E. Foster, Lingo appeals.

Affirmed.

William Ellis Lady, of Los Angeles, for appellant.

Daniel A. Knapp, of Los Angeles, for respondents.

DOOLING, Justice pro tem.

These two cases were tried together and are here presented on appeal upon one set of briefs. Appellant secured a judgment against defendants Frank W. Foster and Effie L. Foster, his wife, for the foreclosure of a chattel mortgage. The mortgaged property was sold for $422.25, leaving a balance due on the judgment of a little more than $6,000. A deficiency judgment was entered for this balance, and to satisfy this judgment appellant caused to be sold at execution a certain ten acres of real estate and over 200,000 shares of the capital stock of Huntington Signal Oil Company then standing in the name of respondent Bertha E. Foster, but formerly standing in the names of Frank W. Foster and his wife. Appellant Lingo was herself the purchaser at the execution sales. In the action numbered herein 8263 respondent Bertha E. Foster sued to quiet title to the real property and judgment went in her favor. In the action numbered herein 8264 appellant asked to have herself adjudged owner of the stock and judgment went in favor of respondent Bertha E. Foster, adjudging her to be the owner of all of such stock.

[1] Appellant claimed in the trial court, and claims here, that the land and stock were transferred by her debtors Frank W. Foster and his wife Bertha E. Foster in fraud of creditors. As to a portion of the stock the trial court found that while standing in the name of Frank W. Foster and wife it was at all times in fact the property of R. J. Foster and Bertha E. Foster. There was evidence to support this finding. As to the balance of the stock and the land the trial court found that the transfers were bona fide and for adequate consideration. In this behalf the proof showed that Bertha E. Foster is the wife of one R. J. Foster; that R. J. Foster is a brother of Frank W. Foster; that at the time of the transfers from Frank W. Foster and wife to Bertha E. Foster, Frank W. Foster, and his wife were indebted to R. J. Foster and Bertha E. Foster in an amount exceeding $25,000; and that the transfers were made to satisfy this indebtedness. While there is much in the evidence which might cast doubt on the bona fides of the transfers and the existence of this debt, those matters were properly addressed to the trial court and the evidence is sufficient to support the trial court's findings.

[2, 3] The pre-existing debt was a sufficient consideration for the transfers (Commercial National Bank v. Roberts, 49 Cal. App. 764, 194 P. 751; Smitton v. McCullough, 182 Cal. 530, 189 P. 686), and a transfer cannot be attacked by one creditor simply because the transferor has seen fit to give a preference to another creditor (Civ. Code, § 3432), even though the debtor thereby renders himself

insolvent. Heath v. Wilson, 139 Cal. 362, 73 P. 182; Shasta Lumber Co. v. McCoy, 85 Cal. App. 468, 259 P. 965.

Appellant, however, claims that under Civil Code, § 3442, the transfers were void though made for a valuable consideration if they were made voluntarily and the debtors were thereby rendered insolvent. This contention is disposed of adversely to appellant in Security Trust Co. v. Silverman, 210 Cal. 578, 292 P. 636.

[4] The most that can be said for appellant is that the evidence was in conflict and inferences might be drawn therefrom in her favor. The trial court did not draw these inferences and we may not do so on appeal where there is substantial evidence to support the trial court's findings. There is nothing in Tobias v. Adams, 201 Cal. 689, 258 P. 588; Lefrooth v. Prentice, 202 Cal. 215, 259 P. 947, or Allee v. Shay, 92 Cal. App. 749, 268 P. 962, in conflict with our conclusion. All of those cases dealt with attempted transfers by way of gift and without valuable consideration.

The judgments appealed from are affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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122 Cal.App. 672

Ex parte TOM WONG.

Cr. 1649.

District Court of Appeal, First District, Division 2, California.

April 19, 1932.

1. Habeas corpus 🔑**30(2).**

Complaint sufficiently stated cause of action in vagrancy to preclude discharge on habeas corpus, since purporting to plead offense defined in statute (Pen. Code, § 647).

Pen. Code, § 647 provides, in part, that every person, except a California Indian, without visible means of living and having the physical ability to work, who does not seek employment nor labor when employment is offered, is a vagrant. The complaint alleged, in substance, that between and on dates not stated, a misdemeanor, to wit vagrancy, was committed by the accused, who, not being a California Indian, without visible means of living, and having the physical ability to work, did not seek employment nor labor when employment was offered him.

2. Indictment and information 🔑**87(6).**

Complaint that accused committed vagrancy from, up to, and on, dates not stated, sufficiently alleged continuing offense, or one on and preceding day certain (Pen. Code, § 647).

3. Vagrancy 🔑**5.**

Conviction of vagrancy *held* not void under statute defining vagrants; "vagrancy" being the state of being a vagrant (Pen. Code, § 647).

[Ed. Note.—For other definitions of "Vagrancy; Vagrant," see Words and Phrases.]

Application by Tom Wong for writ of habeas corpus to be directed to the Sheriff of the City and County of San Francisco, to secure release from alleged illegal detention.

Writ discharged, and petitioner remanded.

McGettigan, Toland & Baumgarten, of San Francisco, for petitioner.

Leo A. Cunningham, of San Francisco, for respondent.

STURTEVANT, J.

A purported complaint was filed in the municipal court of San Francisco against the petitioner; he was arrested and brought before the court; a trial was had and he was found guilty and sentenced to serve a term in the county jail. Later he applied to the superior court for a writ of habeas corpus, and the writ was denied. Being dissatisfied he has applied to this court for a writ. The sheriff has made a return setting up a copy of the judgment of conviction as being his authority for holding the petitioner in his custody. By the stipulation of the parties the return is allowed to stand as a traverse to the petition of the petitioner.

The petitioner claims (1) the complaint against him fails to state a cause of action; (2) that the judgment is void; and (3) that the process under which he is imprisoned is defective in a matter of substance.

[1] The first part of the complaint is as follows: "Personally appears before me this 9th day of December A. D. 1931, J. P. O'Connor, who, on oath, makes complaint and deposes and says, that on the 8th day of December A. D. 1931, and from said ——— day of ——— A. D. 193—, up to and on the ——— day of ——— A. D. 193—, in the city and county of San Francisco, state of California, the crime of misdemeanor, towit: vagrancy, was committed, towit: by Tom Wong who then and there, and from said ——— day of ——— A. D. 193—, not being a California Indian, without visible means of living, and having the physical ability to work, did not seek employment nor labor when employment was offered him. * * *" Paraphrased the foregoing passage has the same meaning as though it were worded as follows: "Personally appears be-

fore me this 9th day of December, A. D. 1931, J. P. O'Connor, who, on oath, makes complaint and deposes and says, that on the 8th day of December, A. D. 1931, and from a date not stated up to and on a date not stated, in the city and county of San Francisco, state of California, the crime of misdemeanor, to-wit: the act of being a vagrant, was committed, to-wit: by Tom Wong who then and there, and from said date not stated up to and on a date not stated, not being a California Indian, without visible means of living and having the physical ability to work, did not seek employment nor labor when employment was offered him. * * *" It will be conceded at once that the complaint was quite ambiguous; nevertheless, we think it must be conceded that the complaint purported at least to state a public offense. Section 647 of the Penal Code is in part as follows: "Every person (except a California Indian) without visible means of living who has the physical ability to work, and who does not seek employment, nor labor when employment is offered him * * * is a vagrant and is punishable, * * *" etc. Comparing the pleading with the statute, we think it is very clear that the pleading purported to plead the offense defined in the statute. That being so, on an application for a writ of habeas corpus, the petitioner is not entitled to a discharge. In re Edwards, 208 Cal. 725, 734, 284 P. 916; In re Brown, 102 Cal. App. 97, 98, 282 P. 538, and cases cited. As this proceeding is an attack on the judgment of a municipal court, the rule in those cases is applicable. In re Rissman, 87 Cal. App. 176, 261 P. 727.

[2] The petitioner argues that the statute, Penal Code, § 647, defines a continuing offense, and it is essential that the information contain a continuendo or it should allege that on a day certain and for some space of time previous thereto the defendant committed the acts or conduct charged. Conceding such to be the rule, we are unable to say that such allegations are not present. Although defectively pleaded, they are not wholly wanting. The petitioner quotes from People v. Lee, 107 Cal. 477, at page 480, 40 P. 754: "A person, for example, charged with vagrancy is of right entitled to know whether he is called upon to meet the charge as being a common drunkard, or as being a dissolute associate of known thieves, or as being a healthy beggar, in short, as belonging to what class, or as having habitually committed what act to lay him liable as a 'vagrom man.'" That is sound doctrine, but it is not pertinent. The complaint in the instant case charged the petitioner under nearly every one of the twelve subdivisions of section 647.

[3] The judgment recites that: "Whereas Tom Wong having been duly convicted in the municipal court of the city and county of San Francisco, state of California, department ten, of the crime of misdemeanor, towit vagrancy as charged in the complaint. * * *" Counsel stress the fact that we have no statute defining "vagrancy." That is true; however, we have a statute defining "vagrants." Turning to the dictionary, vagrancy is the state of being a vagrant. Freely admitting that the judgment was not perfect, we think it must likewise be admitted that it was not void. Ex parte Thomas, 103 Cal. 498, 37 P. 514, contains nothing to the contrary.

The writ is discharged, and the prisoner is remanded.

We concur: NOURSE, P. J.; SPENCE, J.

123 Cal.App. 50

TIFFANY PRODUCTIONS, Inc., et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 8203.

District Court of Appeal, Second District, Division 1, California.

April 25, 1932.

Rehearing Denied May 24, 1932. Hearing Denied by Supreme Court June 24, 1932.

Courts ⚿**30.**

Where motions to stay proceeding and discharge attachment were before court at one time, fact that court entered order staying proceedings first did not prevent court's passing on motion to discharge attachment (Code Civ. Proc. § 1284).

Petition by Tiffany Productions, Inc., and another against the Superior Court in and for Los Angeles County and another, for a writ of prohibition.

Alternative writ discharged, and petition denied.

Sam Wolf and Harry J. Miller, both of Los Angeles, for petitioners.

Loyd Wright and Charles E. Millikan, both of Los Angeles, for respondents.

CONREY, P. J.

In the respondent Superior Court there was pending an action between James Cruze Productions, Inc., Limited, plaintiff, and Tiffany Productions, Inc., and Tiffany Productions of California, Inc., Limited, defendants. The complaint prayed for certain relief to which the plaintiff claimed to be entitled, arising out of a contract between the plaintiff and the defendants. The contract contained an agreement for arbitration in the event of a disagreement between the parties as to the rights, duties, or obligations of either party thereto. In their answer to the complaint, and as a defense thereto, the defendants pleaded the existence of said agreement of arbitration. The defendants also filed a cross-complaint for the recovery of certain moneys which they alleged constituted an overpayment made by them to the plaintiff in the course of the transactions which arose out of said contract. On filing their cross-complaint the defendants and cross-complainants caused to be levied an attachment against property of the plaintiff.

While the action was in the condition hereinabove stated, the plaintiff gave notices of two motions to be made by it in said action, one being a motion for a stay of proceedings in the action, and the other being a motion for discharge and dissolution of the attachment. In accordance with said notices, these matters came on for hearing at one and the same time and place, and it may fairly be said that they were heard together, although the court first heard argument upon the motion to stay proceedings before the motion to discharge attachment was taken up for discussion. It further appears that, in accordance with notice given by the defendants, they also at the same time presented to the court an application for an order staying proceedings in the action "in accordance with the provisions of section 1284 of the Code of Civil Procedure of the State of California." In the argument here it seems to be conceded that at the time of hearing of said motions the court announced its intention to grant the stay of proceedings, and that thereupon the defendants and cross-complainants raised the point that the court by reason of said stay of proceedings became immediately without power to release or discharge the attachment. The action of the court in disposing of the matter at that time is briefly shown in the minutes, which read as follows: "Motion to release and discharge attachment and motions (2) to stay proceedings come on for hearing, Wright & Millikan appearing as attorneys for the plaintiffs and Sam Wolf by H. J. Miller for the defendants; motion to release and discharge attachment to stand submitted upon presentation of closing brief, 7-5 and 1 days allowed. Motions (2) to stay proceedings are granted. Cross-complainant notes an exception to Order staying proceedings on cross-complaint." Thereafter the court notified counsel of its intention to grant the motion for an order discharging the attachment. Thereupon defendants and cross-complainants filed in this court their petition for a writ of prohibition. The alternative writ was issued, return duly made by answer, and, after argument, the matter has been submitted for decision.

Counsel for the respective parties have cited a number of decisions upon which they rely, the one to sustain the position that an order staying proceedings in an action deprives the court of jurisdiction to act further in any proceeding in the action and the other to sustain the position that an ancillary proceeding relating to such a matter as an attachment or a receivership is not included within the scope of a general order for stay of proceedings. None of them are California decisions, but they are instructive upon the question. We have concluded, however, that the inquiry is not necessary in this case. The court had these several motions before it at one time, and plainly intended to dispose of them together. Under such circumstances, the mere order of time in which the court happens to enter its orders becomes immaterial. From the minutes of the court, as well as from the conceded facts with reference to that which actually took place, it is plain that, in granting the order for stay of proceedings, the court intended to and did reserve the right to pass upon the motion for discharge of attachment. Under the circumstances, we think that the court had the right to make such reservation without depriving itself of jurisdiction to complete its action upon the matters thus brought before it for decision. It follows that the court is not now without jurisdiction to render its decision and make an order in accordance with such decision upon the motion for discharge of the attachment.

The alternative writ is discharged, and the petition for the peremptory writ is denied.

We concur: YORK, J.; TAPPAAN, Justice pro tem.

122 Cal.App. 690

STEWART v. BRYANT et al.

Civ. 4545.

District Court of Appeal, Third District, California.

April 19, 1932.

Corporations ⚷691.

In action by receiver of corporation which had forfeited its corporate rights to recover money improperly expended, judgment against directors on theory that they appropriated money as de facto officers *held* justified (Civ. Code, § 309; Const. art. 12, § 3).

Appeal from Superior Court, Los Angeles County; Eugene P. McDaniel, Judge.

Action by J. J. Stewart, as receiver of the United States Thrift Corporation, substitut ed in the place and stead of R. P. Allen, as receiver of the United States Thrift Corporation, against May S. Bryant, John S. Bryant, and others. From an adverse judgment, the named defendants appeal.

Affirmed.

Herbert Cutler Brown, of Hollywood, for appellants.

Charles E. Hobart and Benjamin T. Weinstein, both of Los Angeles, for respondent.

Mr. Justice pro tem. ANDERSON delivered the opinion of the court.

This is an action begun by the receiver against the defendants for the recovery of money improperly expended by the defendants herein while they were in charge and control of the funds of the United States Thrift Corporation of Delaware, a corporation that had been permitted to transact business within the state of California, but subsequently said corporation, by reason of its failure to pay its corporate dues, forfeited its right to transact business in the state of Delaware and also in the state of California.

At the time said corporation forfeited its corporate rights and ceased to do business as a going concern, it carried on hand in the form of a cash balance on deposit in the National City Bank in Los Angeles the sum of seventeen thousand and some odd dollars, and thereafter, up to and including the 18th day of November, 1926, there was added to the account of said corporation in the form of deposits and interest funds of the said Thrift Corporation in the sum of over $44,000; that the total amount of the funds of the corporation on hand on June 1, 1925, and including subsequent deposits up to November 18, 1926, was $62,451.28. The plaintiffs prayed judgment for this amount, and the court gave judgment for the sum of $42,340 and interest to October 17, 1928, amounting to the sum of $5,655.89 and costs. The court found that the defendants May S. Bryant, John S. Bryant, and W. E. Steinbeck were directors during all the times mentioned in the proceedings, and that John S. Bryant was acting president and May S. Bryant secretary of said Thrift Corporation.

There is some contention that the appellants have not furnished a complete record on appeal, and the certificates of the court reporter are presented, which seem to support this contention; the judge's certificate also gives this contention some support:

"State of California, County of Yuba—ss.

"I, Eugene P. McDaniel, judge of the superior court of the state of California, presiding in department 4 of the superior court in and for Los Angeles county, do certify as follows, to-wit:

"I have examined the foregoing partial transcript of testimony taken and proceedings had in the trial of the case of R. E. Allen, a receiver for the United States Thrift Corporation, Plaintiff, v. May S. Bryant, John S. Bryant, et al., Defendants, case No. 229,194, consisting of pages 1 to 1173, both inclusive, together with three volumes of reporter's supplemental transcript of exhibits (the last of which three volumes, marked 'Vol. 5,' has no reporter's certificate attached thereto and is not authenticated in any manner nor at all except by the clerk's endorsement filing entered thereon). I have noted and corrected with lead pencil in my own handwriting certain errors and inaccuracies and have indicated certain sentences which seem to be and in my opinion are unintelligible or meaningless; I am of opinion, however, that said errors, inaccuracies and unintelligible and meaningless expressions are not material; otherwise I find said transcript to be substantially a full, true, fair and correct transcript of the proceedings had at the trial, testimony offered or rejected, acts or statements of the court, and also the objections and exceptions of counsel, and matters to which the same relate.

"Dated this 24th day of February, 1930.

"Eugene P. McDaniel,
"Judge of the Superior Court."

The appellants in their brief confess the record on appeal could be made more perfect, and promised at page 13 of their closing brief that they would at the time of the final submission of the case ask the court's permission to add or supply what was omitted, which they have failed to do. But, notwithstanding these omissions, we believe it to be our duty to entertain the appeal and examine the voluminous record that has been presented, consisting of some two thousand pages.

Appellants find much fault with the pleadings in the case, and with the manner and form in which the learned trial judge construed them. We have examined the pleadings carefully, and find them to be sufficient to embrace the issues. The court admitted they could have been more carefully drawn, but, inasmuch as the defendants presented no motion or demurrer to them before answering, the court deemed them sufficient to rest a judgment upon.

Much criticism is made by appellants as to the law governing the case. They strenuously object to the application of the law as applied to this case, to wit, section 309 of the Civil Code, section 3 of article 12 of the state Constitution, and the general law and the rule of the common-law liability. The trial court very clearly explained his interpretation of the law as he understood it and its application to the evidence adduced in the case, explaining that the defendants appropriated the money as de facto officers.

The Supreme Court clearly state, in Winchester v. Howard, 136 Cal. 432, 64 P. 692, 69 P. 77, 89 Am. St. Rep. 153, and in other cases, the liability of the defendants. The court say, at the top of page 443 of 136 Cal., 64 P. 692, 69 P. 77, 80, "The ground of the liability is the willful misappropriation of the property;" and at the bottom of page 444 of 136 Cal., 64 P. 692, 69 P. 77, 81, they further say, "The design plainly was to prevent speculating in corporate funds by directors, and to make them vigilant for their beneficiaries." At page 439 of 136 Cal., 64 P. 692, 69 P. 77, 78, Mr. Justice Temple, speaking for the court, states, as to certain provisions of the Constitution, "that the presumption is not precisely as it would have been had such a matter been presented for consideration 50 years ago." The court then proceeds to state many reasons for the growth of the law. Upon the first consideration of the case, the court took a certain position and affirmed the decision of the Superior Court, but upon a rehearing reversed their first position. It is quite apparent from a reading of the whole case that it was exhaustively considered.

We think the law abundantly supports the judgment.

We have also carefully examined the transcript and find the evidence sufficiently supports the judgment. The defense offered no evidence in opposition to plaintiff's complaint. The defendant May S. Bryant, the secretary, was the mother of the president, John S. Bryant, and the defendant W. E. Steinbeck admitted the truth of the charges set forth in the complaint in open court. The defendant John S. Bryant was called to the witness stand by the plaintiff to testify under the provisions of section 2055 of the Code of Civil Procedure, and his testimony is contained in the transcript from page 768 to and including page 833, and constitutes an admission that he was merely a willing "tool" for the use of his mother, May S. Bryant, the principal defendant in the case. He stated that he signed checks and the minutes of the corporation without any knowledge of the effect of his conduct, but merely upon the advice of his said mother and a Mr. Werner, the attorney for the corporation, and admitted that he was a "dummy president."

The defendant W. E. Steinbeck stated that he had no sufficient knowledge of the reasons why he as director signed the minutes of the corporation, but that he acted upon the advice of the secretary, the attorney, and a Mr. Jaquins, who, as the evidence showed, received the benefit of most of the money drawn out of the funds of the corporation by the acts of the three defendants named.

The defendant May S. Bryant did not take the stand.

The court observed that from the evidence proven in the case plaintiff could easily have established a conspiracy between the defendants to embezzle the funds of the corporation. From the evidence and the law there seemed nothing for the court to do but to render a proper judgment for the plaintiff.

The court could have rendered a judgment for $20,000 in excess of the amount of judgment awarded, but, owing to certain technicalities, declined to do so.

We can see no prejudicial error in the record, and therefore the judgment is affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

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123 Cal.App. 4

KEHLOR v. CHESLEY FINANCE CORPORATION.

Civ. 7233.

District Court of Appeal, Second District, Division 1, California.

April 22, 1932.

1. Corporations ⟹189(12).

Evidence sustained finding that assessment on paid-up capital stock by finance corporation was unnecessary and not for paying expenses, conducting business, or paying debts (Civ. Code, § 331).

2. Corporations ⟹175.

No discretion exists in corporate board of directors to assess capital stock for purposes not mentioned in permissive statute (Civ. Code, § 331).

3. Corporations ⟹175.

Corporation assumes risk of whether facts exist justifying assessment on capital stock, which may be determined by court (Civ. Code, § 331).

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by Kenneth H. Kehlor against the Chesley Finance Corporation. From judgment for plaintiff, defendant appeals.

Affirmed.

Fickeisen & Richardson and J. E. Haley, all of Los Angeles, for appellant.

Ralph W. Evans, of Los Angeles, for respondent.

HOUSER, J.

The salient facts upon which the judgment herein and the ensuing appeal depend are that, some four years after the defendant corporation was organized, and during all of which time it had been regularly conducting its business at a profit, it caused an assessment to

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⟹For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes be levied upon the outstanding paid-up capital stock of the corporation, for the asserted purpose of "conducting business." In response to such assessment, plaintiff and his assignors paid the same "under protest," and thereupon brought an action to recover from the corporation the amount of money thus paid, together with legal interest thereon. From a judgment in favor of plaintiff, the defendant appeals to this court.

[1] The first point suggested by appellant as a sufficient reason for a reversal of the judgment is that the evidence adduced on the trial of the action was insufficient to sustain the finding of fact made by the trial court, that at the time when the assessment in question was levied "the defendant corporation was conducting business at a profit and had assets of its own in form and amount sufficient and ample to continue conducting its business at a profit, and that at the time of the levy of the assessment in controversy * * * there existed no necessity for additional funds to pay expenses, conduct business, or pay debts of the defendant corporation."

The second point presented by appellant likewise is addressed to the question of the insufficiency of the evidence, and concerns a related finding of fact made by the trial court, to the effect "that the said assessment was not levied for the purpose of paying expenses, conducting business, or paying debts."

Although not entirely without conflict from other evidence, or all-inclusive in its scope, nor even not without what might appear to be qualifying or modifying conditions—supporting such findings of fact, among other statements which appear in the testimony given by respective witnesses, may be found the following:

The assessment was levied on July 27, 1928, at a time when the corporation had a "liquid working capital" of $23,000; from the inception of the organization of the corporation which occurred in 1924, and "up until the early part of June, 1928, * * * dividends had been earned on the preferred stock of the appellant corporation. * * * During the month of June, 1928, it earned a profit of $1,172.12, and during the month of July, 1928, it earned a net profit of $770.20." Furthermore, the appellant corporation lent to the Metropolitan Finance Corporation a total of $35,000 between June 7, 1928, and July 31, 1928; of which amount $10,000 was lent on June 7, 1928; $10,000 was lent on July 12, 1928; $5,000 on July 26, 1928; and $10,000 on July 31, 1928. It was also shown that the loans thus made by appellant to the Metropolitan Finance Corporation "were all funds that were not working"; in other words, such loans were all funds of the appellant which it did not require in the operation of its business. Furthermore, it was disclosed that the president of the appellant corporation owned the controlling interest in the Metropolitan Finance Corporation, in which latter corporation he was also a director; that the number of directors of the appellant corporation consisted of five persons, of whom the said president was one, his wife was a second member thereof, and another person, who was identified as the vice-president of the Metropolitan Finance Corporation, was a third member of the board of directors of the appellant corporation. A financial statement and balance sheet of the appellant corporation as of June 30, 1928, showed a net surplus of $12,856.15; a similar statement and balance sheet as of date July 31, 1928, showed a net surplus of $13,628.35. It also appeared that, although the par value of the preferred, as well as the common, stock of the corporation was $10 per share, four days after the assessment had been levied, the president of the appellant corporation bought from it seven hundred shares of the preferred capital stock and seven hundred shares of the common capital stock of the corporation for the sum of $7,000; and shortly thereafter, notwithstanding the previous loans shortly theretofore made by the appellant corporation to the Metropolitan Finance Corporation, the appellant corporation borrowed from a bank the sum of $15,000. However, from the testimony given by the president of the appellant corporation, it not only appeared that the loans made by it to the Metropolitan Finance Corporation were all funds which the appellant did not require in the operation of its business, but that such loans were collectible as, if, and when the money represented thereby was needed or demanded by the appellant corporation. As was testified by the president of the corporation:

"Q. When did you make any of those loans? A. As the Chesley Company has more funds than they can put out on regular automobile contracts and that is—

"Q. By that you mean that when the Chesley Finance Company had funds that were not working you loaned them to the Metropolitan Finance Corporation of California? A. Yes, sir. * * *

"Q. Oh, I see. And they repaid? A. They are repaid, or as they needed it. In other words, if they would have a run of business today for needing half of that, even though the loans are for ninety-day periods, they could get it."

Furthermore, the president of the appellant corporation testified that the purpose of the assessment in question was to get money with which *"to increase the business"*; or according to an admission made by him to the plaintiff, "the object of the assessment was * * * to build up the assets of the company and put them in a position where they could make more money."

Considering the foregoing testimony and evidence, it becomes clear that it was ample to sustain the findings of fact to which objection is here made.

[2, 3] As it existed at the time the assessment was levied, section 331, Civil Code, provided: "The directors of any corporation formed or existing under the laws of this state, after one fourth of its capital stock has been subscribed, may, for the purpose of paying expenses, conducting business, or paying debts, levy and collect assessments upon the subscribed capital stock thereof, in the manner and form and to the extent provided herein."

Since by the findings of fact made by the trial court "the said assessment was not levied for the purpose of paying expenses, conducting business or paying debts," it should naturally follow that the judgment should be affirmed. But, in that connection, the appellant contends that the levying of an assessment rests within the discretion of the board of directors, and that unless in that regard it be affirmatively shown that such discretion was abused, the courts are unauthorized to disturb the action of the board of directors by which such assessment was levied. That such position assumed by the appellant is ordinarily sound may be conceded; but manifestly the operation of such principle of law depends for its accuracy of application upon the preliminary prerequisite that the assessment be levied for one or more of the purposes permitted by the terms of the statute, under the provisions of which the original and enabling authority of the board of directors of the corporation to levy any assessment is conferred. In other words, should an assessment be levied for an unauthorized purpose, no foundation would have existed for the exercise of discretion. It is only when the object of the assessment actually falls within one or more of the specified purposes, as expressed in the language of the statute, that the board of directors is empowered to levy an assessment; and when it appears that an assessment has been levied for any other purpose, neither the good faith of the board of directors in levying the assessment, nor, in the end, the probability that the action of the board of directors in that regard was for the best interests of the corporation, nor any other reason, may be permitted to prevail over the timely and legal objection of a protesting stockholder. No discretion is vested in the board of directors to determine the *fact* of whether the conditions, or either of them, provided by the statute are, or either of them is, actually present. In that regard, in levying an assessment, the board of directors must act at its peril; or, at any rate, the corporation must assume the risk. The question of whether the facts were such as to justify the board of directors in levying the assessment is one of ultimate fact to be determined by the court from the evidence. In the instant case, founded upon substantial supporting evidence, by its findings of fact the trial court having expressly declared that "the said assessment was not levied for the purpose of paying expenses, conducting business, or paying debts," the conclusion must be that the board of directors had no authority to levy the assessment in question.

It becomes unnecessary to consider other points presented on the appeal.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

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122 Cal.App. 763

In re DREER'S ESTATE.

GLENDOWER v. READ et al.

Civ. 8160.

District Court of Appeal, Second District, Division 2, California.
April 21, 1932.

1. Wills ⚷753.

"Specific legacy" disposes of property identified by will at time of execution, and does not include property thereafter acquired and not included in testamentary provision when viewed as of date of execution (Civ. Code, § 1357).

[Ed. Note.—For other definitions of "Specific Legacy," see Words and Phrases.]

2. Wills ⚷439.

Testator's intent controls in construction of will and codicils (Civ. Code, § 1317).

3. Wills ⚷812.

Gift of property in state, of which testator may die possessed, to be sold and proceeds invested in securities and income thereof paid to named devisees for life and then principal paid over, *held* not "specific legacies," to which resort should first be had for payment of debts of estate, where testator left no residuary estate in California, but to be "general legacies" (Civ. Code, §§ 1317, 1357).

[Ed. Note.—For other definitions of "General Legacy," see Words and Phrases.]

4. Appeal and error ⚷694(1).

Where findings were based on evidence not contained in record on appeal, appellate court was unauthorized to correct findings and decree of lower court.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Petition by Alice A. Glendower for partial distribution of the estate of Edwin Greble Dreer, deceased, opposed by Abigail Dickinson Dreer Read and others. From an order granting partial distribution, petitioner appeals.

Reversed.

Philip N. Krasne, of Los Angeles, for appellant.

Meserve, Mumper, Hughes & Robertson, Fred E. Stivers, and O. M. Peabody, all of Los Angeles (Timon E. Owens, of Los Angeles, of counsel), for respondents.

FRICKE, Justice pro tem.

While this appeal is presented without a transcript of the evidence upon which the court based the order appealed from, it appears that the deceased made a will in the year 1914, that in April, 1920, he made another will, revoking that of 1914, following this by the execution of two codicils, one in April, 1924, and one in January, 1929, about three months prior to his death. The will of 1920 and the two codicils were admitted to probate as the will of the decedent. The document made bequests and devises of specifically described articles of personal property and definite sums of money, of the testator's realty in Laguna Beach and his interest in a trust fund to various specifically named beneficiaries. The residue of the estate was left in trust, naming the beneficiaries and contingent beneficiaries thereof. The codicil of April, 1924, made no change in the will except that it devised to William J. Benners all of the testator's real property. The codicil of 1929 revoked one of the bequests of money, devised and bequeathed certain described real and personal property to Jack H. Glendower and Alice Glendower, devised and bequeathed certain lands and moneys in the state of Pennsylvania to Joseph Beechem and Clarence J. D. Read, and also included the following as paragraphs numbers 5 and 11:

"5. I desire that all of the California property of which I may die possessed except the property hereinabove given to Jack H. Glendower and Alice Glendower be sold by my executor as soon after my death as will in the judgment of my executor hereinafter appointed be for the best interest of my estate and all of the proceeds therefrom shall be delivered by said executor to the Fidelity-Philadelphia Trust Company, the executor under my will to be held in trust for my friend William James Benners of 4720 Chester ave., in the city of Philadelphia, Pennsylvania. I direct that said Fidelity-Philadelphia Trust Company shall invest said funds in securities in accordance with their custom in handling trust funds and deliver the income therefrom to said William James Benners quarterly, commencing on January 1st, after said fund is received until the death of said Benners at which time said fund shall be delivered by said executor to my loving sister, Abigail Dreer Read of 4105 Pine street, Philadelphia, Pennsylvania. And in event of her prior death, to the heirs of her body."

"11. At the time of making this codicil I do not have before me a copy of my last will and testament and am somewhat hazy as to some of the provisions therein contained, but to the best of my memory said will names several persons as residuary legatees. I desire specifically to revoke and annul said provision and direct that all property of every kind and nature and description of which I may die possessed and not specifically provided for in my last will or codicil shall be given to my loving sister Abigail D. Dreer Read."

Alice A. Glendower filed a petition for partial distribution of the estate, which was opposed by the special administrator and by Abigail Dreer Read. After a hearing the court made an order which, among other things not involved in the question presented by this appeal, found and decreed that the first codicil was revoked by the second codicil; that certain bequests of personal property and sums of money as provided by the will were inconsistent with and superseded by paragraph 5 of the second codicil; that there was no residuary estate in California, all of the property in that state having been specifically disposed of by the will and codicils, and that the devises set out in paragraph 5 of the second codicil were specific; and that the devises to all persons other than those in favor of Abigail Dickinson Dreer Read and Clifford J. D. Read, the sole kindred of the deceased mentioned in the will, should first be exhausted in payment of debts, taxes, and expenses of the estate before resort be had to the devises to said beneficiaries.

[1-3] Appellant, Alice J. Glendower, contends that the trial court erred in construing the fifth paragraph of the codicil and in holding that the devises and bequests therein to Abigail Dreer Read and James Benners were specific and not general legacies. In defining the term "specific" as applied to legacies, section 1357 of the Civil Code provides: "A legacy of a particular thing, specified and distinguished from all others of the same kind belonging to the testator, is specific; if such legacy fails, resort cannot be had to the other property of the testator." While this section refers to legacies, it includes dispositions of real as well as personal property. Estate of Painter, 150 Cal. 498, 89 P. 98, 11 Ann. Cas. 760; Estate of McLaughlin, 97 Cal. App. 481, 275 P. 874. It sufficiently appears from the rec-

ord that the testator possessed real and personal property in the state of Pennsylvania as well as in this state. The intention of the testator as to the residue of his estate is clearly shown by paragraph 11 of the last codicil, whereby he specifically revokes the provisions of his will as to residuary legatees and directs that all of his property not specifically provided for shall be given to his sister. This provision militates against the contention that paragraph 5 of the last codicil is a disposition of the residue of the estate. There remains only the question as to whether that paragraph provides for a specific legacy.

The language of section 1357 of the Civil Code defining a specific legacy appears, at first blush, to fit the provision made in paragraph 5 of the codicil above referred to. However, for a legacy to be specific the testator must have in mind, at the time of making the testamentary disposition, a specific piece of property, then in existence, which he intends the beneficiary to receive upon his death. 18 Am. & Eng. Encyc. Law p. 715. In other words, a specific legacy disposes of property which is identified by the terms of the will at the time it is made, and does not include property thereafter acquired and not included in the testamentary provision when it is viewed as of the date of its execution. In the case at bar paragraph 5 does not even attempt to describe the property left to Abigail Dreer Read as of the date of the will, but, on the contrary, by the use of the words "of which I may die possessed," the testator clearly indicated that the property given under this paragraph was to be determined by his possessions at the time of his death, and should include after-acquired property. The intent of the testator as expressed in the will and codicils must control in their interpretation and construction. Estate of McCray, 204 Cal. 399, 402, 268 P. 647; section 1317, Civ. Code. Under the rules laid down in the authorities it must be held that the provisions of the fifth paragraph of the last codicil do not constitute a specific bequest or devise. Estate of Woodworth, 31 Cal. 595, 601; Abila v. Burnett, 33 Cal. 661; Estate of Ratto, 149 Cal. 552, 86 P. 1107; Rood on Wills, §§ 523 et seq.; Underhill on Wills, § 405; Page on Wills, § 768; Jarman on Wills (6th Ed.) 295 et seq., 393 et seq. It follows that the order granting partial distribution is erroneous.

[4] Appellant requests that, if the order for partial distribution be reversed, this court, under authority of section 956a of the Code of Civil Procedure, correct the findings and decree of the trial court in certain respects specified in the brief. That section, however, provides that findings by an appellate court "may be based on the evidence adduced before the trial court either with or without the taking of evidence by the court of appellate jurisdiction." While the use of the word "may" permits this court to exercise its discretion as to whether further evidence shall be taken here, the provision is mandatory in that the evidence before the trial court must be considered by this court in the making of findings. As the recitals in the order indicate that evidence was received by the trial court, and since this appeal is upon the clerk's transcript alone, appellant's request must be denied.

The order appealed from is reversed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

122 Cal.App. 742

ELAM v. ARZAGA.

Civ. 8246.

District Court of Appeal, First District, Division 2, California.
April 21, 1932.

1. Assignments 🔑121.

Assignee of claim for purpose of collection could prosecute action on claim in his own name as holder of legal title, but equitable interest remained in assignor.

2. Assignments 🔑89.

Fiduciary relation existed between assignor and those connected with collection agency in prosecution of claim, precluding agency from obtaining any advantage over assignor by misrepresentation or concealment (Civ. Code, § 2228).

3. Assignments 🔑89.

Collection agency as assignee of claim for collection could not take part in any transaction in connection with court action on claim in their own interest without consent of assignor, having full knowledge of facts and motives (Civ. Code, § 2230).

4. Assignments 🔑89.

Any advantage obtained by representative of collection agency over assignor of claim to agency for collection was presumed to be without sufficient consideration (Civ. Code, § 2235).

5. Execution 🔑228.

Where defendant's grantor assigned claim for collection and attorney for assignee, through an intermediary, purchased property levied on at sale under execution and concealed facts from grantor, defendant receiving quitclaim deed from grantor obtained superior right over attorney subsequently obtaining deed from grantor.

Facts disclosed that defendant's grantor had assigned the claim to a collection agency for collection, that judgment was obtained thereon and property levied upon, which was thereafter sold to satisfy judgment without knowledge of grantor, that proceeds of sale were not turned over to grantor, and that plaintiff as attorney for assignee of claim, on day before last day when property could have been redeemed, made discouraging reports to grantor and purchased judgment for half its face value, that purchaser at execution sale thereon executed a deed in favor of plaintiff, that grantor executed a quitclaim deed to the premises to defendant, and that plaintiff thereafter, with knowledge of such quitclaim deed, induced grantor without new consideration to execute a quitclaim deed to the premises in favor of plaintiff.

Appeal from Superior Court, Los Angeles County; L. T. Price and Myron Westover, Judges.

Action by William R. Elam against Rosalio Arzaga. From judgment for defendant, plaintiff appeals.

Affirmed.

William R. Elam and Hugh L. Dickson, both of Los Angeles, for appellant.

H. M. Dalton, of Los Angeles, for respondent.

SPENCE, J.

In this action in ejectment and to quiet title defendant had judgment, from which judgment, and the order denying plaintiff's motion under sections 663 and 663a of the Code of Civil Procedure, plaintiff appeals.

The background of this litigation is found in the dealings of plaintiff, an attorney at law, with certain Mexicans who had little ability to understand the English language and had little or no ability to understand the significance of the documents and proceedings to which reference is hereinafter made. One Lopez loaned the sum of $65 to one Tapia. When the loan was made to Tapia, defendant Arzaga orally agreed to pay Lopez if Tapia did not do so. The money was not repaid and Lopez consulted plaintiff, who had his office with the Universal Adjustment Company, a collection agency. It appears, as found by the trial court, that plaintiff and G. C. Dilsaver were partners conducting said collection agency, although plaintiff testified, when asked if he was a partner, that he did not know whether he was or not; that he was "at one time or was supposed to be." Lopez signed a rather unusual document which appears to be the form used by the Universal Adjustment Company. We will assume, as contended by appellant and as found by the trial court, that the instrument constituted an assignment of Lopez' claim to the Universal Adjustment Company for the purpose of collection. By this instrument Lopez agreed to pay to the collection agency a commission on the amount collected. An action was filed in the justice court in the name of Mary Dilsaver doing business under the name of Universal Adjustment Company, as plaintiff, against both Tapia and this defendant. Said Mary Dilsaver was the wife of said G. C. Dilsaver. Prior to the commencement of the action and shortly thereafter, plaintiff collected from Lopez a total of $30 to defray costs in the action. Both defendants named in the justice court action defaulted, and on June 15, 1925, judgment was entered against them. Thereafter execution was issued, and without any actual notice to defendant herein or to Lopez, the real property of defendant involved herein having two houses thereon together with certain property of Tapia, were advertised for sale by the constable. Plaintiff appeared at the constable's sale on September 30, 1925, and bid in all of said property in the name of Mary Dilsaver, the nominal plaintiff in the justice court action, for the sum of $99.37. Lopez repeatedly called to see plaintiff regarding the progress of his claim, but received no money and was given discouraging reports concerning the prospects. One of his visits occurred on September 29, 1926, being within twenty-four hours of the expiration of the year of redemption upon the sale on execution. Lopez testified that plaintiff had never told him that the Arzaga property had been sold on execution to Mary Dilsaver, the nominal plaintiff in the justice court action, or that Lopez had any interest therein; but on the visit mentioned, plaintiff told Lopez "he was not sure whether they would get anything." Without full knowledge of the proceedings, Lopez, while in need of funds to pay on an installment contract, and while discouraged by the reports which had been given him, agreed to accept $50 from plaintiff for the justice court judgment. Plaintiff herein did not pay the money at that time, but made out a promissory note for $50 payable in installments of $10 per month. No written assignment of the judgment was executed and plaintiff did not deliver the promissory note at that or any other time, but retained the same in his own possession. The first payment on the note was made some days later, and the last payment was not made until April 13, 1927, being some time after the commencement of the present action on March 18, 1927. In the meantime, the year for redemption expired on the day following the execution by plaintiff of the $50 note and thereafter the marshal's deed to Mary Dilsaver (the marshal being the successor to the constable) was executed and recorded. In February, 1927, said Mary Dilsaver executed a deed to plaintiff herein purporting to convey to the plaintiff the property involved on the execution sale, and plaintiff thereupon demanded that defendant Arzaga pay rent or vacate the premises. Defendant refused to do either and this action was commenced. Defendant then employed counsel, who consulted with Lopez and advised Lopez of the entire proceedings. As a result Lopez, in consideration of the payment of $45 by defendant Arzaga, executed a quitclaim deed to the premises in favor of defendant Arzaga. Thereafter plaintiff herein with knowledge of the last-mentioned quitclaim deed from Lopez to defendant Arzaga, induced Lopez, without any consideration, to execute a quitclaim deed to the premises in plaintiff's favor. Defendant Arzaga filed an answer and cross-complaint in the present action fully setting forth all of the material facts above referred to and the trial court made findings and entered judgment in his favor.

Appellant has submitted a brief of over 100 pages attacking the judgment in various ways, but we do not deem it necessary to give extended consideration to each of the various points raised. Appellant claims title to the property through the purported purchase of the justice court judgment from Lopez and through the deed from Mary Dilsaver, the nominal plaintiff in the justice court action and the nominal purchaser at the constable's sale. It is appellant's contention that title was thereby vested in appellant and that Lopez had no interest in the property to convey at the time he executed the quitclaim deed to respondent. It is apparently conceded, however, that whatever interest Lopez may have had at the time of the execution of the said quitclaim deed was thereby conveyed to respondent and of course the subsequent quitclaim deed obtained by appellant from Lopez could not serve to strengthen appellant's claim of title as against respondent.

[1-4] It becomes important to consider the relationship between Lopez and the parties connected with the collection agency arising out of his original transaction with said agency. We will assume, as contended by appellant, that the original instrument signed by Lopez constituted a valid assignment of his claim for the purpose of collection. The agency could prosecute the justice court action in its own name as the holder of the legal title to the claim, but the equitable interest remained in Lopez. Kelley v. Hampton, 22 Cal. App. 68, 133 P. 339; Greig v. Riordan, 99 Cal. 316, 33 P. 913. Upon assignment for the purpose of collection the assignee has been referred to as the trustee or agent of the assignor. Toby v. Oregon Pacific R. R. Co., 98 Cal. 490, at page 497, 33 P. 550. Whether regarded as the agent or the trustee of the assignor, the obligations of the assignee are practically the same. Civ. Code, § 2322; Darrow v. Klein (Cal. App.) 295 P. 566. Appellant insists that he was not the attorney for Lopez, but was attorney for the collection agency. In our opinion this is immaterial. A fiduciary relationship existed between Lopez and all those connected with the collection agency in the prosecution of the claim, and appellant and his associates were under obligation to act in the highest good faith by reason of such relationship. They could not obtain any advantage by the slightest misrepresentation or concealment (Civ. Code, § 2228); nor could they take part in any transaction in connection with the justice court action in their own interest and for their own benefit without the consent of Lopez after full knowledge of the facts and of their motives (Civ. Code, § 2230). Furthermore, any transaction by which they or any of them obtained any advantage over Lopez is presumed to have been entered into without sufficient consideration. Civ. Code, § 2235.

[5] With the foregoing principles in mind, we are of the opinion that the acts of Mary Dilsaver and all parties connected with the collection agency in the prosecution of the justice court action and purchase of the property at the constable's sale were acts done by them as agents or trustees for Lopez. It is quite apparent that the parties were intending to act for Lopez when Mary Dilsaver "purchased" the property at the constable sale, for if it be claimed that Mary Dilsaver was attempting to act on her own behalf and not on behalf of Lopez in purchasing said property, no explanation is made of the failure to account to Lopez for the proceeds of the sale amounting to $99.37, which sum was ample to pay the judgment and costs. The trial court was entirely correct in finding and concluding that the justice court action was instituted "in the interest and for the benefit of" Lopez and that all proceedings in said action including the purchase of the property at the constable's sale were "taken on behalf of and in the interest of" the said Lopez. It follows that the naked legal title to the property acquired by Mary Dilsaver by virtue of the constable's sale and subsequently conveyed by her to appellant was held subject to the equitable interest of Lopez at all times unless the purported purchase of the justice court judgment by appellant from Lopez on September 29, 1926, constituted a valid transfer of the equitable interest of Lopez to appellant. We have no hesitancy in saying that in our opinion such purported purchase lacked all semblance of validity. Without disclosing to Lopez his motives or the fact that the property had been purchased at the constable's sale on behalf of Lopez or the fact that the time for redemption would expire the following day, appellant gave Lopez discouraging reports and attempted to take advantage of the concealment for his own benefit. No aid should be given by the courts to one who seeks to obtain the fruits of such an unconscionable transaction. The purported purchase by appellant was wholly ineffectual to transfer the equitable interest of Lopez to appellant, and the trial court properly concluded that appellant acquired no right, title, or interest in or to the property thereby. The trial court further properly concluded that respondent acquired all of the right, title, and interest of Lopez by virtue of the quitclaim deed from Lopez to respondent and that appellant acquired no right, title, or interest by virtue of the subsequent quitclaim deed from Lopez to appellant.

Appellant's various attacks upon the judgment include claims that the evidence is insufficient to support the findings; that the findings do not support the judgment; that the trial court failed to make findings upon all issues raised; and that the findings are inconsistent and contradictory. We find no merit in these claims. An examination of the record convinces us that there was ample evidence to sustain the material findings; that these findings support the judgment; that findings were made upon all material issues; and that the findings are neither inconsistent nor contradictory.

The judgment and order appealed from are affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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122 Cal.App. 755

TAGGART v. SHEPHERD et ux.

Civ. 7175.

District Court of Appeal, Second District, Division 1, California.

April 21, 1932.

1. Use and occupation 🔑6.

Complaint and facts in action against husband and wife for withholding realty showed action was one in quasi contract, as against claim it was in tort (Civ. Code, §§ 171, 3334).

> Complaint, brought by trustee in bankruptcy, alleged that on certain day defendants entered upon real estate without knowledge or consent of plaintiff and continued in sole and exclusive possession and enjoyment until certain day, at which time they vacated and quit possession of premises, and facts disclosed that wife leased premises from one who was not the true owner six days before plaintiff's principal was declared a bankrupt and had been in use and occupation of premises some weeks before plaintiff became trustee; that defendants remained in use and occupation of premises for some months after plaintiff's appointment, and he, as trustee, then secured possession thereof from defendants by summary proceeding instituted before referee in bankruptcy.

2. Use and occupation 🔑8.

In suit for use and occupation, allegation of lack of permission to occupy property is unnecessary.

3. Action 🔑28.

In suit for use and occupation, owner may waive tort and maintain action upon implied assumpsit to recover value of use of property for time of occupation.

4. Husband and wife 🔑151(6).

Occupation of premises by husband and wife for lodging and shelter constitute "necessaries of life" for which wife's separate estate is liable in action in quasi contract (Civ. Code, § 171).

> Civ. Code, § 171, provides that the separate property of the wife is liable for the payment of debts contracted by the husband or wife for the necessaries of life furnished to them or either of them while they are living together.
>
> [Ed. Note.—For other definitions of "Necessaries of Life," see Words and Phrases.]

5. Husband and wife 🔑19(10).

Husband and wife are jointly liable for necessaries of life furnished them while living together (Civ. Code, § 171).

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by W. H. Taggart, as trustee for Elfego Riveroll, a bankrupt, against C. J. Shepherd and his wife, Rolena B. Shepherd. From a judgment in favor of plaintiff, Rolena B. Shepherd appeals.

Affirmed.

Janeway, Beach & Hankey, of Los Angeles, for appellant.

Paul W. Sampsell and Will J. Thayer, both of Los Angeles, for respondent.

TAPPAAN, Justice pro tem.

Plaintiff recovered judgment against defendants, who are husband and wife. The wife only appeals from this judgment. The appeal is based upon the judgment roll.

The action, denominated by the plaintiff as an "action for damages for withholding real property," was instituted by plaintiff in his capacity as trustee. Riveroll, for whom plaintiff was trustee, had been declared a bankrupt on October 26, 1928. On October 20, 1928, defendant and appellant, Rolena B. Shepherd, entered into a written lease of the premises here in question with the Hollywood Holding Corporation, which at that time was the record owner of the premises. The court in its findings filed herein found that Riveroll, the bankrupt, was in fact the true owner of the premises at the time this lease was made. The defendants occupied the premises from November 1, 1928, until about March 10, 1929, when they removed therefrom pursuant to an order made by the referee in bankruptcy.

The court found that the occupation of the premises by defendants constituted, as to them, necessaries of life during the term of their occupancy. The court also found that the arrangements or negotiations for the lease of the premises were made by the defendant C. J. Shepherd, and that appellant took no part therein, except to sign the lease of the premises as lessee at the instance and request of her defendant husband. Appellant's contention is that the action, as stated by plaintiff, is one in tort and must be deemed to exclude the idea of assumpsit founded upon implied contract; that, the action sounding only in tort and there being no evidence that appellant, a wife, acted of her own volition in the matters complained of by plaintiff, her husband and codefendant only can be held liable.

[1] That this action is not based upon an express contract or *one implied in fact* is made clear when the material allegations of the complaint are considered. The complaint alleges: "That on November 1st, 1928, said defendants entered upon said real estate *without the knowledge or consent* of plaintiff and continued in sole and exclusive possession and enjoyment of said real estate until on or about the 10th day of March, 1929, at which time they vacated and quit possession of said premises." It would seem from an examination of this pleading that plaintiff's theory was one by which he sought to recover from defendants for the "use and occupation" of the premises.

Appellant relies upon the case of Sampson v. Shaeffer, 3 Cal. 196, decided in 1853. This case holds squarely that an action for use and occupation will not lie when possession is *adverse* or *tortious*, as such possession excludes the idea of a contract, express or implied in fact. This case has never been cited by any California court. In the period that has elapsed since the case of Sampson v. Shaeffer, supra, was decided, nearly eighty years, many profound changes have taken place in our law. One instance well illustrates this: In the case of Sampson v. Shaeffer, supra, the court points out that the plaintiff's remedy is one for *mesne profits.* Section 3334 of the Civil Code, enacted long after that case was decided, abolishes the rule that a trespasser may only be sued for mesne profits. Richmond Wharf & Dock Co. v. Blake, 181 Cal. 454, 458, 185 P. 184.

The facts in the case at bar are not of such nature as would exclude the idea that defendants' use and occupation of the premises was by sufferance rather than purely tortious. The lease entered into by appellant was made six days before plaintiff's principal was declared a bankrupt, and defendant had been in the use and occupation of the premises some weeks before plaintiff became trustee. Defendants remained in the use and occupation of the premises for some months after plaintiff's appointment, and he, as trustee, then secured possession thereof from defendants by a summary proceeding instituted before the referee in bankruptcy. The defendants' entry and occupation of the premises was not unlawful or forcible in its inception. The obligation resting upon defendants was one *implied in law*, as distinguished from one *implied in fact*. Quasi contract rather than true contract.

[2, 3] "A landowner, who brings a suit for the use and occupation of his property, need only allege his ownership of the land, occupation of said land by defendant, the reasonable value of the use of the property for the period of occupation, and that such sum is unpaid." Richmond Wharf & Dock Co. v. Blake, supra, page 457 of 181 Cal., 185 P. 184, 185. In the same case, at page 458 of 181 Cal., 185 P. 184, 186, we find that, "Permission or lack of it being immaterial." On page 459 of 181 Cal., 185 P. 184, 186, the court quotes from Parkinson v. Shew, 12 S. D. 171, 80 N. W. 189, as follows: "In such a case the tort may be waived, and an action based upon implied assumpsit is usually maintainable to recover the value of the use of the property for the time of such occupation. * * *"

The trial court made the following finding: "That said occupation and possession of said premises by said defendants constituted *necessaries* of life, to-wit, lodging and shelter, for said defendants, and each of them, during said period of time."

[4] Appellant's contention that defendants' use and occupation of the premises must be deemed as tortious is not sustained by the record presented here, and, under the view of the case as herein expressed, appellant's citation of authorities on that phase of the matter are inapplicable. Section 171 of the Civil Code provides as follows: "the separate property of the wife is liable for the payment of debts contracted by the husband or wife for the necessaries of life furnished to them or either of them while they are living together." Appellant's contention that the term "contracted," as made use of in this section, excludes the idea of an implied contract, is

without merit when read in conjunction with the context of the section.

"Also the wife would be liable for at least the price of the necessities thus furnished while the husband and wife were living together under the provisions of section 171, Civil Code." Wisnom v. McCarthy, 48 Cal. App. 697, 701, 192 P. 337, 339.

[5] "The dismissal in the present action, as to the husband, did not affect the obligation of the wife. Under the holding in Evans v. Noonan, supra [20 Cal. App. 297, 128 P. 794], the defendants were jointly liable. Plaintiff might therefore have sued either, or, having sued both, she might have dismissed her action as to either." Wisnom v. McCarthy, supra, 48 Cal. App. 702, 192 P. 337, 339.

That lodging and shelter are necessaries of life is not questioned.

The judgment appealed from is affirmed.

I concur: CONREY, P. J.

I concur in the judgment: HOUSER, J.

123 Cal.App. 20

GILMORE v. EUREKA CASUALTY CO.

Civ. 393.

District Court of Appeal, Fourth District, California.

April 22, 1932.

1. Insurance ⚿309.

Breach of material warranty by insured avoids policy (Civ. Code, §§ 2607, 2612).

2. Insurance ⚿81.

General agent, who in effect wrote automobile indemnity policy for own benefit, cannot recover where he knew that material representations were untrue and did not inform principal (Civ. Code, §§ 2607, 2612).

General agent issued policy to indemnify named company as assured or vendor, or another as vendee. At the time general agent had lent the alleged vendee money on the automobile involved under alleged conditional sale agreement, which he assigned to named company as assured or vendor, which, on disappearance of alleged vendee with automobile, was reimbursed by general agent.

3. Insurance ⚿392(1).

Retention of premium after occurrence of loss where liability is denied *held* not to estop automobile indemnity insurer to claim breach of material warranty (Civ. Code, §§ 2607, 2612).

4. Insurance ⚿198(5).

General agent who issued automobile policy for own benefit *held* entitled to return of premium and interest where principal defeated policy for agent's fraud (Civ. Code, §§ 2607, 2612, 2617).

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by H. K. Gilmore, doing business under the firm style and name of the Motor Vehicle Loan Company against the Eureka Casualty Company. From judgment for defendant, plaintiff appeals.

Amended and affirmed.

Loren A. Butts, of Los Angeles, and Samuel F. Hollins and L. N. Barber, both of Fresno, for appellant.

Charles X. Arnold, of Los Angeles, and Philip Conley and Conley, Conley & Conley, all of Fresno, for respondent.

MARKS, J.

This action was instituted by appellant to recover the value of an Auburn automobile alleged to have been embezzled by Carl La Duxe, who was also known as George Carlton, G. E. Carlton, and George E. Carlson. Judgment went for respondent and appellant is here on appeal from the judgment.

Appellant was conducting a business in the city of Fresno under the name of Motor Vehicle Loan Company, and J. Clarence Rice was conducting a business under the name of Rice Securities Company in the city of Hanford, Cal. Respondent is a California corporation engaged in the business of writing automobile casualty and indemnity insurance. At all times material to this appeal appellant was its general agent in the city of Fresno with authority to execute and deliver its policies.

On April 24, 1928, Carl La Duxe had resided in Fresno for less than two months, and was in possession of an Auburn coupé and its indicia of title. The automobile was originally sold by the Auburn Automobile Company to the Auburn Wichita Company of Wichita, Kan., on or about June 11, 1928. It was then sold to George Carlton (Carl La Duxe) for $2,550, which was paid by a used car, which "Carlton" represented was free and clear of incumbrances, and a mortgage on the Auburn for $1,200. The mortgage was dated June 16, 1928, and was duly recorded on June 21, 1928. Under the laws of Kansas this vested the title to the mortgaged property in the mortgagee. The indebtedness was not paid and the mortgage was not released. It was assigned to the Union Finance Company, a corporation with its offices in Wichita, Kan. It subsequently developed that the used car which was given in part payment of the Auburn automobile was incumbered with a mortgage in the sum of $700, which was then unpaid. "Carlton" applied for a license for the Auburn automobile in Kansas on June 14, 1928. One was issued on June 18, 1928.

This automobile next appears in the state of Oklahoma. By an application dated June 14, 1928, Carl La Duxe applied for a certificate of title to it. An Oklahoma certificate of registration was issued on the automobile to Carl La Duxe. By a bill of sale on a form bearing the name of "P. G. Orr Book and Stationery Co., 327 Douglas Ave., Wichita, Kansas," and bearing date the 11th day of June, 1928, "Geo. Carlton" purported to sell the Auburn automobile to "Carl La Duxe." The application for registration of the automobile in Oklahoma was based upon the title derived through the bill of sale from "Carlton" to "La Duxe." On August 2, 1928, "La Duxe" applied for a "non-resident paid automobile license" for the Auburn at the Fresno branch of the division of motor vehicles of California. On August 2, 1928, a nonresident registration certificate was issued to the automobile showing Carl La Duxe as the legal and registered owner of the car. On the back appears an indorsement of a first sale from "Carl La Duxe," legal and registered owner, to A. C. Franzke, a dealer, and a second sale to "Carl La Duxe" with the signature of A. C. Franzke appearing on the line above the words "the name of the holder of mortgage, note or lease." On August 2, 1928, a "Report of Sale by Registered Dealer" of the Auburn automobile was made to the division of motor vehicles showing a sale from A. C. Franzke to "Carl La Duxe." On August 27, 1928, another registration certificate was issued showing "Carl La Duxe" as registered owner and Rice Securities Company, Hanford, Cal., as legal owner of the car. On the reverse side, over the words "signature of legal owner—agreeing with name on other side—releasing his equity," is "Rice Securities Co. by J. Clarence Rice." On March 14, 1929, the Rice Securities Company, by a written assignment, transferred all of its right and interest in the automobile and its cause of action against respondent to appellant. The automobile and La Duxe disappeared from Fresno shortly after August 24, 1928, and were not thereafter found. Under date of September 17, 1928, by a bill of sale on a form printed by a firm in Lincoln, Neb., "Carl La Duxe" sold the Auburn automobile to "H. J. Berney," who, on September 18, 1928, applied to the motor vehicle department of the state highway commission of Oklahoma for a certificate of title to the Auburn. Certain similarities in the bill of sale and the application, just mentioned, to others in evidence might indicate that "Berney," "Carlton," "Carlson," and "La Duxe" were all names assumed by the same person.

It is evident from the record that "La Duxe" did not sell the automobile to A. C. Franzke, nor did Franzke sell it to La Duxe as a sale of a motor vehicle is generally understood. La Duxe wished to borrow money from Franzke and indorsed the registration certificate to him who in turn indorsed it back, and the two then executed a conditional sales contract of the automobile to give Franzke security for his loan.

On August 24, 1928, "La Duxe" applied to appellant for an additional loan on the automobile. The two went to the place of business of Franzke, where appellant repaid him the amount of his loan to "La Duxe" and secured the registration certificate and contract. The two returned to the place of business of appellant, where the loan was consummated; he retaining possession of the automobile for three days while "La Duxe" was away from Fresno. The two executed a conditional sales contract with La Duxe named as purchaser. The contract recited that the selling price of the automobile was $2,550 with $1,323.44 paid in cash and the balance of $1,226.56 payable in twelve equal monthly installments. As a matter of fact, the transaction was a loan from appellant to "La Duxe" secured by the conditional sales contract. The actual amount paid out by appellant to Franzke and "La Duxe" was $1,000. The balance of the $226.56 was made up of $25.70 premium on the policy furnishing the subject-matter of this action, $90.86 interest, and other charges in the sum of $110, which made the contract usurious.

When the conditional sales contract was signed, and while it was still in the possession of appellant, he, as general agent of the respondent, executed a contract of insurance whereby the respondent agreed to indemnify the Rice Securities Company as assured or vendor, or "Carl La Duxe" as vendee in the sum of $1,200 against fire and theft, robbery and pilferage, and the Rice Securities Company against all direct loss or damage which it might sustain, caused by the fraudulent concealment or disposal of the automobile by "La Duxe." Appellant then sent the registration certificates, conditional sales contract with his written assignment thereon, and the insurance policy to the Rice Securities Company, and received payment therefor. He paid respondent the insurance premium, less his commission. As both "La Duxe" and the automobile disappeared, and no payments were made on the conditional sales contract, demand was made upon respondent for payment under the concealment or disposal clause of the policy. Respondent then learned for the first time the true nature of the transactions and denied liability on its contract. Appellant repaid the Rice Securities Company its money, took the assignments we have mentioned, and instituted this action to recover on the policy. Judgment went for respondent, and appellant is here on appeal therefrom.

Under the heading "Warranted by the Assured" in the body of the policy it is stated that the automobile was purchased new in April, 1928, for $2,550, and that there was no lien, mortgage or other incumbrance thereon except the lease contract providing for the payment of $1,226.56 in monthly installments already mentioned. The policy contains the following provisions: "It is understood that the automobile described in the attached policy has been sold and delivered by the said Rice Securities Co. Vendor, to Carl La Duxe Vendee, under a Conditional Sales Contract, title retaining note or subject to chattel mortgage, under which the unpaid balance is $1,226.56 copy of which Conditional Sales Contract, title retaining note or chattel mortgage (as the case may be) shall be furnished to the company by the said Vendor on demand." "This entire policy shall be void if the Assured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof; or in the case of any fraud, attempted fraud, or false swearing by the Assured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

The following findings by the trial court, some of which are more properly conclusions of law, are amply supported by the evidence: "The court finds that it is true that a document was signed by said parties purporting on its face to constitute a conditional sale of said automobile by Motor Vehicle Loan Co. to Carl La Duxe, but said document in truth and in fact evidenced a loan by Motor Vehicle Loan Co. to Carl La Duxe and did not in truth and in fact constitute or evidence a sale of said automobile. It is true that, according to the terms and conditions of said document so signed by said parties as aforesaid, the said Carl La Duxe agreed to pay to plaintiff the sum of Twelve Hundred Twenty-six and 56/100 Dollars $1,226.56), payable at the rate of One Hundred Two and 22/100 Dollars ($102.22) per month, the first payment to be made on the 24th day of September, 1928, and on the 24th day of each and every month thereafter until the said sum of Twelve Hundred Twenty-six and 56/100 Dollars ($1,226.56) had been fully paid; and it is true that said document recited and purported to state that title to said automobile was to be and remain in the plaintiff until all of the payments therein provided for had been made and all of the terms and conditions of said purported contract fully complied with by the said Carl La Duxe. It is not true that at said time and place plaintiff delivered possession of said automobile aforesaid to said Carl La Duxe, and in this connection the Court finds that the said Carl La Duxe, prior to and at the time of the execution of said document and thereafter maintained and had possession of said automobile. It is true that after the execution of said document, plaintiff transferred and set over unto J. Clarence Rice, an individual doing business under the firm style and name of Rice Securities Co., all of his right, title and interest in and to said contract and all of the right, title and interest which he had in and to said automobile."

"That said policy of insurance hereinbefore referred to, together with the dealer's contract full coverage endorsement, was issued under and pursuant to the following express representations and warranties of the insured, to-wit (1) that on or about the 24th day of August, 1928, Rice Securities Co. as vendor sold the said automobile to Carl La Duxe as vendee; (2) that the total selling price of said automobile was two thousand five hundred fifty dollars ($2,550) and that there was paid in actual cash at the time of the execution of said purported conditional sales contract the sum of thirteen hundred twenty-three and 44/100 dollars ($1,323.44), with a balance due under the terms and conditions of said purported contract of twelve hundred twenty-six and 56/100 dollars ($1,226.56) payable in twelve equal monthly installments of one hundred two and 22/100 dollars ($102.22) each. The court finds that in truth and in fact the Rice Securities Co. did not sell the said automobile to said Carl La Duxe; that in truth and in fact the said automobile was not sold by Rice Securities Co. or Motor Vehicle Loan Company to Carl La Duxe for a total consideration of two thousand five hundred fifty dollars ($2,550.00) and there was not paid in cash by the said Carl La Duxe to Rice Securities Co. or Motor Vehicle Loan Company the sum of thirteen hundred twenty-three and 44/100 dollars ($1,323.44) or any other sum of money; that in truth and in fact the purported contract of conditional sale hereinbefore referred to between Motor Vehicle Loan Company and Carl La Duxe, evidence a loan by Motor Vehicle Loan Company to Carl La Duxe, and did not in truth and in fact constitute or evidence a sale of said automobile. The court finds that said warranties and representations made by said Rice Securities Co. were relied on by the defendant, Eureka Casualty Company, and the said policy of insurance, together with dealer's contract full coverage endorsement, was issued by defendant in reliance upon said representations and warranties; that defendant did not know of the falsity of said representations or of the breach of said warranties."

"The court finds that at the time of the issuance of said purported policy of insurance to Rice Securities Co. of Hanford, and Carl La Duxe above referred to, plaintiff herein, H. K. Gilmore, was an agent of defendant, Eureka Casualty Company, a corporation, authorized and entrusted by defendant to write policies of insurance for defendant at Fresno, California, and vicinity; that the said plaintiff, H. K. Gilmore, wrote the said policy of insurance above referred to; that the said H. K. Gilmore wrote the said policy of insurance for his own benefit and that he did not ever or at all make disclosure to Eureka Casualty Company of the true facts concerning said transaction."

We find the following pertinent provisions in the Civil Code: "A statement in a policy, of a matter relating to the person or thing insured, or to the risk, as a fact, is an express warranty thereof." Civ. Code, § 2607. "A breach of warranty, without fraud, merely exonerates an insurer from the time that it occurs, or where it is broken in its inception prevents the policy from attaching to the risk." Civ. Code, § 2612.

[1] In construing these sections it has been held that a breach of a material warranty on the part of the insured avoids the policy of insurance, and no recovery can be had thereon. Solomon v. Federal Insurance Co., 176 Cal. 133, 167 P. 859; Breedlove v. Norwich, etc., Ins. Society, 124 Cal. 164, 56 P. 770.

[2] Appellant was the general agent of respondent, and really wrote the policy for his own benefit. He had knowledge of the true facts of the transactions which he did not communicate to his principal. A general agent who in effect writes a policy of insurance protecting himself against loss should not be permitted to recover against his principal on the policy where he has knowledge that material representations made in the policy are untrue and does not communicate such knowledge to his principal.

[3] Respondent received and retained the premium on the insurance policy paid to it by appellant. In an amendment to its answer filed in October, 1929, it tendered to appellant the $25.70 premium and accrued interest in the sum of $2.02, which tender was not accepted. Appellant now contends that because the tender was not made promptly upon the discovery of the breach of warranty, respondent could not defend upon the ground of the misstatements to it. This contention was decided adversely to appellant in the case of Goorberg v. Western Assurance Co., 150 Cal. 510, 89 P. 130, 133, 10 L. R. A. (N. S.) 876, 119 Am. St. Rep. 246, 11 Ann. Cas. 801, where it was said: "The respondent contends that whatever construction be put upon the policy, the judgment must be affirmed, because there was uncontradicted testimony to the effect that, shortly after the fire, the company ascertained the true state of the title, and for a period of several months thereafter, and up to the time of trial, made no offer to return the premium. During all this time, however, it denied liability. It may be conceded that, if by reason of a breach of warranty as to title, no risk ever attached, the insured was entitled to a return of his premium. Civ. Code, § 2617. But the insurer's delay in offering to repay it (assuming the delay to have been unreasonable) did not forfeit the right to defend for such breach. The cases cited to the proposition that a party cannot rescind a contract without restoring what he has received under it are not in point. The defendant is not in this action seeking to rescind the contract sued upon. It is standing upon the contract, and insisting that under its terms there is no liability. Nor can the mere retention of the premium, after the loss has occurred, and where the liability is steadfastly denied, constitute either a waiver of the defense or an estoppel. To constitute such waiver or estoppel by the action or nonaction of the insurer after the loss, it is essential 'that one party should have relied upon the conduct of the other, and been induced by it to put himself in such a position that he would be injured if the other should be allowed to repudiate his action.' McCormick v. Orient Ins. Co., 86 Cal. 260, 24 P. 1003; McCormick v. Springfield F. & M. I. Co., 66 Cal. 361, 5 P. 617. Here nothing was done which could have led the insured to believe that the defendant would not take advantage of the breach of warranty. On the contrary, it persistently asserted its reliance upon such breach."

[4] The trial court failed to dispose of the $27.72, the premium and interest tendered to appellant by respondent in the amendment to its answer. To finally dispose of the case, the judgment should be amended to provide for the recovery of this sum from the respondent.

It is ordered that the last paragraph of the judgment be amended by striking from the opening clause thereof the following: "It is ordered, adjudged and decreed that the plaintiff take nothing by reason of said action," and in lieu thereof the following be substituted: "It is ordered, adjudged and decreed that the plaintiff recover of and from the defendant the sum of $27.72."

The judgment as hereby amended is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

122 Cal.App. 695

SCHUMACHER WALL BOARD CORPORATION v. BUTTONLATH MFG. CO.

Civ. 4546.

District Court of Appeal, Third District, California.
April 19, 1932.

1. Patents ⚿218(3).

Licensor violating license agreement by licensing licensee's competitors to manufacture and sell same product without royalty *held* guilty of material breach, precluding recovery of guaranteed royalty, though licensee did not show amount of damage suffered.

2. Patents ⚿218(3).

Licensor's material breach of license agreement precluded recovery of guaranteed royalty, regardless of any fraud by licensor.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by the Schumacher Wall Board Corporation against the Buttonlath Manufacturing Company. From a judgment in favor of defendant, plaintiff appeals.

Affirmed.

Euler & Subith, of Los Angeles, for appellant.

Lawler & Degnan, of Los Angeles, for respondent.

Mr. Justice pro tem. ANDERSON delivered the opinion of the court.

This is a case where the plaintiff sued the defendant for the sum of practically $9,000, claimed to be due under a license agreement. The suit is defended on the ground that the plaintiff violated the agreement. Plaintiff admitted the violation, but claimed the violation was not material. The court decided that it was material, and gave judgment to defendant for costs.

The questions, whether the violation was material, and whether defendant could be charged with an implied waiver, are the principal questions to be determined on this appeal.

The case was ably and carefully tried. The agreement was made to settle certain litigation which had been heard in the federal court.

[1] The superior court has decided that the violation is material, and we can see no reason to declare the finding wrong. Considered in terms of money, it is indisputable to say that, if a man must pay $10,000 for something that another obtains for nothing, the man who pays must lose something, and that is certainly material to the majority of people.

The situation was summarized by the trial judge as follows, and we think it is sound:

"Assuming, as we must, that the local cost of manufacture would be about the same, the licensee, who (like the defendant) could not manufacture or sell the product except upon the payment of one cent (1c) per square yard, with a minimum guaranty of ten thousand ($10,000) dollars royalty annually, would at once be placed at a disadvantage by other licensees competing with him in the same territory, who could manufacture and sell the same product without the payment of any royalty. This fact would flow from the very nature of things and by the economic laws of production and distribution. And it cannot be assumed that persons who undertake to manufacture and market a product for profit would willingly place themselves at such a disadvantage.

"Waiving, therefore, aside the fact that in reality (as the testimony shows) the defendant could not, during the year 1928 and while the Klinchlath Corporation was competing with it, sell, except at a loss, the conclusion is inevitable that the agreement to pay the guaranteed yearly royalty is dependent upon the undertaking on the part of the plaintiff's predecessors not to issue a license within the territory of the defendant, except upon the same terms, as to royalty, contained in their contract."

In support of the judgment, we cite the following authorities: Wilfley v. New Standard Concentration Co. (C. C. A.) 164 F. 421; Angier v. Eaton, 98 Pa. 594; Rosenthal Paper Co. v. National Folding Box & Paper Co., 226 N. Y. 313, 123 N. E. 766; Dunham v. Pettee, 8 N. Y. 508; Morris v. Sliter, 1 Denio (N. Y.) 59; Oakley v. Morton, 11 N. Y. 25, 62 Am. Dec. 49; Massie v. Asbestos Brake Co., 95 N. J. Eq. 298, 126 A. 669.

There was some contention that the defendant was required to show the amount of damage the defendants suffered, but this was not necessary in order to determine the materiality of the breach. Defendants could waive the claim. It is clear there is evidence that there was damage suffered.

[2] Also, it is claimed that there should be some allegation of fraud, as well as proof and findings of fraud, but we do not see that this is necessary. The finding that the violation was material was alone indispensable.

Appellants are quite insistent that respondents impliedly waived their right to claim the breach. An examination of the transcript, together with the explanation given by respondents in their brief, explains satisfactorily that there was not a waiver.

Reversible error is claimed because the court refused the testimony of Joseph E. Schumacher, but this is all explained away by respondent's brief. To have allowed this testimony would have injected confusion in the record in the matter which was already clear and unambiguous, to wit, the terms of a written instrument.

We think we have answered all of the objections to the judgment, and, while we appreciate the great industry exhibited by appellant, we think the judgment should be affirmed.

The judgment is affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

122 Cal.App. 521

POURROY et al. v. GARDNER et al.

Civ. 8270.

District Court of Appeal, First District, Division 1, California.
April 13, 1932.

1. Corporations 🔑210.

Corporation must be made party to any action instituted by stockholders for corporation's benefit.

2. Bankruptcy 🔑279.

Where corporation is adjudged bankrupt, all actions for recovery of assets of bankrupt estate must be brought by or in name of trustee.

3. Corporations 🔑320(1).

Stockholders could not maintain action for corporation against former directors based on matters discovered within seven months after corporation's bankruptcy terminated.

Stockholders could not maintain the action on behalf of corporations because under federal statute bankruptcy proceedings could have been reopened any time within year after termination thereof to allow trustee to commence action, but stockholders did not attempt to have such proceedings reopened, and also because it appeared that plaintiffs were still owners of stock in corporation and could have elected board of directors and other officers of their own choosing to proceed in name of corporation, where there was then no regularly constituted board of directors in existence.

4. Corporations 🔑206(2).

Before stockholders may sue for corporation, they must exhaust remedies in seeking to have corporation bring action itself.

5. Corporations 🔑202.

If corporation was beyond stage of revival, as stockholders claimed, they could not maintain action in behalf of corporation.

6. Corporations 🔑264.

Action against corporate directors to enforce liability created by law must be brought within three years from creation of liability (Code Civ. Proc. § 359).

7. Corporations 🔑334.

Right of action against corporate directors declaring illegal dividends is purely statutory (Civ. Code, § 309 as amended by St. 1917, p. 657, § 1).

8. Limitation of actions 🔑35(3).

Action against corporate directors declaring illegal dividends *held* not one to recover "penalty or forfeiture imposed" within statute of limitations (Civ. Code, § 309, as amended by St. 1917, p. 657, § 1; Code Civ. Proc. § 359).

[Ed. Note.—For other definitions of "Penalty," see Words and Phrases.]

9. Corporations 🔑264.

Action against corporate directors declaring illegal dividends, not brought within three years after illegal dividends were declared and paid, *held* barred (Civ. Code, § 309, as amended by St. 1917, p. 657, § 1; Code Civ. Proc. § 359).

10. Limitations of actions 🔑37(2).

Statute fixing three-year limitation for actions on ground of fraud *held* inapplicable to actions against corporate directors to enforce liability created by law (Code Civ. Proc. § 338, subd. 4, and § 359).

11. Corporations 🔑204.

Stockholders could not sue on corporation's behalf for damages because of fraudulent representations made to them when purchasing stock.

12. Action 🔑50(9).

Action against corporate directors based upon statutory liability and action for recovery of damages accruing to stockholders because of fraudulent representations made to them when purchasing stock *held* improperly joined (Civ. Code, § 309, as amended by St. 1917, p. 657, § 1; Code Civ. Proc. § 427, subd. 8).

13. Limitation of actions 🔑193.

Absent facts showing why fraudulent representations complained of were not sooner discovered, mere recital they were not discovered until about certain date *held* insufficient to take case out of operation of statute (Code Civ. Proc. § 338, subd. 4).

14. Limitation of actions 🔑100(13).

Where circumstances put person of ordinary intelligence on inquiry, knowledge which might have been obtained is imputed as of time of commission of fraud, as regards statute of limitations (Code Civ. Proc. § 338, subd. 4).

15. Fraud ⚷59(2).

Damages for fraudulent representations concerning value of corporate stock sold is difference between value at time of transaction if representations had been true and what it was then worth.

16. Fraud ⚷47.

Complaint in action for fraudulent representations inducing purchase of stock *held* demurrable, where not alleging facts showing what stock was worth at time it was purchased.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by P. C. Pourroy and others against H. C. Gardner and others. From a judgment of dismissal, plaintiffs appeal.

Affirmed.

Blood & Freeman, of San Francisco, and Freund & Semon, of Los Angeles, for appellants.

Bordwell, Mathews & Wadsworth, Ray W. Bruce, and John H. Mathews, all of Los Angeles, for respondent H. C. Gardner.

KNIGHT, J.

This is an appeal by plaintiffs from a judgment of dismissal entered after demurrers were sustained to the fourth amended complaint, in an action brought by three stockholders of Pacific Stores, Incorporated, a defunct foreign corporation, against the former directors of said corporation and others to recover certain sums of money aggregating more than a million dollars.

The complaint contained three causes of action, stated separately, and, according to its allegations, plaintiffs sought to maintain the action on behalf of themselves, the other stockholders, and the corporation itself. The first cause of action was brought under the authority of section 309 of the Civil Code, as amended in 1917 (Stats. 1917, p. 657), the portions of which, so far as we are here concerned, read as follows: "Unless they shall have been first permitted or authorized so to do by the commissioner of corporations, directors of corporations must not make dividends except from the surplus profits arising from the business thereof. * * * For a violation of the provisions of this section, the directors under whose administration the same may have happened * * * are, in their individual or private capacity, jointly and severally liable *to the corporation, and to the creditors thereof,* to the full amount of the capital stock so divided, withdrawn, paid out, or reduced or debt contracted. * * *" (Italics ours.) The specific charge made was that at all times during the corporation's existence it was operated at a loss; that there never were any surplus profits arising from the business; and that in January, 1924, in violation of the provisions of said Code section, the directors declared and paid dividends out of the capital of the corporation in the sum of $21,269.61, for which amount plaintiffs asked judgment.

The second and third causes of action were for the recovery of damages on account of false and fraudulent representations plaintiffs claimed were made to the stockholders, at the time they purchased their stock, as to the value of the assets of the corporation. In this regard it was alleged in the second cause of action that as a result of fraud and conspiracy Pacific Stores, Incorporated, was organized by certain of the defendants for the purpose of exchanging a large amount of its stock, share for share, for that of another foreign corporation named "Pacific Stores Corporation," whose capital "was greatly impaired" and whose stock "of little or no value," and thereupon to dispose of the remainder of the stock on Pacific Stores, Incorporated, "to the general public at face or par value"; that thereafter, in August, 1923, in consummation of such conspiracy and fraud. and pursuant to a written resolution passed by the board of directors for such purpose, Pacific Stores, Incorporated, did exchange its stock of the value of $875,000 share for share for that of Pacific Stores Corporation, which it was alleged was of no greater value than $50,000; that thereafter in selling the remainder of the stock of Pacific Stores, Incorporated, to plaintiffs and others it was falsely and fraudulently represented that the stock received by Pacific Stores, Incorporated in said exchange was of the value of $875,000; and "that by reason of the acts aforesaid, plaintiffs have been damaged in the sum of $850,000."

The substance of the charge made in the third cause of action was as follows: That in violation of the Corporate Securities Act of this state and as a result of fraud and conspiracy the defendants caused to be transferred to the defendant Shaw, a stock broker, for the purpose of selling the same, stock of the Pacific Stores, Incorporated, of the value of $560,000, for which said corporation received only $336,000, or 60 per cent. of the value of the stock transferred; that at the time plaintiffs and others purchased their stock in said corporation it was falsely and fraudulently represented to them that said corporation received 80 per cent. of the value of the stock turned over to Shaw, "to the total damage of the said corporation and the plaintiffs herein in the sum of $224,000.00."

With respect to all three causes of action, it was alleged that in August, 1925, Pacific Stores, Incorporated, was adjudged bankrupt and a trustee appointed; that on March 1, 1927, after the estate of the bankrupt was fully administered upon, said bankruptcy proceedings were terminated, and the bankrupt and the trustee were finally discharged; that ever since the termination of said bankruptcy proceedings said corporation has been without a board of directors or other officers. Furthermore, it was also alleged "that none of the facts" relating to the alleged unlawful dividends were discovered by the plaintiffs until the month of October, 1927, when plaintiffs caused an audit to be made of the books of Pacific Stores, Incorporated; that "none of the matters" relating to the second cause of action were discovered by plaintiffs until October, 1927, when an audit was made of the books of both corporations; and that "none of the matters" relating to the third cause of action "were discovered by plaintiffs" until October, 1927. The year during which the transaction set forth in the third cause of action took place was not stated; and nowhere in the complaint was it alleged when or about when plaintiffs and the other stockholders acquired their stock. The fourth amended complaint was filed in June, 1929, and it is stated in plaintiffs' brief that the original complaint (which is not embodied in the record) was filed in January, 1928.

So far as the record discloses, only two of the several parties named as defendants appeared in the action, and they demurred to the complaint and to each of the three causes of action set forth therein upon numerous grounds, among them being insufficiency of facts, misjoinder of parties plaintiff, that the several causes of action set forth therein were improperly united, and that the same were barred by the statute of limitations. The demurrers were sustained without leave to amend as to the first cause of action, and with leave to amend as to the remaining two; but plaintiffs having declined further to amend, judgment of dismissal was entered as to all, from which this appeal was taken.

[1, 2] It is well-settled law in this state that so long as a corporation is willing to perform its duty toward its stockholders by instituting and conducting in good faith necessary legal proceedings in its own behalf the stockholders have no cause for complaint, and that with the right of the corporation to sue and be sued, concerning corporate rights or liabilities, the stockholders cannot interfere, except when the governing directors or trustees refuse to act or are guilty of fraud in the maintenance of defense of the action (see Difani v. Riverside County Oil Co., 201 Cal. 210, 256 P. 210, and authorities therein cited); and it is equally well settled that before any such action by stockholders will be entertained it must appear from the allegations of the complaint that demand was first made upon the officers of the corporation to institute the appropriate proceedings in that behalf and that there has been a refusal on their part so to do; or facts must be alleged which clearly show that such demand would have been futile. Fornaseri v. Cosmosart Realty, etc., Corp., 96 Cal. App. 549, 274 P. 597; Difani v. Riverside County Oil Co., supra; Eggers v. National Radio Co., 208 Cal. 308, 281 P. 58. Furthermore, to any action so instituted, the corporation must be made a party. Southern Cal. Home Builders v. Young, 45 Cal. App. 679, 188 P. 586. It is also held that, if a corporation be adjudged bankrupt, all actions for the recovery or protection of the assets of the estate of the bankrupt must be brought by or in the name of the trustee (Dean v. Shingle, 198 Cal. 652, 246 P. 1049, 46 A. L. R. 1156); that he is the sole judge of whether any such actions shall be brought; and that the remedy of those beneficially interested in the estate for relief from any neglect or refusal of the trustee to perform his duty is to apply to the federal court to compel him to proceed or remove him for his disobedience or neglect of duty. Greene v. Moore, 43 Cal. App. 91, 184 P. 506.

[3-5] In the present case plaintiffs did not make the corporation a party to the action, nor did they ever make any demand upon the officers thereof or the trustee in bankruptcy to institute the necessary proceedings to collect the moneys here sought to be recovered, during the four-year period between the commission of the alleged illegal acts and the commencement of this action. The excuse offered for not having made such demand was that they did not discover the matters complained of until October, 1927, which was some seven months after the termination of the bankruptcy proceedings, and that since then the corporation had been without a regularly constituted board of directors, or other officers upon whom such demand could have been made. We are of the opinion that the trial court was warranted in holding the excuse offered legally insufficient to meet the requirements of the law as declared in the cases above cited for the following reasons: First, it is conceded that under the federal statutes the bankruptcy proceedings could have been reopened at any time within one year after the termination thereof to allow the trustee to commence any action for the recovery of additional assets thereafter discovered; and it affirmatively appears from the complaint herein that although plaintiffs were fully aware of the illegal transactions complained of within approximately seven months after the termination of said proceedings they made no attempt whatever to have said proceedings reopened so that the present action might be instituted by the trustee. And secondly, it affirmatively appears that at the time of the commencement of this action plaintiffs were and that they still are the owners of stock in the corporation; and that being so they have been at all times since the discovery of the alleged unlawful acts in a position to elect a board of directors and other officers of their own choosing, and to

proceed in the name of the corporation to accomplish what they here sought to do as individual stockholders. As held in Fornaseri v. Cosmosart Realty, etc., Corp, supra, before the stockholders may maintain an action on behalf of the corporation they must exhaust their remedies in seeking to bring about the institution of the action by the corporation itself. In this connection plaintiffs assert in their brief that the corporation is "actually dead," and consequently beyond the stage of revival; but if such be the fact, they are in no better position to maintain the action in behalf of the corporation, because, in the event judgment were given in their favor, there would be no corporation to receive the benefit of the large sum of money awarded thereby.

[6-9] Dealing with the causes of action separately, and directing our attention to the first, it is evident that the same was barred by the provisions of section 359 of the Code of Civil Procedure. Said section provides that: "* * * Actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce liability created by law * * * must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created"; and in the case of Royal Trust Co. v. MacBean, 168 Cal. 642, 144 P. 139, 143, it has been definitely held that under the terms of the foregoing section an action to enforce "a liability created by law," as distinguished from one "to recover a penalty or forfeiture imposed," must be brought within three years from "the creation of the liability." In so holding, the court said: "The fair reading of this section makes the discovery the starting point of the period of limitation only in cases of actions to recover a penalty or forfeiture." Furthermore, it has been definitely held in the case of Moss v. Smith, 171 Cal. 777, 155 P. 90, 94, that the right of action against directors of a corporation conferred by section 309 of the Civil Code is "a statutory right pure and simple, having no foundation in contract, nor any existence at common law"; and in Southern Cal. Home Builders v. Young, supra, it is made clear that such an action is not one to recover "a penalty or forfeiture imposed," because actual damage must be shown; the measure thereof being "the amount by which its capital is depleted by the unlawful dividends." Manifestly, therefore, since the first cause of action herein was admittedly founded upon a liability created by law, to wit, by section 309 of the Civil Code, and the complaint was not filed within three years after such liability was created, that is to say, within three years after the alleged illegal dividends were declared and paid the first cause of action was barred by the provisions of section 359.

[10] Plaintiffs contend, however, that section 359 does not apply, and that the first cause of action is to be governed by the provisions of subdivision 4 of section 338 of the same Code, which fixes a three-year limitation within which to bring an action for relief "on the ground of fraud or mistake," but provides further that "the cause of action in such case [is] not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts, constituting the fraud or mistake"; and in support of such contention they cite and mainly rely upon the case of Whitten v. Dabney, 171 Cal. 621, 154 P. 312. The complete answer to this contention is that the first cause of action herein is not one for relief on the ground of fraud or mistake. As already shown, and as plaintiffs concede, it is one to enforce the liability created by section 309 of the Civil Code; and while, admittedly, the provisions of subdivision 4 of section 338 apply to suits in equity brought by stockholders to redress corporate wrongs based on fraud (6 Cal. Jur. 873), they have no application to actions for the enforcement of a liability created by law; the latter being controlled by the provisions of said section 359. This distinction was clearly pointed out by the court in Whitten v. Dabney, supra, which was a suit in equity for relief on the ground of fraud. In doing so, the court said (page 628 of 171 Cal., 154 P. 312, 315): "Touching the question of which provision of the statute of limitations is applicable to this action, discussion is indulged in. Unquestionably the right to prosecute this action is governed by the provisions of section 338, subdivision 4, of the Code of Civil Procedure. It is not the action contemplated by section 359 of the same Code 'to enforce a liability created by law.'"

With reference to the second and third causes of action, it is true, as already stated, that under certain circumstances stockholders may maintain a suit in equity on behalf of the corporation for redress from fraudulent transactions completed or contemplated by the officers of the corporation in connection with some other party or among themselves or with other shareholders, which has resulted or will result in serious injury to the corporation, and consequently to the shareholders. Fornaseri v. Cosmosart Realty, etc., Corp., supra. But as will be noted, the second and third causes of action had no such purpose. According to the allegations thereof, the manifest purpose of both was to recover damages accruing to the stockholders individually by reason of certain false and fraudulent representations made to them as to the value of the assets of the corporations at the time they purchased their stock; and it is well settled that in such actions the corporation itself has no interest whatever. Whitten v. Dabney, supra; James v. Steifer Mining Co., 35 Cal. App. 778, 171 P. 117. As said in the former case (page 625 of 171 Cal., 154 P. 312, 314): "Again we must pause to say that these fraudulent representations, however injuriously they may have wronged the purchasers of stock, do not constitute a wrong against the corporation. * * * The right of the individual stockholder thus defrauded would manifestly be simply the right to proceed against the wrongdoers who had made these fraudulent representations to his injury." And in holding to the same effect, it was said in the latter case (page 786 of 35 Cal. App., 171 P. 117, 120): "As to the misjoinder of causes of action it is undoubtedly true that certain acts of a personal nature resulting in injury to plaintiff individually, and not producing any wrong to the corporation, have been set forth in the complaint in connection with those of the nature to which we have referred. Such, for instance, is the purchase by plaintiff of his stock by reason of the false representations of said defendants. It does not appear that the corporation was damaged by such purchase. Nor can it be held that the corporation would be benefited by the annulment of said purchase. The disposition of the funds arising from the purchase is manifestly of concern to the corporation upon the theory that it was treasury stock, but if plaintiff by reason of false representations paid for the stock more than it was worth, that is a matter of his personal interest, and his wrong should be redressed in a personal action against those who made such representations."

[11, 12] It thus appears, not only that the second and third causes of action were of such a nature that they could not be maintained by stockholders for or on behalf of the corporation, but also that several causes of action were united in one complaint which did not arise out of the same transaction or transactions connected with the same subject of the action, namely, an action against the directors based upon a statutory liability and actions for the recovery of damages accruing to plaintiffs on account of fraudulent representations made to them in the purchase of corporate stock; nor did the several causes of action so united affect all of the parties to the action. Therefore, under the provisions of subdivision 8 of section 427 of the Code of Civil Procedure, the complaint was clearly demurrable on those grounds.

[13, 14] "The theory of appellants * * *" in this regard, say the plaintiffs in their brief, "is not that they are seeking to have such damages as may be recovered [under the second and third causes of action] apportioned among them personally, but * * * that whatever sums are recovered must be delivered to a trustee of the corporation to be appointed so that the same can be apportioned among those who may establish their right to the same." In view of the settled law as declared in the two cases last above cited, however, such theory cannot be accepted. No authority has been cited to support it, and the result contemplated thereby is wholly speculative. But even though it were possible to ignore the main allegations upon which the second and third causes of action were based, and thereby change the nature of the actions so as to treat the same as actions brought on behalf of the corporation for the recovery of damages accruing to the corporation on account of wrongs committed against it by its officers, they were nevertheless demurrable upon the ground that they failed to set forth any facts whatever to take the causes of action out of the operation of the three-year statute governing actions for relief on the ground of fraud. Subdivision 4, § 338, Code Civ. Proc. As will be remembered, the original complaint was filed more than four years after the consummation of the transactions upon which the second and third causes of action were founded, but in order to escape the effect of the three-year limitation fixed by subdivision 4 of section 338 it was alleged merely that plaintiffs did not discover the matters complained of until October, 1927, more than three years after those transactions took place. It has been held, however, that, in the absence of any facts showing why matters complained of were not sooner discovered, the mere recital that the same were not known or discovered until about a certain date is wholly insufficient to take the case out of the operation of the statute. Glindemann v. Ehrenpfort, 29 Cal. App. 87, 154 P. 481, 483. In so holding, the court, in the case last cited, said: "No facts are pleaded showing why the alleged fraud was not sooner discovered. The complaint contains the mere statement that the fraud was not known or discovered by the plaintiff until about the 1st day of February, 1913. Such an allegation is insufficient to excuse the delay in bringing the action. People v. San Joaquin Valley, etc., Assn., 151 Cal. 797, 91 P. 740; Truett v. Onderdonk, 120 Cal. 581, 589 53 P. 26." True, no duty rests upon stockholders to examine the books or minutes of the corporation, either constantly or at intervals, for the purpose of detecting illegal or fraudulent transactions committed against the corporation or its directors (Reid v. Robinson, 64 Cal. App. 46, 220 P. 676); nevertheless where the circumstances are such as to put a person of ordinary intelligence and prudence on inquiry, or where there are gross laches in not making any effort to discover the real facts which might have been discovered by the use of slight diligence, the statute of limitations cannot be avoided, and the knowledge which thus might have been obtained is imputed as of the time of the commission of the fraud. Bills v. Silver King Mining Co., 106 Cal. 9, 39 P. 43; Whitten v. Dabney, supra; Beal v. Smith, 46 Cal. App. 271, 189 P. 341; James v. Steifer Mining Co., supra; 6 Cal. Jur. 873. Here the complaint

affirmatively shows that all of the transactions complained of appeared of record on the books of the corporation, and that upon making the audit in October, 1927, they were readily discovered. The fact, therefore, that soon after the alleged false representations were made the corporation was adjudged bankrupt would seem to be sufficient to put a person of ordinary intelligence and prudence on inquiry as to its internal affairs. In any event no facts or circumstances whatever were alleged to explain why the audit of the books was deferred for more than two years after the corporation was declared bankrupt, nor why the bringing of this action was delayed until a time when, by reason of the termination of the bankruptcy proceedings, the creditors would be foreclosed from participating in the distribution of any money plaintiffs by this action sought to recover.

[15, 16] It is well established also that, in actions for damages alleged to have been sustained by reason of false and fraudulent representations concerning the value of corporate stock, the measure of damages "is the difference between the value of the stock at the time of the transaction if the alleged representations had been true, and what it was then actually worth" (Glindemann v. Ehrenpfort, supra); and in the present case the complaint does not set forth the number of stockholders in the corporation, who they were nor how many were injured by the alleged illegal acts, nor the number of shares owned by plaintiffs, nor the value of the stock at any time or under any circumstances. In fact, there is nothing in the complaint to show that at the time the stock was purchased it was not actually worth all or even more than plaintiffs paid for it.

For the reasons and upon the grounds above stated the demurrers, in our opinion, were properly sustained. The judgment is therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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123 Cal.App.(Supp.) 777

KRIEGER v. DENNIE et al.

Civ. A–1202.

Appellate Department, Superior Court, Los Angeles County, California.

April 26, 1932.

1. Judgment 🔑**185.**

In action for rent, defendants' affidavits in opposition to motion for summary judgment *held* sufficient to entitle them to defend (Code Civ. Proc. § 831d (4, 6).

Defendants' affidavits were sufficient where they showed that lease covering premises was made by another and plaintiff's predecessor in title; that such other person alone paid rent or furnished funds therefor; and that none of the defendants had any conversations with plaintiff about rent.

2. Judgment 🔑**186.**

On motion for summary judgment, defendants' affidavits must be accepted as true, and motion denied, if facts stated constitute defense and can be proved by competent witnesses (Code Civ. Proc. § 831d (4, 6).

Appeal from Municipal Court, City of Los Angeles; Charles L. Bogue, Judge.

Action by Carrie B. Krieger against E. B. Dennie and others. From a judgment for plaintiff, against Mrs. E. B. Dennie, H. Vetters, and Mrs. H. Vetters, such defendants appeal.

Reversed.

Max Mayer, of Los Angeles, for appellants.

Lyndol L. Young, of Los Angeles, for respondent.

BISHOP, J.

In this action to recover two months' rent, plaintiff obtained judgment against Mrs. Dennie and Mr. and Mrs. Vetters, not after a trial, but following proceedings instituted under section 831d, Code Civ. Proc. Because in their affidavits, filed in opposition to the motion to strike their answers and enter judgment, the appealing defendants showed facts sufficient to entitle them to defend, it was error to enter judgment against them summarily.

So much of section 831d as is involved in a consideration of the question presented by this appeal, follows: "(4) When an answer is filed in an action to recover upon a debt * * * if it is claimed that there is no defense to the action, on motion of the plaintiff, * * * supported by affidavit of any person or persons having knowledge of the facts, the answer may be stricken out and judgment may be entered, in the discretion of the court, unless the defendant, by affidavit or affidavits, shall show such facts as may be deemed by the judge hearing the motion sufficient to entitle him to defend. * * * (6) The affidavit or affidavits in opposition to said motion shall be made by the defendant, or by any other person having knowledge of the facts, and together shall set forth facts showing that the defendant has a good and substantial defense to the plaintiff's action (or to a portion thereof) upon the merits. The facts stated in each affidavit shall be within the personal knowledge of the affiant, shall be set forth with particularity, and each affidavit shall show affirmatively that the affiant, if sworn as a witness, can testify competently thereto. * * *"

For the purposes of this decision we are assuming that plaintiff's affidavits were sufficient to entitle her to press her motion. From them it appears that on or about October 14, 1929, plaintiff became the owner of the premises which the four defendants were then occupying, and which they continued to occupy until the middle of May, 1931. At about the time plaintiff became the landlady, she purchased, at the request of Mrs. Dennie, some furnishings for defendants' use. About the same time Mrs. Vetters expressed a desire that the porch be roofed, with which desire plaintiff complied. Later, Mrs. Dennie pointed out that the floor needed repairing, and that was done. Some five months before the defendants quit the premises Mr. Vetters expressed regret that the rent was in arrears, but stated that "we will pay the rent as soon as we can." Shortly before the premises were vacated Mrs. Vetters telephoned the plaintiff that "we can no longer keep your property * * * we will pay your rent as soon as we can." During the first year of the plaintiff's relation with the defendants, the monthly rental was paid by the personal check of Mr. Dennie; thereafter by the personal check of Mrs. Vetters. All these facts appear in plaintiff's affidavits.

Each of the four defendants filed an affidavit in opposition to plaintiff's motion for a summary judgment. Disregarding such conclusions of law as "affiant never had any privity of contract," and similar statements, we find sufficient remaining to indicate that, from one witness or another competent to testify concerning the matters involved, defendants could show that the original lease, under which they entered the premises, was one between the then owners and Mr. Dennie alone. This lease expired two months after plaintiff acquired the property, but by its terms it was provided that a holding over would be under the same conditions as those in the written lease. All rent was paid by Mr. Dennie, or, if by others, from funds furnished by him; the plaintiff always came to him for the rent. The conversations about the furnishings, floor, and porch roof were, with one unimportant exception, not held with the appealing defendants, but with the defendant Dennie. None of the appealing defendants had any conversation with plaintiff about the rent.

[1, 2] Bearing in mind that we are not concerned with the liability of Mr. Dennie, against whom judgment was not rendered, we find that the three appellants presented affidavits which entitled them to defend. There may be some doubt as to the sufficiency of the showing made that Mr. Dennie would be a competent witness as to the written lease, or that any one could competently testify as to its contents, but, aside from the testimony it was forecast would be given as to the terms of that instrument, it is apparent that the defendants showed themselves to be in a position to meet completely the evidence offered by the plaintiff by which she would seek to prove that the relation of landlord and tenant existed between herself and appellants. True, the defendants' affidavits were contradicted by those of the plaintiff. In proceedings taken under section 831d, however, the trial judge is not charged with the duty of determining wherein, amidst conflicting statements, lies the truth. Judgment may not be entered summarily if the defendant "shall show such facts as may be deemed by the judge hearing the motion sufficient to entitle him to defend." For the purposes of the motion, the allegations of the defendants' affidavits must be accepted as true. Cowan Oil & Refining Co. v. Miley Petroleum Corp. (Cal. Super. 1931) 295 P. 504, 507; Adler v. Wiener (Sup. 1922) 197 N. Y. S. 599; Tully v. New York Life Ins. Co. (1930) 228 App. Div. 449, 240 N. Y. S. 118; Wyatt v. Madden (1929) 59 App. D. C. 38, 32 F.(2d) 838. Nor does the expression "as may be deemed by the judge * * * sufficient" place the matter within the arbitrary discretion of the judge to determine whether a sufficient showing has been made. If it appears that the evidence which the defendants' affidavits reveal they can furnish by competent witnesses would, if furnished and believed, defeat plaintiff's claim, the motion for a summary judgment must be denied.

In Baxter v. Szucs (1929) 248 Mich. 672, 227 N. W. 666, 667, the principle was expressed thus: "The province of the court, on motion for summary judgment, is to determine judicially whether there is an issue of fact which, if resolved in favor of defendant, would preclude a verdict for plaintiff in whole or in part of his demand." In New York a procedure for summary judgment much like ours is authorized. Mr. Justice Cardozo, speaking for the court in Curry v. Mackenzie (1925) 239 N. Y. 267, 146 N. E. 375, made this statement: "Civil practice rule 113 permits summary judgment at times in favor of a plaintiff, though material averments of his complaint have been traversed by the answer. To that end there must be supporting affidavits proving the cause of action, and that clearly and completely, by affiants who speak with knowledge. There must be a failure on the part of the defendant to satisfy the court 'by affidavit or other proof' that there is any basis for his denial or any truth in his defense. The case must take the usual course, if less than this appears. To justify a departure from that course and the award of summary relief, the court must be convinced that the issue is not genuine, but feigned, and that there is in truth nothing to be tried." In Hanna v. Mitchell (1922) 202 App. Div. 504, 196 N. Y. S. 43, 52, in treating of a conflict made by contrary affidavits in a proceeding for summary judgment, the opinion reads: "The court is not authorized to try the issue, but is to determine whether there is an issue to be tried."

In the case at bar defendants have shown that there is an issue to be tried. That it may be tried, the judgment is reversed, appellants to have their costs on appeal.

I concur: SHAW, Acting P. J

McLUCAS, J., being absent, did not participate in the decision.

215 Cal. 449

KATZ v. HELBING et al.

S. F. 14411.

Supreme Court of California.
April 27, 1932.

Rehearing Denied May 26, 1932.

1. Negligence 🔑62(3).

Owners and contractor *held* liable to street car passenger injured by caustic lime thrown by boys.

> Evidence showed, among other things, that owners obtained permit to place building materials on sidewalk; that plastering contractor made wooden box which he placed partly on sidewalk; that box contained caustic lime used both by plastering contractor and owners; that boys had thrown lime at street cars on several different days prior to accident, and did not know that such material was dangerous; and that five days before accident street car company complained to police, and officer went to building and communicated that fact to person thought to be plastering contractor.

2. Negligence 🔑136(16).

Whether policeman notified contractor that boys were throwing lime at street cars *held* for jury on conflicting evidence.

> It appeared that, although there was some uncertainty in identification of plastering contractor made by policeman, who was compelled to refresh his memory by statement made in office of injured street car passenger's attorney shortly after accident, this uncertainty was not surprising, since about five years had elapsed between that time and date of trial.

3. Negligence 🔑48.

Owners' and contractor's actual knowledge that boys were throwing lime at street cars *held* unnecessary respecting liability to injured passenger; consequences being foreseeable.

4. Negligence 🔑48.

Owners and contractor *held* chargeable with notice that unguarded lime box on sidewalk might attract boys, who threw lime at street cars.

5. Master and servant 🔑315.

Where owners and plasterer used lime from plasterer's box, fact that plasterer was independent contractor did not relieve owners of duty to prevent injury to street car passenger by lime thrown by boys.

6. Damages 🔑132(14).

$30,000 for injury causing loss of eye, probably permanent malodorous secretions, and inability to wear artificial eye, *held* not excessive.

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Fred Katz against William Helbing, Sr., and others, partners doing business under the firm name and style of the Helbing Company, and others. A judgment for plaintiff in the Superior Court was modified, and, as modified, was affirmed by the District Court of Appeal, and all parties petitioned for a hearing in the Supreme Court.

Judgment of the Superior Court affirmed.

Superseding opinion in 1 P.(2d) 1076.

Hadsell, Sweet & Ingalls, of San Francisco, for appellant A. G. Isaacs.

Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for appellants Helbing Co. and Members of Copartnership.

Hubbard & Hubbard, of San Francisco, for respondent.

PER CURIAM.

This is an action for damages for personal injuries. Defendants Helbing were partners, engaged in the business of general contracting under the firm name of Helbing Company. They were owners of a piece of land on Sutter street between Hyde and Leavenworth streets in San Francisco, on which they were erecting a building. Defendant Isaacs was an independent contractor engaged by them to do certain of the plastering on the building. Pursuant to a city ordinance, the defendant owners obtained a permit from the board of public works to place building materials on the sidewalk. The defendant contractor made a wooden box about eight feet long, five feet wide, and two feet deep, which he placed partly on the sidewalk and partly on the street. The box was used to hold caustic lime delivered on the job already mixed. It was used both by the plastering contractor and the defendant owners, whose employee was in charge of some of the plaster work. On August 25, 1925, after working hours, plaintiff was riding on a street car past the building. Two boys, twelve years of age, were throwing the lime at street cars, and one of their missiles struck him in the right eye, causing a severe burn. Ultimately the eye had to be removed.

Plaintiff brought this action against both the owners and the independent contractor. A general demurrer to the complaint was sustained by the lower court, but, on appeal, this court held that a cause of action was stated. Katz v. Helbing, 205 Cal. 629, 271 P. 1062, 62 A. L. R. 825. Upon the trial, judgment was rendered against defendants in the sum of $30,000, and they appealed to the District

Court of Appeal, First Appellate District, Division 1. Said court affirmed the judgment except as to the award of damages, which it reduced to $16,000. All parties petitioned for a hearing in this court, which was granted.

The basic principles upon which liability in this case must rest are familiar, and they were carefully considered in the previous decision of this court on demurrer. We there said (205 Cal. 633, 271 P. 1062, 1064, 62 A. L. R. 825): "It must be conceded that building materials are commonly left standing on the sidewalk and border of the street fronting on buildings in the course of construction, and that wet lime and mortar are frequently mixed in boxes placed upon the sidewalk or street area, to be from there carried into the building for use. This practice, under ordinary circumstances, is recognized as lawful by custom and judicial decision. But, if experience had demonstrated that the placing of building materials in public streets and sidewalks was likely to be attended by accidents to persons lawfully using said streets and sidewalks, whether by virtue of wrongful acts of interference of young children or otherwise, we might expect to find the matter regulated by statute, and in the absence of statutory prohibitions it would be the duty of courts and juries to declare such conduct wrongful if a reasonably prudent man would have foreseen that injury would probably result, for the acts of a defendant are deemed the proximate cause of such consequences as a reasonably prudent man would anticipate as likely to result therefrom. Royal Indemnity Co. v. Public Service Corp., 42 Cal. App. 628, 183 P. 960; Polloni v. Ryland, 28 Cal. App. 51, 151 P. 296; Merrill v. Los Angeles Gas & Electric Co., 158 Cal. 499, 139 Am. St. Rep. 134, 31 L. R. A. (N. S.) 559, 111 P. 534. Intervening wrongful acts of third persons, but for which injuries complained of would not have been received ordinarily break the chain of causation, because they are not to be anticipated as probable consequences, but are occasional and exceptional results. But this is not always the case, especially where the acts of children of a nonresponsible age are involved. See Parkin v. Grayson-Owen Co., 25 Cal. App. 269, 143 P. 257; Cahill v. E. B. & A. L. Stone Co., 153 Cal. 571, 19 L. R. A. (N. S.) 1094, 96 P. 84; Id., 167 Cal. 126, 138 P. 712; Faylor v. Great Eastern Q. Min. Co., 45 Cal. App. 194, 187 P. 101."

[1, 2] Tested by these principles, we think the record sufficiently supports the jury's verdict against the defendants. The box containing the lime was on the sidewalk and street, unguarded and practically uncovered. There were no warning signs on or near it, and there was no watchman at the building. The two boys testified that they had played there and had thrown lime at street cars on several different days prior to August 25; that other boys had done the same; that they had never been told to stay away from the box; and that they did not know that the material was dangerous. Frederick J. Staeglish, a police officer, testified that on August 20, 1925, a complaint was received from the Market Street Railway Company that small boys were throwing lime from the box in front of this building at street cars; that he went to the building and communicated this fact to some one there who gave his name as Isaacs, and who he believed was the same man as the defendant Isaacs present in court. It is true that there is some uncertainty in the identification made by the officer, and that he was compelled to refresh his memory by a statement made in the office of plaintiff's attorney shortly after the accident. Considering the fact that about five years had elapsed between that time and the date of the trial, it is not surprising that his testimony was less positive than it might have been at the time he made the statement. Defendant Isaacs denied having received any communication of this sort, but we think that the evidence was properly presented to the jury, and we may assume by their verdict that they placed credence in the testimony of Officer Staeglish. In this state of the record it can hardly be denied that under the rule of our prior decision defendant Isaacs at least is clearly liable for the injury to plaintiff.

[3, 4] In our opinion, however, it is not essential to the liability of any of the defendants that they have had actual knowledge of the activities of the children. We think there is no doubt that the conduct of the parties who were responsible for allowing this highly dangerous material to remain on the sidewalk uncovered, unguarded, and with no precautions taken to prevent injury to members of the public, was negligent. We think it may also be said that the box with its material was attractive to small boys, and that defendants were charged with notice of the possibility of boys being allured by it and using it in a manner dangerous to others. Even if defendants knew nothing of the acts of the children in the instant case, they should have known, both from general experience and from the fact that the children had played with the material for days prior to the accident. Under all of the circumstances, the jury might certainly find, as may be implied from the verdict, that the consequences in this case should have been foreseen.

[5] It is vigorously contended that defendant owners can in no event be liable, for the reason that defendant Isaacs was an independent contractor. This fact, while unquestioned, is not conclusive. The record shows that the box was not used by Isaacs alone. Some of the plastering was done by an employee directly responsible to defendant owners. The duty to prevent injury from careless handling of the lime box was therefore

as much that of the owners as it was of Isaacs, and the liability for acts reasonably foreseen rests upon them as well as upon him.

[6] The final question is as to the award of damages. This court has, in prior decisions, reduced the amount of damages for loss of an eye to sums considerably below that awarded by the jury in the instant case. We think, however, that the facts here are sufficient to distinguish such decisions. Without reviewing the evidence in detail, it appears that plaintiff underwent numerous operations over a period of months; that he suffered, and continues to suffer, great pain and annoyance from malodorous secretions which exude from the empty socket of the eye; that the nature of the injury was such that he is unable to wear an artificial eye; and that the aggravating conditions just described are likely to continue throughout his life. Plaintiff is an accountant, and must necessarily suffer a great diminution of professional capacity. These facts, in our opinion, support the verdict of the jury, and offer no basis for interference on our part.

The judgment is affirmed.

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215 Cal. 336

BRIGGS et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

L. A. 13150.

Supreme Court of California.

April 29, 1932.

1. Prohibition 🔑10(1).

Prohibition lies to control ruling on judge's disqualification, where facts are without substantial conflict and disqualification is question of law (Code Civ. Proc. § 170, as amended).

2. Judges 🔑51(4).

In determining whether judge was disqualified, opinion of challenged judge as to his state of mind *held*, in view of circumstances, insufficient to raise conflict in evidence (Code Civ. Proc. § 170, as amended).

> The evidence showed that the challenged judge, on trial of contempt proceeding, took witness stand and stated under oath that certain charges made in statement of grounds of his disqualification were absolutely, unqualifiedly, and wholly false. Later, in answering affidavit, the judge stated that he had not intended to charge parties with deliberate falsehood.

3. Judges 🔑49(2).
Prohibition 🔑10(1).

Where trial judge in contempt proceeding stated under oath that statements alleged to constitute grounds for disqualification were absolutely, unqualifiedly, and wholly false, *held* that judge was disqualified as matter of law, and ruling on qualification was reviewable by prohibition (Code Civ. Proc. § 170, as amended).

> Prohibition was proper remedy on ground that probability of bias and prejudice of judge appeared as matter of law, since words "false" and "falsehood" generally refer to false statements made with knowledge of falsity, and since the judge's statement read as a whole resulted in conclusion that judge meant to and did in fact charge persons accused of contempt with having knowingly made false statements in their affidavits, and would therefore probably be biased in passing on credibility of affiants.
>
> [Ed. Note.—For other definitions of "False; Falsely" and "Falsehood," see Words and Phrases.]

4. Prohibition 🔑10(1).

Prohibition to restrain proceedings by disqualified judge should be limited to judge whose disqualifications are passed on (Code Civ. Proc. § 170, as amended).

In Bank.

Proceedings by H. B. R. Briggs and others for writ of prohibition to be directed to the Superior Court of Los Angeles County and Hon. Frank C. Collier and Hon. J. T. B. Warne, Judges thereof, to restrain the court from hearing and trying certain contempt proceedings.

Writ, as limited, granted.

Superseding opinion 10 P.(2d) 53.

McAdoo, Neblett & Clagett and S. S. Hahn, all of Los Angeles, for petitioners.

Chandler, Wright & Ward and Chandler P. Ward, all of Los Angeles, for respondents.

PER CURIAM.

Petitioners seek by prohibition to restrain the Superior Court, in and for the county of Los Angeles, and Frank C. Collier and J. T. B. Warne, judges thereof, from hearing, and trying a certain contempt proceeding now awaiting trial in that court, and in which proceeding petitioners herein are named as defendants. Petitioners contend that Judge Collier is disqualified from hearing the contempt case on the ground that it is "probable that, by reason of bias or prejudice of such * * * judge * * * a fair and impartial trial cannot be had before him." Subdivision 5, § 170, Code Civ. Proc.

The controversy thus presented is of long standing. On May 17, 1930, petitioners were charged with having committed constructive contempts arising out of certain publications appearing in the Los Angeles Record, of which the petitioners are the publishers and editors. Upon the filing of the complaint, the Superior Court in and for Los Angeles county caused to be issued an order to show cause directed to petitioners, and which order was made returnable before Judge Collier. Before the return date, petitioners filed a statement objecting to the hearing and trial of the contempt case before Judge Collier on the grounds that he was interested in the action, that he was biased and prejudiced, and that he had given advice to the Los Angeles Bar Association, at whose request the contempt proceedings had been instituted. The grounds of the alleged disqualification were set forth in full. This statement was filed by petitioners on the theory that the provisions of section 170 of the Code of Civil Procedure applied to constructive contempt proceedings. Judge Collier ruled that this section did not apply to constructive contempt proceedings. Petitioners applied to this court for a writ of prohibition to have that question determined. This court held in the case of Briggs v. Superior Court, 211 Cal. 619, 297 P. 3, that the provisions of section 170 of the Code of Civil Procedure applied to constructive contempt proceedings, and that, when the trial judge's disqualifications are attacked in such a case, another and impartial judge must pass on that question, as provided by the amendments of 1927 to that section. In accordance with that opinion, the chairman of the judicial council appointed Judge Warne to hear and determine the question as to the qualifications of Judge Collier. Judge Warne ruled that Judge Collier was not disqualified, for reasons that are set forth in a written opinion which is set forth in full in the present petition. The decision of Judge Warne resulted in the present petition for prohibition, which is based on the theory that Judge Collier is disqualified as a matter of law from presiding at the trial of the contempt case.

The original statement objecting to Judge Collier alleges that the proceeding in contempt was instituted at the request of the Los Angeles Bar Association; that Judge Collier is an active member thereof; that Judge Collier was then a candidate for reelection as judge of the Superior Court; that his name, together with that of the other candidates, was to be submitted to the members of the association in a plebiscite; that the Bar Association was to assist financially in the campaign of those who won the plebiscite; that Judge Collier had expressed an opinion as to the merits of the case to the members of the association; that he had written a letter to the association showing his partiality. In reference to the letter alleged to have been written by Judge Collier, Judge Warne ruled, and his ruling was undoubtedly correct, that the interpretation sought to be placed thereon by petitioners was not well founded. Petitioners recognize that the grounds for disqualification alleged in the original statement are now, for the most part, moot, for the reason that the election mentioned by petitioners has long since been held, but allege, by a supplemental statement, that facts occurring subsequently to the filing of the original statement conclusively show, as a matter of law, that it appears "probable" that Judge Collier is biased and prejudiced so that a fair and impartial trial cannot be held before him. It is alleged that, when the contempt matter first came before Judge Collier for hearing on June 2, 1930, and at the time that he ruled section 170 of the Code of Civil Procedure had no application to constructive contempt proceedings, the following took place:

Judge Collier ascended the bench, visibly agitated (which agitation petitioners allege was caused by anger towards them), and had himself sworn as a witness. Then, in an oral statement combining testimony, arguments, and rulings, he concluded that he was not disqualified. He took up each statement alleged by petitioners to constitute a ground for disqualification and denied its truth. During the course of his oral statement, Judge Collier stated:

"Mr. Briggs, will you please arise so that I may see you. I want to look you squarely in the eye when I say certain things that I am going to say this morning. Taking up the first statement objecting to the hearing at the trial of this matter * * * that is an unqualifiedly false statement." He then told Mr. Briggs that another charge of disqualification is "likewise an unqualifiedly false statement"; that the charge that he had given advice to the Los Angeles Bar Association is "absolutely and unqualifiedly and wholly false—not one word of truth in it. And the falsity of that statement could have easily been ascertained upon inquiry of me or of any member of the Los Angeles Bar Association"; that another charge was "absolutely and unqualifiedly false * * * there is no truth in the statement whatsoever"; that another charge "is false in every respect." Referring again to the charge that he had advised the Los Angeles Bar Association, he stated "that statement is a falsehood—every word of it; every word of it * * * I challenge anyone here to prove that statement. * * * Now any attempt on the part of the drawer of this document or the person who verified it to state that I advised with the Los Angeles Bar Association or any of its Board of Trustees or members with regard to this proceeding is an absolute, unqualified falsehood, and could have been ascertained, if the drawer of this document, or its verifier, had made an investigation of any kind concerning it." It would serve no useful purpose to quote from the rest of the statement. Sufficient has been set forth to show the character of the statement and to indicate the state of mind of the judge at the time it was made.

Petitioners contend that Judge Collier has clearly made it appear that it is "probable that by reason of bias or prejudice * * * a fair and impartial trial cannot be held before him," for the reason that by his statement of June 2, 1930, he has shown that he will start the trial with the settled conviction that petitioners have been capable and guilty of deliberately misstating certain facts in the verified statement filed by them in this proceeding. With this basic premise as the starting point, it is argued that, if Judge Collier be permitted to try the case, at such trial he will be both the trier of the fact and of the law; that, as the trier of fact, it will be necessary for him to pass upon the credibility of the witnesses, the most important of whom will be petitioners; that, in order to determine the qualifications of a judge in such a case, the same test that is applied to a prospective juror should be applied; that a juror would be disqualified if he had the belief that any of the parties to the action had been guilty to his knowledge of having deliberately told a falsehood.

Judge Collier not only admits having made the statements set forth by petitioners, but sets forth these statements verbatim by way of answer to the original statement of petitioners. After the supplemental statement of petitioners had been filed setting forth the statement of June 2, 1930, as an additional ground of disqualification, Judge Collier filed a supplemental answer thereto, in which he admits that, when he ascended the bench on that morning, he "was visibly shaken with emotion, but he denies that his attitude toward the defendants was either of anger or disdain, but on the contrary that this affiant was then moved by a desire of great earnestness and sincerity to deny and refute so far as possible all of the statements contained in tne affidavit of bias and prejudice * * *"; he also specifically denies that he took advantage of his position as a judge to denounce the defendants. It is then alleged in various forms that by the use of the words "false," "unqualifiedly false," "absolutely false," etc., he did not intend to imply that the petitioners had knowingly made false statements, but used that form of expression simply as a denial of the allegations in petitioners' statement. On this state of the record Judge Warne ruled that "in the absence of any proof to the contrary (as to the intent with which the words were used) this court is bound to resolve the matter in the Judge's favor," and for that reason held that Judge Collier was not disqualified. It is the correctness of that determination that is challenged in this proceeding.

[1] The first question presented is whether or not prohibition can be used to test the correctness of Judge's Warne's decision. Prior to 1927, when the qualifications of a judge were questioned, it was necessary for the challenged judge to pass on the question himself. It was held that under the law, as it then existed, the correctness of that determination could be tested by prohibition, even where the aggrieved party had a remedy by appeal. Hall v. Superior Court, 198 Cal. 373, 245 P. 814; Lindsay-Strathmore Irr. Dist. v. Superior Court, 182 Cal. 315, 187 P. 1056; Quatman v. Superior Court, 64 Cal. App. 203, 221 P. 666. In 1927 section 170 of the Code of Civil Procedure was amended (St. 1927, p. 1403) to provide that, when the qualifications of a judge are challenged, the challenged judge may consent to have the action tried before another judge, or he may file his written answer admitting or denying the charges, and may set forth "any additional fact or facts material or relevant to the question of his disqualification. * * * No judge * * * who shall deny his disqualification, shall hear or pass upon the question of his own disqualification; but in every such case, the question of the judge's disqualification shall be heard and determined by some other judge." No reason has been suggested why these changes in the procedure in determining a judge's qualifications have in any way changed the rule that the validity of that determination may be tested by prohibition. The same reasons why prohibition was permitted under the old law still exist. If a judge is disqualified as a matter of law, every order entered by him is as equally void under the new law as it was under the old, and no reason appears why the parties should be forced to trial before a disqualified judge, only to have the judgment set aside when it later appears that as a matter of law the judge was disqualified. It may be conceded that, when the disqualification of a judge is a question of fact, and the facts are disputed, the determination of the judge assigned to pass on the question is final and conclusive under the well-settled rule that appellate courts are bound by the determination of a lower court, based on conflicting evidence. But, where the facts are without substantial conflict, the question of disqualification is one of law, and the prohibition will lie. It would seem to be to the interest of all concerned that this should be so and that a final determination should be had at the earliest opportunity. Particularly is that so in the present case. If Judge Collier is disqualified as a matter of law, every order entered by him in the proceeding will, of course, be null and void. There is no independent appeal from Judge Warne's order holding Judge Collier to be qualified, and the correctness of that ruling cannot be tested on

appeal from the judgment in the contempt proceedings, for the reason that there is no appeal from a judgment in a contempt proceeding. If petitioners are forced to trial before Judge Collier and are convicted, they could, perhaps, secure a review of Judge Warne's ruling by habeas corpus or certiorari, but that relief is certainly not adequate. This court has recently held that the amendments of 1927 to section 170 of the Code of Civil Procedure (St. 1927, p. 1403) in no way changed the rule that the correctness of the trial court's determination that a judge is or is not qualified can be passed upon by prohibition addressed to this court. Central Pacific Railway Co. v. Superior Court, 211 Cal. 706, 296 P. 883. We have no hesitancy in holding, therefore, that, if the question of the disqualification of Judge Collier is a question of law, this court has the power and jurisdiction to determine that question in the present proceeding. We turn, therefore, to a discussion of the question as to whether Judge Collier is disqualified as a matter of law.

The amendments of 1927 to section 170 of the Code of Civil Procedure not only made several important changes in procedure, but also changed the substantive law in reference to disqualifying a judge by reason of bias or prejudice. Before 1927 the section on bias and prejudice provided that a judge was disqualified when it "appears from the affidavit or affidavits on file that either party cannot have a fair and impartial trial before any judge * * * by reason of the prejudice or bias of such judge." Under this section it was necessary to show actual bias or prejudice. In 1927 the wording of the section was changed to read that a judge is disqualified "when it is made to appear probable that, by reason of bias or prejudice of such * * * judge * * * a fair and impartial trial can not be had before him." Under the section prior to said amendment it was necessary not only to show bias and prejudice, but also that a fair trial could not be had by reason thereof. In 1927 the wording of the section was changed to read that a judge is disqualified "when it is made to appear probable that, by reason of bias or prejudice of such * * * judge * * * a fair and impartial trial can not be had before him." As amended, the section does not dispense with, but still requires a showing of bias or prejudice. It then remains to determine whether, as matter of law, it is probable by reason thereof a fair and impartial trial cannot be had. Our first inquiry is whether the bias or prejudice of Judge Collier has been established without substantial conflict in the evidence.

[2, 3] None of the facts is in dispute. Judge Collier does not deny that he made the statements alleged to have been made by him at the hearing on June 2, 1930, but in fact candidly admits having made said statements. When they are read as a whole the only reasonable conclusion to be drawn from the words used is that Judge Collier meant to charge, and did in fact charge these petitioners with having knowingly made false statements in their affidavit. This is the usual and ordinary meaning of the word "false" or "falsehood." Hatcher v. Dunn, 102 Iowa, 411, 71 N. W. 343, 36 L. R. A. 689; United States v. Ninety-Nine Diamonds (C. C. A.) 139 F. 961, 968, 2 L. R. A. (N. S.) 185; Gilpin v. Merchants' Nat. Bank (C. C. A.) 165 F. 607, 611, 20 L. R. A. (N. S.) 1023. That this was the meaning intended to be conveyed at the time the statement was uttered, is made certain by the terms "absolutely," "unqualifiedly," "wholly," used repeatedly in conjunction with the terms "false" and "falsehood," and by the repeated assertion that, if any investigation at all had been made, the falsity easily could have been ascertained. We feel impelled to conclude that the words used by him and the conduct of Judge Collier at the time and under the circumstances show, without any substantial conflict in the evidence, bias and prejudice against the petitioners as contemplated by the Code section. Respondents contend, however, that there is a conflict in the evidence which is binding on this court because Judge Collier, in his answering affidavit, gave it as his opinion as to his state of mind when he uttered these words, that he did not mean by the terms used to charge the petitioners with having deliberately made false statements, but simply intended to deny the truth of the allegations in the affidavit of the petitioners. As already stated, Judge Warne ruled that this statement of Judge Collier, as to his opinion as to what he intended by the use of the terms, was binding on him. It is obvious that, if the affidavit of Judge Collier in this respect creates a conflict in the evidence, under the principles already discussed, Judge Warne's ruling is binding and conclusive on this court. But it is our opinion that the statement of Judge Collier as to his opinion regarding his state of mind was not binding on Judge Warne, and, in fact, did not raise a conflict in the evidence in this case. It is obvious that the Legislature, by providing as it did in 1927 that the question of disqualification should be passed on by another judge, not disqualified, intended to deprive the challenged judge of the power as well as of the somewhat delicate necessity of passing upon the question as to his state of mind. If it be held that the statement of the challenged judge as to his opinion as to his state of mind is binding or conclusive, it is obvious that in every case the challenged judge himself in effect will pass upon the question of his own qualifications, contrary to the letter and spirit of section 170 of the Code of Civil Procedure. It

is our opinion that in this case the state of mind of the challenged judge must be determined by what he said or did, and not by what he may think his state of mind to be. Any other rule would avoid the purpose of the 1927 amendments. We are not to be understood as holding that under no circumstances may the affidavit of the challenged judge as to the meaning of the words or conduct attributed to him be considered by the judge assigned to pass upon the issue of whether bias or prejudice exists. We are simply holding that the charge of bias or prejudice has been sustained in this case by the undisputed facts and circumstances appearing in the record, and that the opinion expressed by Judge Collier in his affidavit as to the intended meaning to be given to his words did not raise a substantial conflict in the evidence. The statements made by Judge Collier and his conduct on the bench may reasonably be interpreted to mean but one thing, namely, that Judge Collier believed that these petitioners had deliberately misstated the truth in their affidavit, and that he charged them with having done so. Under these circumstances is it fair to Judge Collier or to the petitioners that he should be called upon to preside at the trial of the case? We think it would be fair to neither party. The trial judge in the contempt case will be the trier of both the facts and of the law. As the trier of the facts he will be called upon to pass on the credibility of these petitioners as the principal witnesses in their own behalf. Is it humanly possible or probable that a judge who has stated under oath that it is his opinion that these petitioners have deliberately falsified under oath can pass upon their credibility with that impartial judicial mind which should exist in the trier of the facts? We think it not probable. Where the trial judge acts as the trier of both the facts and the law, his qualifications, so far as bias and prejudice are concerned, are somewhat the same as the qualifications of a juror. No one would doubt that if a juror stated that he was of the opinion that one of the parties to the action was not only capable of being but had, to his knowledge, been guilty of making false statements under oath, such juror would and should be disqualified, even if that juror stated that he could give the parties a fair trial. Quill v. Southern Pacific Co., 140 Cal. 268, 73 P. 991.

The District Court of Appeal has recently decided a case closely in point with the instant case. Evans v. Superior Court, 107 Cal. App. 372, 290 P. 662. In that case Judge Tappaan had presided at the trial of a certain action. At the close of the trial, he rendered an oral opinion in which he stated that two of the defendants, naming them, had been guilty, in his opinion, of deliberately falsifying while under oath. Later, another case in which these two individuals were parties defendant was assigned to Judge Tappaan for trial. The two individuals objected to Judge Tappaan on the ground that he had an opinion as to the credibility of these parties gained from the prior case. An impartial judge was appointed to pass upon the question of the qualifications of Judge Tappaan. He ruled that Judge Tappaan was qualified. Defendants sought by prohibition to prevent Judge Tappaan from trying the case. The writ was granted. It was held that prohibition was the proper remedy, and that as a matter of law Judge Tappaan was disqualified because he had admittedly expressed an opinion as to the lack of credibility of the petitioners.

We are in accord with the theory of the above case, and are of the opinion that the principles therein stated are conclusive in the case at bar, and that the petitioners are clearly entitled to the writ.

[4] In directing the issuance of the writ, it is obvious that it should be confined in its application to the particular judge whose disqualifications are herein passed upon.

Let the peremptory writ, as thus limited, issue.

The petition for rehearing is denied.

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122 Cal.App. 660

BROOKS v. WHITMAN et al.

Civ. 8275.

District Court of Appeal, First District, Division 1, California.

April 19, 1932.

1. Specific performance ⚷119.

Plaintiff, to have specific performance of parol agreement of decedent to bequeath her his property, must show such agreement and such exceptional facts as compel equitable aid.

2. Specific performance ⚷121(7).

Making of will later destroyed ***held*** no evidence of agreement to make will.

3. Specific performance ⚷121(7).

Statements made by party as to his having made will in favor of one seeking specific performance of parol agreement to make will *held* not evidence of agreement.

4. Specific performance ⚷121(7).

In suit for specific performance of parol agreement to make will in plaintiff's favor, evidence supported court's finding against existence of agreement.

⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

5. Appeal and error ⚷1012(1).

Weight of testimony of plaintiff regarding deceased's oral declarations agreeing to make will, impeached by other evidence, *held* for trial court.

6. Specific performance ⚷121(7).

In suit for specific performance of parol agreement to make will, plaintiff *held* not to have made sufficient showing to bring case within principles of equity (Civ. Code, § 1624; Code Civ. Proc. § 1973).

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Suit by Lucy Brooks against Irving Whitman and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

Hugh Martin Young, of Los Angeles, for appellant.

Fogel & Beman, of Los Angeles, for respondent Holt & Holt as executor.

Henry W. Williams, of Los Angeles, for respondent Elizabeth Whitman Stephen.

PARKER, Justice pro tem.

The case at bar is a suit in equity seeking the specific enforcement of a parol agreement to bequeath and devise made by Walt Whitman, deceased. The parties defendant are the heirs and devisees under the will of said decedent and also the executor of said testament. It might be noted, in passing, that since the institution of the action certain defendants have died and substitution has been made. Preliminary to a statement of the facts, we may discuss generally the nature of actions of this character.

[1] Under the provisions of section 1624 of the Civil Code and section 1973 of the Code of Civil Procedure, any agreement to devise or bequeath property or to make provision for any persons by will must be in writing. However, the courts in the exercise of an equitable jurisdiction have, to some extent, relaxed the rule, to the extent that parol agreements may and will be enforced pursuant to established and well-defined principles of equity jurisprudence. Wolf v. Donahue, 206 Cal. 213, 220, 273 P. 547; O'Brien v. O'Brien, 197 Cal. 577, 241 P. 861.

In order that plaintiff might succeed, there were two things she must show: First, that by parol the decedent had agreed to devise or bequeath to her his property; second, that there were present those exceptional facts compelling equitable aid.

The finding of the trial court is as follows: The court finds that it is not true that plaintiff and Walt Whitman entered into an agreement wherein and whereby it was agreed by and between them that if the plaintiff should provide said Walt Whitman with a comfortable home, food, and lodging and give him all the care and attention that he required for his comfort and health, the said Whitman would make, execute, and publish a will wherein and whereby he would give all of his property to plaintiff, save and except certain specified bequests to others. This finding, while perhaps subject to some criticism as to form, nevertheless is in direct response to the allegations of the complaint, and the finding is made in the exact language of the said complaint. Appellant concedes that if that finding is sustained, the appeal falls.

The evidence before the trial court consisted entirely of that offered by plaintiff. There was testimony to the effect that Walt Whitman was a man of declining years. He had suffered a paralytic stroke and was confined to a hospital in a generally weakened condition, though with no immediate expectancy of death. Plaintiff was a married woman, living with her husband and family. For some years she had known Whitman and had been his friend, and more or less generally interested in his welfare. In the early part of 1925 or thereabouts Whitman, after some months in a hospital, deemed it best to seek private care. Accordingly he was moved to the home of plaintiff, accompanied by a trained nurse. According to the testimony of plaintiff, in the early part of February, 1925, at her home, she held a conversation with Whitman at which time there were present her husband, her son, the nurse, Miss Drake, and, of course, Whitman. In that conversation and at that time and place Whitman said he thought he would like to dismiss the nurse and make some other arrangements. He asked plaintiff if she would be willing to take care of him, realizing that he was not in a condition to take care of himself, and suggested to plaintiff that she would have to take care of him when the nurse left. He then stated that some arrangements would have to be made for that. Quoting the record verbatim: "The Court: Kindly tell what he said and what you said in reply thereto, * * * A. [The plaintiff.] He said, 'I am about to let the nurse go, and we have to make some different arrangements. Will you take care of me? As compensation for taking care of me I will make a will in your favor. Whatever I have when I die is for you. Will that be agreeable to you?' I said, 'Yes, it will.'" This testimony, corroborated by the son and husband, is relied on as establishing the agreement. True, there is other testimony as to the fact that Whitman did make a will (subsequently destroyed) in favor of plaintiff, and also testimony that Whitman had told others after the date of the alleged agreement, that plaintiff was to be the beneficiary under his will and that he had made a will so providing.

[2, 3] The making of a will is absolutely no evidence of an agreement to make a will. As was said in Monsen v. Monsen, 174 Cal. 97, 102, 162 P. 90, 92: "The making of a will has no tendency to show that there is a contractual obligation to make such will." See, also, Zellner v. Wassman, 184 Cal. 80, 86, 193 P. 84, 87, wherein it is said: "A potential factor in furtherance of fraud would be engendered were a will containing a simple bequest permitted to operate as evidence of a binding contract to make such a bequest." And in the same category and for the same reasons would fall statements made by a party as to the fact of his having made a will in favor of one claiming as in the present case. So, therefore, as to the agreement relied upon, we have but the testimony stated.

[4] While, as hereinbefore noted, defendants offered no testimony, yet the case of plaintiff contained within itself certain contradictions and defects now to be noted. Plaintiff, her son and husband had testified that at the conversation wherein the agreement was reached, a Miss Drake was present. Miss Drake, called as a witness by plaintiff, denied being present at any such conversation. Miss Drake's testimony was not in the nature of negative testimony; in other words, it was not a case of being present and not recalling such conversation. She denied that she was present at any time when the subject of Whitman's property was mentioned. Upon cross-examination, the plaintiff admitted that during the period Whitman was in her care, covering some three years and six months, she received compensation at the rate of $100 per month. Payments were made to her weekly in sums of $25 per week. These payments were made by check and at the time each check was delivered to plaintiff there was indorsed on the face of the check these words: "For room, board and care." Plaintiff indorsed each of these checks and received the amounts represented thereby. She explains the notation as meaning room and board and *general care*, as being exclusive of the special care and nursing she was to bestow under the agreement claimed.

On May 18, 1928, and before the filing of the complaint in this action, but subsequent to the death of Whitman, the plaintiff presented to the executor of the estate of said Whitman her verified claim against the estate of said decedent. In this verified claim she itemizes demands for special nursing by herself totaling five days, also a demand for fumigating and cleaning her house and for the replacement of damaged sick-room furniture. Also, she itemizes claims for telephone calls and money advanced for the services of another attendant. The main claims made against the estate by this verified demand read as follows: "July 1, '25 to March 26, '28 Balance due as *per contract* for room, board and special diet for Wm. E. Whitman from July 1, 1925 to and including March 26, 1928 at $50.00 per month. Said contract called for $150.00 per month for said room, board and special diet and receipt is acknowledged of the sum of $100 per month on said contract." Another item of the demand read as follows: "Sept. '26 to March 21, '28 Services as practical nurse to Mr. Whitman for 18 months, $4.00 per day—$2160.00." These claims, on their face, show demands covering the period subsequent to the alleged agreement and for practically the same services which plaintiff now claims were to be rendered under the agreement to devise. The claim was rejected and thereafter this suit commenced. Upon being interrogated regarding the filing of this claim, plaintiff stated that she was advised the only way she could get her compensation for services rendered before the date of the alleged agreement was by putting in a claim, and that she changed her mind and asked for the whole amount which was due. Her testimony then as to the claim was: "That has nothing to do with this case. * * * I am going to use that later."

Another fact developed was that during the time Whitman was supposed to be receiving the so-called supercare, it was frequently necessary for plaintiff to call in assistance, in which cases bills for the services of such attendants were presented to Whitman and paid.

Attention may now be called to the verified complaint of plaintiff herein. She alleges that she and Walt Whitman entered into an agreement wherein and whereby it was agreed by and between the said parties that if plaintiff should provide said Walt Whitman with a *comfortable home, food and lodging* and give him all the care and attention that he required for his comfort and health, the said Walt Whitman would make and publish his will in her favor, etc. Upon being interrogated as to why she verified a complaint setting up the contract and including general care and attention, the plaintiff's only reply was that it was a mistake. It was in this state of the record that the trial court found against the existence of any agreement to devise. We think the trial court's finding amply supported. We concede the rule that a trial judge may not arbitrarily ignore credible testimony.

[5] From time immemorial it has been the rule of evidence and a rule of law that testimony of oral declarations made by a person since deceased is the weakest kind of evidence. Naturally it follows that it does not require strong evidence to rebut such testimony. Here there was more than sufficient to impeach the witness in almost every detail and her testimony, thus impeached, was entitled to no more weight than the court in its discretion cared to give it. In Cox v. Schnerr,

172 Cal. 371, at page 379, 156 P. 509, 513, the court says: "It is within the province of the trial court to determine what weight and credit shall be given to the testimony of any witness and this court may not control the conclusion or finding of the superior court denying credence to the testimony unless it appears that there is nothing which at all impairs its accuracy." In Davis v. Judson, 159 Cal. 121, at page 128, 113 P. 147, 150, we find: "The most positive testimony of a witness may be contradicted by inherent improbabilities as to its accuracy contained in the witness' own statement of the transaction, or there may be circumstances in evidence in connection with the matter, which satisfy the court of its falsity. The manner of the witness in testifying may impress the court with a doubt as to the accuracy of his statement, and influence it to disregard his positive testimony as to a particular fact." As was said in Wolf v. Donahue, supra, 206 Cal. at page 216, 273 P. 547, 548: "In this class of cases the temptation is strong for those who are so inclined to fabricate evidence giving color to the claim that a written agreement subsequently lost or destroyed was made by a decedent to dispose of his property at death to the claimant. For this reason the trial court should closely scrutinize the testimony of interested parties who offer themselves to re-establish an alleged lost or destroyed written contract or agreement, lest an irremediable wrong be done to the heirs of a decedent whose lips cannot speak in protest against the consummation of a wicked design." And this language is equally fitting to a case where the issue is as to the existence of a parol agreement to devise.

Without further comment, it is our opinion that the finding of the trial court may not be disturbed. Ordinarily this should dispose of the appeal. However, by way of complete disposition of the questions presented, we may proceed further.

[6] If the finding of the trial court above discussed should be upset and the fact found that the oral agreement claimed had actually been shown, nevertheless the plaintiff would be compelled to bring her case within well-recognized principles of equity before she could secure the relief sought. It is conceded that a parol agreement to devise property is invalid, by reason of the statute of frauds, Civ. Code, § 1624. It is likewise conceded that, notwithstanding the statute, such a contract may be enforced upon a showing sufficient to arouse the "hosts of equity." We refrain from a detailed analysis of the evidence here presented, but we have gone carefully over the record and find nothing therein that would bring plaintiff within the rule announced.

The contract at best was uncertain and lacked mutuality. There was no showing of performance chargeable to the terms of the claimed contract, inasmuch as the main part of the service rendered was chargeable to a separate arrangement and the service compensated. There is no showing of any definite change in the situation of plaintiff and there is definite and convincing evidence showing the claimed service to have a value readily compensable in money. Monsen v. Monsen, supra, 174 Cal. at page 99, 162 P. 90; O'Brien v. O'Brien, supra; Christin v. Clark, 36 Cal. App. 714, 173 P. 109; Baumann v. Kusian, 164 Cal. 582, 129 P. 986, 44 L. R. A. (N. S.) 756; Kurtz v. De Johnson, 42 Cal. App. 221, 183 P. 588.

In conclusion, we note appellant's complaint on the action of the trial court in granting respondents' motion to strike certain testimony from the record. We have, notwithstanding, considered the entire record and find that, while there may be some ground for appellant's complaint, yet with all of the stricken evidence restored our conclusion would be the same.

Judgment affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

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123 Cal.App. 125

DUISENBERG-WICHMAN & CO. v. JOHNSON.

Civ. 7200.

District Court of Appeal, First District, Division 1, California.

April 28, 1932.

Appeal and error ⚿773(5).

Failure of plaintiff appellee to respond to order to show cause why judgment should not be reversed or to file answering brief on appeal justified reversal.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by Duisenberg-Wichman & Co. against H. L. Johnson. From a judgment for plaintiff, defendant appeals.

Reversed.

John C. Scott, of Oakland, for appellant.

Preston Higgins, of Oakland, for respondent.

PER CURIAM.

The defendant, H. L. Johnson, appeals from an adverse money judgment in an action involving certain corporate stock transactions which took place between the plaintiff, a copartnership engaged in the stock and bond brokerage business, and defendant, who carried a purchasing and selling account with said firm.

The account was opened in May, 1928, and closed October 30, 1928. It was the business custom of said firm to retain in its possession the stock purchased for its clients and to mail the latter memorandums of purchases and sales, and a monthly statement showing, among other things, the names and number of shares of the stocks bought and sold, the price paid and received therefor, the amount of debits and credits, and the balance remaining in the account. During the period defendant maintained said account he had purchased and sold some Magnavox stock, and in July his account was credited with $300 in cash and 200 shares of Magnavox stock, which said firm had purchased at $2.60 a share; and his monthly statement so showed. Shortly thereafter, at defendant's direction, the stock was sold for approximately $533, and about the same time defendant drew from his account by check a certain amount of cash, including the $300 with which he had been theretofore credited. A few days later and in October, 1928, the firm discovered that the 200 shares of Magnavox and the $300 in cash which had been credited to defendant's account some three months before belonged to one E. L. Johnson, another of the firm's clients, and that, through error and carelessness on the part of the firm, had been credited to the account of the defendant H. L. Johnson; whereupon certain members of the firm called on defendant, directed his attention to the mistake, threatened him with prosecution for embezzlement, and demanded restitution of the $300 cash and the proceeds received from the sale of the stock. Defendant complied with such demand by paying the firm $500 in cash and turning over certain stocks of the admitted value of $358.94, making a total of $858.94. The evidence adduced on the part of the defendant, according to his brief, was to the effect that the payment of the cash and delivery of the stock above mentioned was in full and final settlement of the transaction. However, the firm claimed later that it was obliged to restore the same amount of stock to the account of E. L. Johnson, and for that reason it went into the market some time afterwards and purchased a like amount of stock, but that the price thereof had risen and they were obliged to pay $2,375.39 for the same number of shares that defendant had shortly before sold through said firm for only $533; and thereafter the firm instituted this action against defendant to recover the sum of $1,516.45, which represented the difference between the amount it claimed to have paid for the purchase of said stock and the amount it received from the defendant in settlement of the transaction with him; and upon trial before the court sitting without a jury judgment was given accordingly.

Defendant has presented numerous grounds for reversal, among them being insufficiency of the evidence, one of the chief contentions in this regard being that the settlement he made with the firm, in accordance with its demands, was in full satisfaction of the matter; and in his brief he has cited evidence which supports this claim, and is legally sufficient to sustain a judgment in his favor upon that ground. Plaintiff has made no effort to uphold the judgment. Defendant's brief was filed herein on November 25, 1929, within 30 days after the transcript was filed, and no brief has ever been filed by plaintiff in answer thereto; nor has any extension of time ever been applied for, or reason assigned for not filing a brief. The cause was placed on a special calendar of this court on October 26, 1931, pursuant to an order to show cause why the judgment should not be reversed for failure to file a brief (Duisenberg-Wichman & Company v. Johnson (Cal. App.) 7 P.(2d) 1081), but at that time plaintiff did not appear in response to such order to show cause, nor has it since filed any brief or offered any excuse for not having done so. We are justified in assuming, therefore, that the point made by the defendant for reversal is meritorious, and that plaintiff has abandoned any attempt to support the judgment.

For that reason and upon that ground the judgment is reversed.

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123 Cal.App. 9

FAIR VIEW FARMS CO. et al. v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY.

Civ. 8212.

District Court of Appeal, Second District, Division 1, California.

April 22, 1932.

Rehearing Denied May 19, 1932. Hearing Denied by Supreme Court June 20, 1932.

1. Courts 🔑472(6).

Action for money paid under contract and for rescission alleging breach, and that plaintiff notified defendants of rescission, *held* to seek equitable relief, of which superior, and not municipal, court had jurisdiction.

> Jurisdiction was in superior court as against contention that, in such action, which sought to recover $1,084.07 that had been paid under the contract, the rescission was complete upon plaintiff's giving notice thereof and that the action was an action at law within the exclusive

jurisdiction of the municipal court, the sum demanded being less than $2,000.

2. **Courts 🔑472(6).**
Estoppel 🔑68(2).
That complainant secured attachment in prohibition proceeding did not estop him from proceeding on theory that action for rescission was for equitable relief with jurisdiction in superior, and not municipal, court.

Application by Fair View Farms Company and another for a writ of prohibition to restrain the Superior Court in and for Los Angeles County from proceeding in a certain action.

Writ denied.

William C. Ring, of Los Angeles, for petitioners.

Everett W. Mattoon, Co. Counsel, and Fred M. Cross, Deputy Co. Counsel, both of Los Angeles, for respondent.

TAPPAAN, Justice pro tem.

Petitioners secured an alternative writ of prohibition directed to the respondent, the superior court of the state of California, in and for the county of Los Angeles, requiring said court, at a date therein fixed, to show cause why a peremptory writ of prohibition should not issue prohibiting and restraining said court in a certain action then pending before it from making, rendering, or entering its decision in writing in said action, or making or entering findings of fact or conclusions of law or judgment therein. Treating the first paragraph of the return as a demurrer to the petition, we proceed on the theory that the facts alleged in the petition are admitted.

The action in which petitioners seek this writ is entitled "Walsh v. Fair View Farms Co. et al.," and the complaint alleges that plaintiff therein made and entered into a contract with defendants and petitioners by the terms of which petitioners contracted to sell to plaintiff certain real property and to plant, upon said property so contracted to be sold, grape vines and to care for said vines when so planted. It is alleged that plaintiff, under the terms of this contract, paid to defendants sums amounting to $1,084.07, and the complaint further alleges defendants have failed to comply with the terms of the contract, and there has been a total failure of consideration. There is also an allegation that plaintiff served upon defendants a notice of rescission of the contract. The prayer of the complaint is for the sum of $1,084.07 and for the rescission of the contract, and that it may be canceled and delivered up. The answer of petitioners denies all material allegations of the complaint.

The case came on for trial before the superior court, and at that time defendants and petitioners objected to the hearing of the cause on the ground that it was a cause at law and within the exclusive jurisdiction of the municipal court, the sum demanded being less than $2,000. The superior court overruled this objection and proceeded to hear the evidence, and at the close of the trial indicated that it would give judgment in favor of plaintiff and against defendants and petitioners for the sum found due, and that the contract be canceled and rescinded. Thereupon petitioners secured this alternative writ of prohibition.

[1] Petitioners' position here is that rescission is complete upon the giving of notice, and that there then arises an obligation implied by law to return the money paid under the rescinded contract; that this implied obligation to return the money is enforceable in an action at law, as contradistinguished from equity. That the complaint in the action here involved states a cause of action for rescission and seeks equitable relief there can be no question. The granting of a money judgment alone, without the cancellation of the outstanding contract, would have afforded plaintiff but an incomplete and inadequate remedy, under the circumstances.

The question presented here has been before our courts in many phases, and the decisions rendered have not at all times seemed to be harmonious. In the case of Stone v. Superior Court, 4 P.(2d) 777, our Supreme Court refused to follow the principle contended for by petitioners here. The facts in that case were not as strongly indicative of an equitable cause of action as they are in the case at bar. In the opinion filed in that case many of the cases cited by petitioners are there cited, and any further discussion of authorities is deemed unnecessary.

[2] Petitioners' contention that, by the securing of an attachment in the instant action, plaintiff became estopped from proceeding upon any theory other than that his cause of action was at law is without merit. Plaintiff's cause of action must be measured by the facts as stated in his complaint, and the trial court is justified in rendering its judgment in conformity with such allegations. The fact that a plaintiff may be inconsistent in attempting to enforce his cause of action of itself does not change his cause of action, as stated in the complaint. The plaintiff must rest his case upon the cause so stated. The fact that he does so cannot mislead defendant or form the basis of estoppel.

The demurrer is sustained; the alternative writ is discharged; and the petition for peremptory writ is denied.

We concur: CONREY, P. J.; YORK, J.

123 Cal.App. 106

In re SCHWALL'S ESTATE.

SCHWALL v. DEERING et al.

Civ. 8337.

District Court of Appeal, First District,
Division 1, California.
April 27, 1932.

Army and navy 🔑51½.

Monthly sums payable under war risk policy belong to insured's estate, are distributable as part thereof, and subject to exemption from execution in favor of widow (Code Civ. Proc. § 690; World War Veterans' Act 1924, §§ 26, 303, as amended [38 USCA §§ 451, 514]).

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Petition by Margaret Theresa Schwall to have certain property of the estate of William Schwall deceased, set aside as her property and exempt from execution opposed by Mamie Deering and others. From an order granting the petition, contestants appeal.

Affirmed.

George L. Lang, of San Francisco (Vincent Surr, of San Francisco, of counsel), for appellants.

William T. Sweigert, of San Francisco, for respondent.

PER CURIAM.

An appeal from an order made pursuant to section 1465 of the Code of Civil Procedure, setting aside to Margaret Theresa Schwall, decedent's widow, certain proceeds of a war risk insurance policy as property exempt from execution under section 690 of the same Code.

The facts are as follows: William Schwall died on December 2, 1925. By the terms of a war risk insurance policy issued to him while a soldier in the United States army during the World War the United States agreed to pay him the monthly sum of $57.50 if he became permanently and totally disabled while the policy was in force, and upon his death similar payments to his beneficiary, the total number of payments not to exceed 240. He named his sister, Mamie Deering, as the beneficiary under the policy, but failed to pay the premiums thereon after May 21, 1919. The beneficiary brought suit on the policy against the United States, and on May 22, 1930, it was adjudged that the deceased became permanently and totally disabled on May 21, 1919. Since December 2, 1925, the beneficiary has been and continues to be paid the monthly sums payable under the policy.

In August, 1924, Schwall married the petitioner herein, who subsequent to the rendition of the judgment mentioned was appointed the administratrix of his estate. As such administratrix she made claim for the payments due under said policy from May 21, 1919, the date of the permanent and total disability of the decedent, to December 2, 1925, the date of his death; and the United States Veterans' Bureau has paid to her as administratrix the sum of $4,085.92, the sum of $453.99 being withheld pending adjustment of the question of attorneys' fees. These sums, upon the petition of Margaret Theresa Schwall, decedent's widow, were, by an order of the superior court in which the administration of the estate of decedent is pending, set aside to her as property exempt from execution under section 690 of the Code of Civil Procedure. The said sister and other heirs at law of the decedent contested the petition and have appealed from the order.

The World War Veterans' Act makes provision for payment under such policies to certain permitted classes and also to the insured during his total and permanent disability, and the above amount was paid to decedent's estate pursuant to section 451 of title 38 of the United States Code Annotated, which at the time of his death read as follows: "The amount of the monthly installments of compensation, yearly renewable term insurance, or accrued maintenance and support allowance which has become payable under the provisions of Parts II, III, or IV of this chapter, but which has not been paid prior to the death of the person entitled to receive the same, may be payable to the personal representatives of such person: Provided, That in cases where the estate of the decedent would escheat under the laws of the place of his residence, such installments shall not be paid to the estate of the decedent but shall escheat to the United States and shall be credited to the appropriation from which the original award was made." June 7, 1924, c. 320, § 26, 43 Stat. 614.

In 1926 this section was amended to provide that, in the absence of a duly appointed legal representative, where the combined amounts payable are $1,000 or less, the director shall allow and pay such sums to such person or persons as would under the laws of the state of residence of the decedent be entitled to his personal property in case of intestacy. July 2, 1926, c. 723, § 3, 44 Stat. 792 (38 USCA § 451).

Appellants contend that those who receive the benefits of war risk insurance take as beneficiaries and not as heirs; that the proceeds of such insurance must be distributed to designated persons within the permitted class as ascertained by the laws of succession of the state of residence of the insured and to which class all the parties here belong; and also that the facts make the state statutes upon which respondent relies inapplicable.

With one exception the precise situation here presented does not appear to have been passed upon. In Canada v. Canada's Adm'x, 235 Ky. 747, 32 S.W.(2d) 330, one Jesse Canada held a war risk insurance policy for $5,000 in which his mother was named as beneficiary. He was discharged from the service on June 7, 1921, and married and died in 1924, leaving his widow Margaret and one son. In 1928 suit was commenced on the policy, and in 1929 a judgment was entered establishing the disability of Canada for a considerable period prior to his death. The United States paid to his widow as administratrix of his estate the sum of $1,121.25, which was the aggregate of the monthly installments which became payable to him between the date of his disability and his death. The widow sued to have it declared that she was entitled to have set aside to her out of this fund the sum of $750, this being the amount of the widow's exemption under the Kentucky statute. The mother of decedent, being as stated the beneficiary named in the policy, intervened, claiming the entire fund. Judgment was entered in favor of the widow. The reviewing court, without discussing the possible effect of the federal statutes upon the claim of the widow, affirmed the judgment on the ground that the amount claimed was exempt under the state statute.

As stated, no other case involving the effect of the above section has been brought to our attention, but section 514 of the same title, providing for the payment of insurance to the estate of the insured where no beneficiary has been designated, or such beneficiary does not survive the insured, has been considered in numerous cases. This section, so far as material, provided that: "If no person within the permitted class be designated as beneficiary for yearly renewable term insurance by the insured either in his lifetime or by his last will and testament or if the designated beneficiary does not survive the insured or survives the insured and dies prior to receiving all of the two hundred and forty installments or all such as are payable and applicable, there shall be paid to the estate of the insured the present value of the monthly installments thereafter payable, said value to be computed as of date of last payment made under any existing award. * * *" June 7, 1924, c. 320, § 303, 43 Stat. 625; March 4, 1925, c. 553, § 14, 43 Stat. 1310. A minority of the decisions hold that under this section the unpaid installments payable to the estate of the insured are to be distributed to his heirs of the permitted class designated by the act. Sutton's Ex'r v. Barr's Adm'r, 219 Ky. 543, 293 S. W. 1075; In re Estate of Hallbom, 179 Minn. 402, 229 N. W. 344; In re Estate of Cross, 152 Wash. 459, 278 P. 414; Cassarello v. United States (D. C.) 271 F. 486, 491; Watkins v. Hall, 107 W. Va. 202, 147 S. E. 876; State v. Security Bank of Creighton, 121 Neb. 521, 237 N. W. 620; Price v. McConnell, 153 Va. 567, 149 S. E. 515. This rule was also followed in Re Sabin's Estate, 131 Misc. Rep. 451, 227 N. Y. S. 120, 121, but the decision was later overruled (see 224 App. Div. 702, 228 N. Y. S. 890), and judgment ordered in accordance with the views expressed in Re Ryan's Estate, 129 Misc. Rep. 248, 222 N. Y. S. 253, infra. The contrary rule that such installments belong to the insured's estate and are distributable as part thereof and not to a certain class to the exclusion of others is declared in the following cases: In re McQuade's Estate, 88 Colo. 341, 296 P. 1023; Palmer v. Mitchell, 117 Ohio St. 87, 158 N. E. 187, 55 A. L. R. 566; Turner v. Thomas (Tex. Civ. App.) 30 S.W.(2d) 558; In re Estate of Pivonka, 202 Iowa, 855, 211 N. W. 246, 55 A. L. R. 570; Robbins' Petition, 126 Me. 555, 140 A. 366; Wade v. Madding, 161 Tenn. 88, 28 S.W.(2d) 642; Whaley v. Jones, 152 S. C. 328, 149 S. E. 841; Williams v. Eason, 148 Miss. 446, 114 So. 338, 55 A. L. R. 574; Perrydore v. Hester, 215 Ala. 268, 110 So. 403; In re Estate of Singer, 192 Wis. 524, 213 N. W. 479; In re Hogan's Estate (Utah) 297 P. 1007; In re Ryan's Estate, 129 Misc. Rep. 248, 222 N. Y. S. 253; In re Ogilvie's Estate, 291 Pa. 326, 139 A. 826, 829. And the latter view was approved in Singleton v. Cheek, 284 U. S. 493, 52 S. Ct. 257, 76 L. Ed. —.

In the cases of Succession of Geier, 155 La. 167, 99 So. 76, 32 A. L. R. 353, and Tax Commission v. Rife, 119 Ohio St. 83, 162 N. E. 390, it was held that the intestate laws do not operate on the funds payable under the last section, but are referred to in order to determine who shall take the proceeds of the insurance; and that consequently, under the provision in the act that compensation and insurance payable thereunder shall be exempt from all taxation, the same are not subject to a state inheritance tax.

In Re Ogilvie's Estate, supra, where it was contended that the fund paid under the provisions of the section last mentioned should be distributed by the state court to heirs who were of the permitted class, the court said: "The distribution of the funds under these insurance certificates is by a governmental agency, and not through the courts. When, however, the fund is transmitted to the insured's estate, as here, without limitation it passes under control of the proper state court, and is distributable thereby. We cannot assume, with no suggestion to that effect, that Congress intended to impose upon the state courts the duty of distributing such fund to a certain class in exclusion of others. * * * Waiving the question of the right of Congress to impose such duty upon state courts, it is sufficient to say it has not attempted to do so. When Congress desired the fund to be specifically appropriated, as in the case of escheat, it was not turned over to the insured's estate. So, had Congress intended the fund for a certain preferred class, we believe it would have provided that such disposition be made directly by a governmental agency." We have referred to the amendment of 1926 to section 451. Under this amendment, when the sums payable pursuant to the section are $1,000 or less, the director shall pay the same to such person or persons as would under the laws of the state of residence of a decedent be entitled to his personal property in case of intestacy, and this without limitation to a class. The original and amendatory acts are properly considered together, and the intention of the lawmaking power gathered from a consideration of all the provisions enacted on the subject. 23 Cal. Jur., Statutes, § 165, p. 787; Harrigan v. Home Life Ins. Co., 128 Cal. 531, 538, 58 P. 180, 61 P. 99. This amendment strongly indicates that it was not the intention at any time to limit this fund to a class, but to permit its distribution to all who would be entitled to decedent's personal property in case of intestacy; and this conclusion is supported by the construction placed upon section 514 by the majority of the decisions construing that section and by the decision in Canada v. Canada's Adm'r, supra.

We are satisfied, in view of the foregoing, that such is the correct construction of section 451, and the order is accordingly affirmed.

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123 Cal.App. 119

In re KESSING'S ESTATE.

PORTER et al. v. KESSING et al.

Civ. 8447.

District Court of Appeal, First District, Division 2, California.

April 27, 1932.

1. Evidence ⚷66.

Testatrix would be presumed to have known that husband's brothers were not her "relations."

[Ed. Note.—For other definitions of "Relation; Relative," see Words and Phrases.]

2. Wills ⚷520.

One will take in accordance with relationship expressed in will, though such relationship does not in fact exist.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Proceeding by F. F. Porter, executor of the will of Lou E. Kessing, deceased, of which Ralph W. Arnot, etc., and others, were proponents. From an order denying the alleged right of George Kessing and others, objectors, to participate in the residue of the estate, the objectors appeal.

Affirmed.

Donahue, Hynes & Hamlin, of Oakland, and James M. Hanley, of San Francisco, for appellants.

H. A. Frank, J. W. Bingaman, and Ralph W. Arnot, all of Oakland, for respondents.

NOURSE, P. J.

Lou E. Kessing died testate. In her will she made special bequests to her sister, to three named cousins, to three brothers of her deceased husband, to her "nephew" Ivan Kessing, who was in fact a nephew of her deceased husband, to six personal friends, and "to the Fenner Boys and Metzel Boys of Virginia City Montana, and the Hopes of Indianola, Iowa, whatever of my estate is left is to be divided among these my cousins and other relations mentioned above." This clause was followed immediately by a paragraph reading: "Sixthly. The rest, remainder and residue of my estate whether real, personal or mixed, I give, devise and bequeath to my sister and my cousins and my nephew Ivan Kessing of Berkeley, California, share and share alike."

The sole question involved on this appeal is whether the three brothers of the husband of the testatrix are entitled to participate in the residue of the estate. These three, who are the appellants herein, argue that they are included under the "other relations" mentioned in the fifth clause of the will, and that, as this clause disposed of the entire residue, there was no property left to be covered by the sixth clause. The probate court interpreted the will as excluding these appellants from both residuary clauses, and we are asked to reverse this order.

We are satisfied that the order must be affirmed. The construction adopted by the probate court is in harmony with section 103, Probate Code (formerly sections 1321 and 1323, Civ. Code), providing that all parts of a will are to be construed together to form a consistent whole, but that, if several parts are irreconcilable, the latter must prevail. Estate of Borba, 110 Cal. App. 150, 153, 293 P. 809.

[1, 2] The testatrix will be presumed to have known that the three brothers of her husband were not "relations." If we exclude these from the fifth clause of the will, the "other relations" would include the sister and "my nephew Ivan Kessing," the latter under the rule that one will take in accordance

with a relationship expressed in the will, though such relationship does not in fact exist. Matter of Estate of Robinson, 159 Cal. 608, 115 P. 49. Thus the sixth clause covers the same persons mentioned in the fifth, "my sister and my cousins and my nephew Ivan Kessing." It would seem that the purpose of the testatrix in adding the sixth clause was merely to emphasize or clarify the expressions in the fifth, and we cannot find that the clauses are inconsistent. However, under the rule above cited, if they are irreconcilable, the latter must control.

Order affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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123 Cal.App. 76

AMERICAN TRUST CO. v. DE ALBERGARIA.

Civ. 7965.

District Court of Appeal, First District, Division 2, California.

April 26, 1932.

1. **Mortgages 🔑369(1).**

Sale under trust deed, if irregular because postponed in defiance of injunction, was voidable, not void.

2. **Mortgages 🔑369(4).**

Where sale under trust deed was at most voidable, original owner could attack sale only by offering to do equity.

3. **Mortgages 🔑372(4).**

In unlawful detainer action by purchaser at trustee's sale, which was at most voidable, not void, defendant, having failed to offer to do equity and his attack on sale being collateral, *held* not entitled to equitable relief.

4. **Mortgages 🔑369(7).**

Party attacking voidable sale under trust deed must show injury to himself from asserted irregularity.

5. **Mortgages 🔑338.**

Postponement of sale under trust deed until after dissolution of temporary injunction *held* not to violate injunction restraining sale or "continuing" sale.

Trustee's postponement of sale until after dissolution of injunction was in conformity with letter and spirit of order, since it kept matters in statu quo, and such was the only purpose of court in issuing injunctive order.

[Ed. Note.—For other definitions of "Continue," see Words and Phrases.]

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by the American Trust Company against M. S. De Albergaria. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

H. H. McPike, of San Francisco, for appellant.

Brobeck, Phleger & Harrison, of San Francisco (Southall R. Pfund and G. Demming, both of San Francisco, of counsel), for respondent.

NOURSE, P. J.

Plaintiff sued in unlawful detainer to recover possession of real property which it had purchased at a trustee's sale. Plaintiff had judgment, and defendant appealed, attacking the validity of the trustee's sale. Respondent has moved to dismiss the appeal upon the ground that a second sale gave it clear title and that the questions raised on the appeal are therefore moot. We do not pass on the motion to dismiss because we are satisfied that the judgment must be affirmed.

The property is located in Contra Costa county, and was subject to a deed of trust upon which default had occurred. Notice of sale under the terms of the deed of trust was duly given, but before sale was made appellant went to the Superior Court in San Francisco county and obtained a temporary injunction restraining the trustees and those acting in its behalf from "selling or attempting to sell, or continuing the sale" of the property. Pending hearing of this injunction, respondent's agent postponed the sale from the day set until December 10, 1929. On December 5 of that year the temporary injunction was, after hearing in the San Francisco court, dissolved, and the sale was made on December 10th. Appellant was present at the time of the sale, and does not attack it upon the ground of want of sufficient notice.

[1-3] The judgment must be affirmed for these reasons: The sale, if irregular because postponed in defiance of the injunction, was voidable and not void. Powell v. Bank of Lemoore, 125 Cal. 468, 472, 58 P. 83; 18 Cal. Jur. p. 560. Being voidable at the most, appellant could attack the sale only by offering to do equity. Humboldt Sav. Bank v. McCleverty, 161 Cal. 285, 290, 119 P. 82, where the conflicting rules are discussed and the California rule is stated. This appellant has failed to do, and, his attack being collateral, he is not entitled to equitable relief.

[4] In any event, the party attacking such a sale must show injury to himself from the asserted irregularity (25 Cal. Jur. 91; Sargent v. Shumaker, 193 Cal. 122, 132, 223 P.

464), and here, again, appellant has failed in his proof.

[5] But we should not be understood as implying that the sale under attack was voidable or irregular. The injunction restrained the "continuing" of the sale of the property until further order of the court. It did not restrain the postponement of the date of sale. Respondent did not disobey the injunction by the postponement until a date after the dissolution of the injunction. If they had gone ahead with the sale or had continued to make the sale so that the rights of the parties would have been changed pending the injunction, appellant would have had ground for complaint. But their postponement of the sale until after the dissolution of the injunction was in conformity with the letter and spirit of the order as it kept the matters in statu quo, and we are convinced that such was the only purpose of the court in issuing the injunctive order.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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123 Cal.App. 121

MORRIS et al. v. WHITTIER AMUSEMENT CO. et al.

Civ. 4557.

District Court of Appeal, Third District, California.

April 27, 1932.

1. Corporations 🔑30(4).

Rights and liabilities of parties associating themselves together to acquire property and afterward create corporation are governed by principles applying to joint adventures.

2. Joint adventures 🔑4(1).

Coadventurer undertaking to purchase property occupies fiduciary relation to associates.

3. Joint adventures 🔑4(1).

Coadventurer may not conceal his interest or profits from associates in enterprise, and cannot obtain advantage over them by secret agreement.

4. Corporations 🔑30(2).

Generally, where secret profit is gained through fraudulent contract between corporation and promoter, corporation is proper party to bring action.

5. Corporations 🔑30(4).

Where parties associated themselves together for purpose of acquiring property and afterward forming corporation, secret profit secured by one purchasing property *held* to belong to original organizers and not corporation.

> The secret profit belonged to the original organizers who furnished and paid the purchase price for the property, since the fraudulent sale was not made to the corporation, but to the organizers, at a time when the corporation was not in existence.

6. Equity 🔑11.

Equity will follow illicit gains, no matter in what form they may be, and restore them to party defrauded, providing rights of innocent third parties have not intervened.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by R. R. Morris and another against the Whittier Amusement Company and others. Judgment for defendants, and plaintiffs appeal.

Reversed, with directions.

R. T. Walters, of Los Angeles, for appellants.

Frank G. Swain, of Los Angeles, for respondents.

Mr. Justice pro tem. TUTTLE delivered the opinion of the court.

This is an action brought to recover secret profits arising from the sale of real property. The trial court sustained a demurrer to the complaint, without leave to amend. Judgment was entered for defendant, and the appeal is prosecuted from said judgment.

The complaint alleges that on March 9, 1923, plaintiffs and some of the persons named as defendants, associated themselves together for the purpose of purchasing Scenic Theater Building in the city of Whittier, Cal., from defendants Thuman Berry and Louise Berry; that it was agreed between defendant Harris and the other parties that none of them should charge or receive a commission for purchasing or securing title to said property; that defendant Harris was selected by said intended purchasers as their representative and agent to secure from defendants Berry their lowest purchase price for said property and to negotiate the sale thereof to all of said parties, including plaintiffs and Harris, and a corporation to be thereafter organized by them; that Harris agreed to and did act as such agent; that Harris interviewed the owners of said property and was told that the lowest price was $125,000; that Harris then stated to the Berrys that he desired to make a secret profit, and agreed with the owners that he should report to his associates that the lowest price was $135,000; and that they would split the added $10,000 between them, by means of a fictitious note; that Harris falsely and fraudulently reported to his associates that the purchase price for said property was $135,000, and he concealed from them that he had received a dummy note for $10,000; that said parties purchased said property for the sum of $135,000; that title to said property was taken in the names of Siler and Gwin, who were to hold the same and deed it to a corporation to be formed by said parties; that said corporation, Whittier Amusement Company, was formed, and the property deeded to it; that plaintiffs paid $20,000 toward the price of said property and received for the same 200 shares of stock in said corporation; that the total cash investment in said property by said parties was $75,000; that defendant Harris received 100 shares of stock for his dummy note of $10,000; that thereafter plaintiffs and their associates and said corporation discovered for the first time that Harris and Berry had made a secret profit from said sale, and the coporation demanded from them a return of the 100 shares of stock; that this stock was returned to the corporation and is now held by it; that plaintiffs are entitled to a 20/75 share of said stock.

The sole question here presented is the right of plaintiffs to maintain the action. Respondents contend that the secret profits belong to the corporation, while appellants contend that they belong to the original organizers who furnished and paid the purchase price.

[1-3] The rights and liabilities of the parties who thus associate themselves for the purpose of acquiring the property, and afterward forming the corporation, are governed by the same principles as those applying to joint adventures. 7 R. C. L. 86; 33 C. J. 846; Miller v. Walser, 42 Nev. 497, 181 P. 437. A joint adventurer who undertakes to purchase property for the joint account of himself and his associates occupies a fiduciary relation to them as respects such property. 33 C. J., p. 855. In accordance with the principles of good faith and confidence governing the relations of joint adventurers a coadventurer may not conceal his interest or his profits from his associates in the enterprise. None will be allowed to obtain by secret agreement any advantage over the other. Menefee v. Oxman, 42 Cal. App. 81, 183 P. 379; Munson v. Fishburn, 183 Cal. 206, 190 P. 808. "Promoters, like other joint adventurers, and like parties generally, occupy a relation of trust and confidence, so that they must act toward each other with the utmost good faith, and if one or more are guilty of any fraud or breach of trust against the others, by taking a secret profit, misappropriating funds, or otherwise, they will be compelled to account in equity as in other like cases." 14 C. J., p. 281. The foregoing authorities clearly establish the rights and liabilities of these associates, per se. It would appear that the transaction here detailed was a matter entirely between themselves.

[4, 5] We are aware of the general rule that where a secret profit is gained through a fraudulent contract made between the corporation and the promoter, the corporation is the party directly injured by the fraud, and is, therefore the proper party to bring the action. Fletcher Cyc. Corp., vol. 1, p. 297. Or, as stated elsewhere, "where the collective or corporate rights of the shareholders have been infringed, the company is the proper party plaintiff." 1 Thomp. Corp. (2d Ed.) § 111, citing 1 Morawetz Corp., § 292. The solution of the question as to who may maintain this action depends upon the answer to the question, "Who was injured by the fraud of Harris?" We canot see how the corporation is the aggrieved party. The alleged fraudulent sale was not made to it, but to the associates, at a time when the corporation was not in existence. The sale to the corporation is not questioned. We must assume that the property was worth what the corporation paid for it. None of the dealings between the associates and the corporation is attacked, and we may assume they were fair and honest. As we view it, the injury was not suffered by the corporation but by the associates, who paid their cash for the property, and who were defrauded by their own agent. We have examined the cases which are cited by Thompson and Morawetz, in support of the rule referred to, and find that each of them involves an attack upon dealings between the promoters and the corporation. Under such circumstances, the corporation is the proper party to bring the action. Here the sum of $10,000 was taken directly out of the pockets of the associates, and it certainly would be unfair and unjust to permit subsequent stockholders to share in the benefit of any reimbursement. We believe that this sum belongs equitably to those who advanced and paid it, and that plaintiffs are entitled to recover their pro rata share thereof.

Great reliance is placed by respondents in the case of Ex-Mission Land & Water Co. v. Flash, 97 Cal. 610, 32 P. 600. There it was held that the corporation was the party directly injured by the fraud, and entitled to bring the action. In that case, however, the court found that it never was the intention of the subscribers of stock to purchase the land, but merely to take stock in a corporation thereafter to be organized. The action was not brought to recover secret profits, but to cancel the note and mortgage of the corporation, alleged to have been executed through fraud. The procuring of these documents under such circumstances was clearly a case where "the collective or corporate rights of the shareholders have been infringed."

[6] This secret profit of $10,000 is now represented by the 100 shares of stock, which

was the personal property of Harris, and is now in the possession of the corporation. Equity will follow these illicit gains, no matter in what form they may be, and restore them to the party defrauded, providing that the rights of innocent third parties have not intervened.

We therefore hold that the trial court erred in sustaining the demurrer.

It is ordered that the judgment be reversed, with directions to the trial court to overrule the demurrer.

We concur: PRESTON, P. J.; R. L. THOMPSON, J.

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123 Cal.App. 133

FLETCHER et al. v. STAPLETON et ux.

Civ. 8273.

District Court of Appeal, First District, Division 1, California.

April 28, 1932.

1. **Easements** 🔑40.

Burden of dominant tenement cannot be enlarged to manifest injury of servient estate by any alteration in mode of enjoying former (Civ. Code, §§ 806, 811, subd. 3).

2. **Easements** 🔑40.

Owner of dominant estate cannot commit trespass on servient tenement beyond limits fixed by grant of easement (Civ. Code, §§ 806, 811, subd. 3).

3. **Easements** 🔑40.

Limitations in exercise of easement cannot be changed at grantee's pleasure (Civ. Code, §§ 806, 811, subd. 3).

4. **Easements** 🔑44(1).

Grantee of right of way over another's land merely has privilege of passing over land in some particular line and acquires no ownership in fee of soil.

5. **Easements** 🔑26(2).

Lot owners' easement for driveway over adjoining lot to street was extinguished by grading of their lot and lowering of street grade in such manner as to prevent use of driveway (Civ. Code, §§ 806, 811, subd. 3).

6. **Easements** 🔑48(6).

Lot owners, whose use of driveway over adjoining lot was prevented by grading of their lots and lowering of street grade, could not make it available by entering on, and excavating deep cuts through, servient lot.

7. **Easements** 🔑54.

Grantee of right of way over another's land cannot so change surface as seriously to injure or likely destroy usefulness of servient estate.

8. **Easements** 🔑70.

Measure of damages for unlawful interference with enjoyment of easement is difference between value of claimant's property just before and immediately after obstruction was completed.

9. **Appeal and error** 🔑1033(8).

Lot owners, whose easement for driveway across adjoining lot was rendered useless by their reduction of elevation of their lot and lowering of street grade before owners of adjoining lot started to build garage partially obstructing driveway, could not complain of judgment allowing them damages for loss of use thereof.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by Arnon R. Fletcher and wife against Landis A. Stapleton and wife, in which defendants filed a cross-complaint. From the judgment, plaintiffs appeal.

Affirmed.

C. E. McDowell, of Los Angeles, for appellants.

Fred Mansur, of Los Angeles, for respondents.

KNIGHT, J.

This is an appeal by plaintiffs from a judgment entered in an action involving an easement for driveway purposes across the end of defendants' lot. The controversy arose out of the following facts which are not disputed: Defendants were the owners of two adjoining residential lots in Los Angeles, to wit, lots 179 and 171 in tract 5832. As shown by the maps which are made part of the record herein, the block in which said lots were laid out was bounded on the east by St. George street, which extended in a northerly direction along the easterly ends of lots 176, 177, and 178, and for a few feet along the easterly end of lot 179, turning thence easterly and extending along the easterly boundary of lot 14, which was triangular in shape and lay between St George street and the easterly end of lots 179 and 171, thereby cutting off lots 179 and 171 from access to St. George street, except for a few feet of lot 179 bordering thereon. In April, 1925, defendants sold and conveyed by grant deed to plaintiffs lot 171, which ran back to and abutted on another street, named Monon street, but, in order to give plaintiffs access also to St. George street, defendants conveyed to them by the same instrument "a right of way and easement over the East ten

(10) feet of Lot One Hundred Seventy-nine (179) of said Tract, for driveway purposes." At that time neither St. George street nor the lots had been graded or improved; the grade of the street adjacent to lot 179 being substantially on a level therewith. Soon after plaintiffs acquired lot 171, and in August, 1925, they graded it so as to lower the level thereof four feet below the level of lot 179; and thereafter they constructed a dwelling thereon. While such construction work was going on, plaintiffs obtained access to St. George street over lot 14, with the permission of the owner thereof; and at no time did they attempt to use the easement across defendants' lot. Later the city caused the grade of St. George street to be lowered some seventeen feet below the level of lot 179, over which the right of way was granted; and the street was paved. After the street work was finished, defendants graded lot 179 down to an elevation of about nine feet above the street level, and soon afterwards constructed a two-story dwelling thereon.

As a result of the foregoing physical changes, the northerly end of the ten-foot strip of land over which the right of way was granted was left four feet above the level of plaintiffs' lot, and the southerly end was left nine feet above the level of St. George street. For those reasons plaintiffs were unable to use the same for any purpose; whereupon they asked defendants if they would buy a portion of lot 14 so as the provide plaintiffs with access to St. George street, which defendants declined to do. Plaintiffs then stated that they would insist on using the right of way called for by the deed, and defendants replied: "* * * There it is, go ahead and use it"; but, on account of the conditions mentioned, plaintiffs could not do so. Shortly afterwards the owner of lot 14 informed plaintiffs and defendants that, unless they purchased the portions of lot 14 they were then using for rights of way, the lot would be utilized for building purposes; whereupon, and in January, 1928, plaintiffs purchased a twelve-foot strip across the same, and defendants purchased the remaining triangular-shaped piece adjoining lot 179. Soon after purchasing the same, defendants commenced to build a concrete garage thereon, a portion of which overlapped the ten-foot strip of lot 179 over which they had granted the easement, and, when the concrete floors were laid and the forms for the walls were erected, plaintiffs served notice on defendants that, if the garage was built as planned, they would commence action to have the same removed and for damages.

Accordingly plaintiffs brought this suit to compel defendants to remove the garage from that portion of the strip of land covered by the right of way, to restrain future interference therewith, and to recover damages in the sum of $1,000. The trial court found in substance that, on account of the changed conditions hereinabove set forth, all of which were brought about subsequent to the granting of the easement, and without fault on the part of defendants, notably the lowering of the level of plaintiffs' lot at one end of the right of way and the level of the street at the other, it was neither practicable nor possible to use said easement without first going upon defendants' lot and excavating and removing therefrom large quantities of earth, and building on each side of the cut retaining walls of sufficient strength and size to protect the driveway and preserve defendants' property, which necessarily would materially increase the burden on the servient estate and cause irreparable injury thereto. And the court concluded, therefore, that under such circumstances, and in view of the fact that plaintiffs had already acquired and were using another and more convenient right of way from St. George street to their property, it would be inequitable either to award damages or grant the injunctive relief sought. However, it gave plaintiffs judgment for $300 "for the loss of use" of said easement, and thereupon, in accordance with the prayer of the cross-complaint, quieted title to the strip of land covered by said easement in defendants.

[1-4] Section 811 of the Civil Code provides that a servitude is extinguished: "* * * 3. By the performance of any act upon either tenement, by the owner of the servitude, or with his assent, which is incompatible with its nature or exercise"; and in the case of Lux v. Haggin, 69 Cal. 255, page 292, 4 P. 919, 10 P. 674, 692, it is held that the Code provision above quoted "seems to be a recognition and statutory declaration of the rule which Prof. Washburn says has become well settled, that if the owner of a dominant estate do acts thereon which permanently prevent his enjoying an easement, the same is extinguished, or if he authorize the owner of the servient estate to do upon the same that which prevents the dominant estate from any longer enjoying the easement, the effect will be to extinguish it. Easem. & Serv. 560." And in this connection also the same author states (page 699) that: "Another mode of extinguishing easements is by such a change in the condition of the estates, in reference to which such easements have existed, as to render the use and enjoyment thereof no longer of any practical utility or avail." Furthermore, section 806 of the Civil Code provides that the extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired; and it is well settled that the burden of the dominant tenement cannot be enlarged to the manifest injury of the servient estate by any alteration in the mode of enjoying the former; nor can the owner thereof commit any trespass upon the servient tene-

ment beyond the limits fixed by the grant (North Fork Water Co. v. Edwards, 121 Cal. 662, 54 P. 69); nor can the limitations in the exercise of the easement be changed at the pleasure of the grantee (Winslow v. City of Vallejo, 148 Cal. 723, 84 P. 191, 5 L. R. A. (N. S.) 851, 113 Am. St. Rep. 349). It is equally well settled that the grantee of a right of way over another's land merely has the privilege of passing over the land in some particular line (Kripp v. Curtis, 71 Cal. 62, 11 P. 879), and that he acquires no ownership in the fee of the soil (City and County of San Francisco v. Calderwood, 31 Cal. 585, 91 Am. Dec. 542).

[5-7] After applying the foregoing legal principles to the admitted facts of the present case, we are of the opinion that the judgment of the trial court is sustained thereby, for it is evident that, by reason of the acts of plaintiffs in grading their lot and the act of the city in lowering the grade of St. George street, in such a manner as to prevent the use of said right of way, it became of no practical utility or avail, and therefore to all intents and purposes was extinguished, unless plaintiffs made it available by entering upon the servient estate and excavating deep cuts through it, which under the authorities above cited they were not allowed to do, because, as the trial court found, such acts would increase the burden on the servient estate, and result in irreparable injury thereto. Upon this latter point plaintiffs cite the case of Ballard v. Titus, 157 Cal. 673, 110 P. 118, to the effect that the grant of a "right of way" carries the implied right to make such changes in the surface of the land as are necessary to make the right of way available for travel in a convenient manner; but manifestly this does not mean that the grantee may so change the surface of the land as to seriously injure or likely destroy the usefulness of the servient estate.

[8, 9] Aside from the question of extinguishment, however, the trial court held that under all the circumstances it would be inequitable to grant the injunctive relief prayed for, and presumably for that reason it allowed plaintiffs $300 "for the loss of use" of said easement, which amount, it would seem, reasonably compensated them for any contribution on the part of defendants to such loss. The measure of damages for unlawful interference with the enjoyment of an easement is the difference between the value of the claimant's property just before the interference and its value immediately after the obstruction was completed. 9 Cal. Jur. 963. Here, however, as the evidence shows and the trial court found, the easement had been rendered useless by the acts of plaintiffs themselves in reducing the elevation of their lot and of the city in lowering the grade of St. George street, which occurred long before the defendants started to build their garage. Necessarily, therefore, the building of the garage had nothing to do with the loss of the easement; and, since defendants were directed to pay to plaintiffs $300 toward a loss to which defendants had in no way contributed, it would seem that plaintiffs have no just cause for complaint.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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123 Cal.App. 175

ROSS v. AMERICAN SECURITY & FIDELITY CO. et al.

Civ. 4556.

District Court of Appeal, Third District, California.

April 29, 1932.

1. Corporations ⚷139.

In action to determine ownership of corporate stock, evidence supported finding that plaintiff had no interest in stock.

2. Costs ⚷263.

Appellant bringing appeal utterly and obviously devoid of any merit *held* liable to $100 fine.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by J. B. Treadwell against the American Security & Fidelity Company and others, in which, on the death of plaintiff, Lillian Bishop Ross, as executrix of his will, was substituted as plaintiff. From the judgment, plaintiff appeals.

Affirmed.

James W. Bell and Humphrey Marshall, both of Los Angeles, for appellant.

W. B. Thomas, of Los Angeles, Glenn E. Whitney, of Glendale, and Sherman & Sherman, of Los Angeles, for respondents.

Mr. Justice pro tem. TUTTLE delivered the opinion of the court.

This is an action to determine the ownership of certain corporate stock. The trial court found that plaintiff was not the owner thereof. From the judgment entered upon said findings, plaintiff appeals, relying upon the insufficiency of the evidence to support the findings.

The original plaintiff in this action was J. B. Treadwell. He died while the case was pending, and his executrix has been substituted in his stead. Where the word "plaintiff" is used hereafter, it refers to the original plaintiff.

On November 10, 1905, there was issued to J. B. Treadwell, plaintiff herein, certificate No. 49 of the Tropico Land & Improvement Company, for 500 shares of its capital stock. This certificate was indorsed in blank by plaintiff. On June 3, 1907, plaintiff wrote one J. J. Lockwood (now deceased) that he (plaintiff) held for Lockwood 500 shares of the capital stock of Tropico Land & Improvement Company, to be delivered to the latter "when my stock is taken out of the pool." Plaintiff testified that this stock was never in the "pool."

Plaintiff then testified that on June 14, 1909, he paid Lockwood $100 for the purchase of the stock. The receipt read as follows: "Received from J. B. Treadwell the sum of One Hundred Dollars in full for 500 shares of Tropico Land and Improvement stock." An expert witness called by the defendants testified that the words "dollars, in full for 500 shares of Tropico Land and Improvement Stock" were forged, being inserted in different ink, after the original document was written. A letter was also admitted in evidence, dated March 25, 1913, and signed by plaintiff, wherein he stated: "Certificate No. 49, I gave to J. J. Lockwood."

[1] There is abundant evidence in the record to support the findings to the effect that the heirs of Lockwood were the owners of the stock, and plaintiff had no interest therein. The trial court also found that plaintiff was guilty of laches. In view of the fact that the judgment should be sustained upon the grounds we have indicated, we do not deem it necessary to pass upon the question of laches.

[2] The appeal is utterly and obviously devoid of any vestige of merit, so much so that a fine of $100 is hereby assessed against appellant for indulging in this frivolity.

The judgment is affirmed.

We concur: PRESTON, P. J.; R. L. THOMPSON, J.

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123 Cal.App. 139

STANLEY v. BARNEY et al.

Civ. 8402.

District Court of Appeal, First District,
Division 2, California.
April 28, 1932.

Venue 🔑5(3).

Action by heir of unadministered estate to set aside deed to other heirs on ground of undue influence *held* "action for recovery of real property," maintainable where land was situated (Code Civ. Proc. § 392).

[Ed. Note.—For other definitions of "Action for the Recovery of Real Estate," see Words and Phrases.]

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by Benjamin B. Stanley against Cecelia R. Barney and another. From an order denying a change of venue, defendants appeal.

Affirmed.

Owen D. Richardson and Donald B. Richardson, both of San Jose, for appellants.

Eldon B. Spofford, of San Francisco, for respondent.

TUTTLE, Justice pro tem.

This is an appeal from an order denying a motion for change of venue.

The complaint alleges that Lydia H. Barney died on January 6, 1927, leaving no issue, and that no administration has been had upon her estate; that plaintiff is the grandson of decedent, and an heir at law; that defendants are granddaughters of decedent; that about a month prior to her death, decedent deeded certain real property in the city and county of San Francisco and the county of San Mateo to appellants herein; that at said time decedent was mentally incapable of transacting business; that the consideration recited in the deed was grossly inadequate; and that the execution of the deed was induced by the fraudulent acts and representations of defendants (which are particularly set forth). It is prayed that the deed be annulled, that defendants be ordered to surrender the same, and that plaintiff have such other relief as may be just in the premises.

Section 392 of the Code of Civil Procedure provides in part as follows:

"Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial, as provided in this code:

"1. For the recovery of real property, or of an estate or interest therein, or for the determination in any form, of such right or interest, and for injuries to real property."

It has been held that the foregoing section is very broad, and that it includes an action to declare a trust in real property. Donohoe v. Rogers, 168 Cal. 700, 144 P. 958. It has been construed to cover an action for the reformation of a written contract for the sale of real property (Franklin v. Dutton, 79

Cal. 605, 21 P. 964), and an action for the specific performance of a contract for the sale of land (Grocers', etc., Union v. Kern, etc., Co., 150 Cal. 466, 89 P. 120).

There are two cases in California which are very similar to the instant case, and both of these support the action of the trial court here. The first is Sloss v. De Toro, 77 Cal. 129, 19 P. 233, 234. There it was sought to set aside a sale of real property made by an administrator upon the ground of fraud arising out of the connivance between him and the purchaser. The land was situated in San Diego county, and the action was commenced there. Defendants resided in Los Angeles county, and moved for a change of venue. An appeal was taken from the order denying the motion. In passing upon the application of the Code section quoted, the court said:

> "The question then is, did this action require the determination, in any form, of a right or interest in real property?
>
> "It seems to us that it did. The main purpose of the action evidently was to have an alleged fraudulent sale of land set aside and the title revested in its former owners. This purpose could only be accomplished by showing—First, that the plaintiff had an estate or interest in the land; and, second, that the defendants had wrongfully tried to deprive him of that interest. If the action had been ejectment, or to quiet title, it would not more clearly have required a determination as to the plaintiff's right or interest in the property."

The second case is that of Booker v. Aitken, 140 Cal. 471, 74 P. 11. That was an action brought by an executor to have it decreed that defendant held certain real property in trust upon the ground that it was procured from the decedent through fraud. The real property was in San Luis Obispo county, and the action was commenced there. Defendant resided in the city and county of San Francisco, and moved for a change of venue to that place. The Supreme Court, through Chipman, commissioner, held that the action came within the provisions of the Code section cited, and sustained an order denying the motion.

Appellants rely upon the case of Reid v. Kerr, 64 Cal. App. 117, 220 P. 688, 690, which was decided by this court. There an action was brought to cancel a deed on account of fraud. The land was situated in a county other than that where the action was commenced. No motion for change of venue was made. The point was raised in this court that the action should have been tried in Contra Costa county, where the real property was situated, and that the superior court of Alameda county had no jurisdiction under section 5, article 6, of the Constitution. The latter provision relates solely to the place where an action may be commenced, and covers only "all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate." When this court stated that "such an action is transitory and is not governed by the section cited from the Constitution," it was referring solely to the constitutional provision, and the Code section governing the place of trial was not under consideration. The latter is far more broad and comprehensive than the constitutional provision.

While it may be true, as appellants contend, that the relief which might be granted under the complaint would operate in personam, we are of the opinion that the action would determine, in some form, the right or interest of plaintiff in the real property. The court would be called upon to determine whether or not plaintiff was an heir of the decedent grantor. As such an heir he had the right, in the absence of administration, to attack the transfer. 9 Cal. Jur. 212. Thus his interest was an issue. To say that the real property was not the subject of the action would be to indulge in a mere quibble. It is a direct attack upon the title.

Our conclusion is that the action comes within the provisions of the Code section in question, and that the proper place of trial is the city and county of San Francisco.

The order is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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123 Cal.App. 157

CHAPMAN v. ASSOCIATED TRANSIT TERMINAL CORPORATION et al.

Civ. 8228.

District Court of Appeal, First District, Division 2, California.

April 29, 1932.

1. Appeal and error ⚷1071(5).

In action to compel transfer of stock in new corporation for which stock of old corporation had been given, alleged erroneous finding that it was agreed that new corporation should issue both common and preferred stock, *held* not prejudicial, since matter was immaterial.

Finding was immaterial, since, if there had been only one class of stock, it would not have mattered; it being the exchange and delivery to plaintiff of the equivalent of his own stock that was material.

2. Corporations ⚷133.

In action to compel transfer of stock issued to replace stock in old corporation, evidence supported finding that defendant's name was inserted in old stock certificate as transferee without knowledge or consent of plaintiff.

3. **Evidence** 🔑**271(6).**

In action to compel transfer of stock, evidence of conversation between plaintiff and stockholders, although held in defendant's absence, *held* admissible, since, at time of conversation, defendant was not connected with affairs of corporation.

4. **Witnesses** 🔑**133.**

Action for recovery of stock transferred to defendant by her deceased husband, but held in defendant's individual capacity, *held* not within statute relating to testimony of party to action against executor upon claim or demand against estate (Code Civ. Proc. § 1880, subd. 3).

5. **Appeal and error** 🔑**1050(1).**

In action to compel transfer of stock, testimony that defendant's husband gave as reason for issuing stock in defendant's name that there were judgments against him *held* not prejudicial, although it did not appear whether remark concerned stock involved.

> Testimony was not prejudicial since, if defendant desired to clear up the matter of whether the remark testified to concerned stock involved, or other stock, it was her privilege to examine the witness further.

6. **Evidence** 🔑**471(11).**

Question whether, if witness were corporation secretary and signed stock certificate, he had notice to whom it was issued *held* properly excluded as calling for conclusion.

> Subject and circumstances surrounding the signing of certificates were fully developed on the trial, and it was for the trial court to determine whether witness knew to whom the certificate was issued.

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

Action by G. M. Chapman against the Associated Transit Terminal Corporation and others. From the judgment, defendant Pearl V. Exterstein appeals.

Amended and, as amended, affirmed.

Walters & Mauk, of Los Angeles, for appellants.

C. A. Ballreich and Walter S. Coen, both of Los Angeles, for respondent.

BURROUGHS, Justice pro tem.

This is an appeal by the defendant Pearl V. Exterstein from a judgment ordering a transfer of certain shares of the capital stock of the defendant corporation, Associated Transit Terminal Corporation, now standing in the name of said Pearl V. Exterstein, to the plaintiff. The judgment decreed the plaintiff to be the owner of 395.25 shares of the preferred, and 3068.10 shares of the common stock of said corporation, and ordered an assignment of the same and the filing thereof with the county clerk within thirty days. The defendant was also enjoined from selling or disposing of said stock.

[1] One of the specifications of error is that the evidence does not support the findings of fact, conclusions of law, and judgment. The finding complained of is as follows: "That it is true that on, to-wit: July 20th, 1925, it was agreed by and between plaintiff and said H. J. Exterstein that a new corporation should be organized in which both common and preferred stock should be issued and stock of the Transit Company transferred to such new corporation and shares of the new corporation issued to the stockholders of the Transit Company, transferring their stock to the new corporation in such proportion as the stock so transferred should bear to the stock of said Transit Company delivered to the new corporation so to be organized, and that plaintiff should transfer his said 1500 shares of the capital stock in said Transit Company to one Thomas Massey, and that said Massey in turn would transfer such stock to the new corporation so to be formed and that said H. J. Exterstein would proceed to have the new corporation organized and when organized would cause its capital stock to be issued to Chapman and other stockholders in said Transit Company in exchange, as aforesaid, and that thereupon plaintiff endorsed, assigned and transferred his said certificates of stock for 1500 shares to said Massey pursuant to said oral agreement and thereafter and on July 20th, 1925, said Massey surrendered said certificates endorsed to him as aforesaid by plaintiff, to said Transit Company and a new certificate for 1500 shares of the capital stock of said Transit Company was issued to said Massey and that thereupon said Massey endorsed such new certificate in blank and delivered it so endorsed to said H. J. Exterstein for the purposes aforesaid, all in pursuance of the agreement hereinbefore referred to without any other or further consideration whatsoever; that thereafter said H. J. Exterstein caused the defendant Associated Transit Terminal Corporation, hereinafter called the Terminal Corporation, to be organized under the laws of the State of California relating to corporations, with authority to issue both preferred and common stock with the par value of Ten Dollars per share; that thereafter said H. J. Exterstein, without the knowledge, acquiescence or consent of either said Thomas Massey or plaintiff, inserted the name of defendant Pearl V.

Exterstein in said certificate as transferee, which insertion was without any consideration whatsoever, and that plaintiff had no notice nor knowledge of the insertion aforesaid until about January, 1928; that said H. J. Exterstein surrendered said certificate of stock endorsed as aforesaid, to the said Transit Company, together with other certificates for 2,900 shares of said stock in said Transit Company, all standing in the name of defendant Pearl V. Exterstein and caused to be issued in lieu thereof a new certificate for 4,400 shares of its capital stock in the name of defendant Pearl V. Exterstein, and thereupon said H. J. Exterstein caused said stock to be endorsed by defendant Pearl V. Exterstein to defendant Terminal Corporation, and thereupon and thereafter defendant Terminal Corporation, in consideration of the transfer to it of said certificates for 4,400 shares issued 1,000 shares of the preferred capital stock of said Terminal Corporation and 9,000 shares of the common capital stock of said Terminal Corporation in the name of defendant Pearl V. Exterstein, which certificates were delivered in escrow to the Citizens National Bank, a corporation, and said certificates are now held in escrow by defendant Citizens National Trust and Savings Bank of Los Angeles, California, (successor to said Citizens National Bank), under an Impounding Order issued by the Corporation Commissioner of the State of California; that said preferred and common capital stock issued as aforesaid was in lieu and place of the aforesaid 4,400 shares of the capital stock of said Transit Company, which included the 1,500 shares of capital stock of said Transit Company held and owned by the plaintiff and transferred by him to said Thomas Massey as hereinbefore stated; that no consideration whatever was paid by defendant Pearl V. Exterstein for the issuance in her name for that portion of said capital stock of defendant Terminal Corporation issued in consideration of the transfer and delivery to it of the 1,500 shares of the capital stock owned by plaintiff and included in said 4,400 shares of the capital stock of the Transit Company delivered to said Terminal Corporation as aforesaid; that plaintiff made repeated demands upon H. J. Exterstein for the delivery to him of his pro rata share of the stock issued by said Terminal Corporation, but that said H. J. Exterstein failed and neglected to deliver the same to him, and that plaintiff's stock in said Terminal Corporation was never issued nor delivered to him and that the same now stands in the name of defendant Pearl V. Exterstein and is in possession of defendant Citizens National Trust and Savings Bank, as aforesaid."

It is contended that there is no evidence to support that portion of the foregoing finding which says that plaintiff and H. J. Exterstein agreed that both "common and preferred stock should be issued" in the new company, and our attention has not been called to any evidence to that effect. However, when the new company was organized, both common and preferred stock were issued. It was agreed there should be a new corporation organized, and the record shows that the new corporation had two classes of stock. If there had been only one class of stock it would not have mattered; it was the exchange and delivery to plaintiff of the equivalent of his own stock that was material. A failure to find or an erroneous finding upon immaterial matters is not prejudicial. See Schurman v. Look, 63 Cal. App. 347, 218 P. 624; 24 Cal. Jur. p. 993, § 217. "If a judgment is fully supported by and rests upon valid findings, it may not be set aside because not supported by other findings, which may be ignored as being immaterial." 24 Cal. Jur. p. 1000, § 221; Miller & Lux, Inc., v. Secara, 193 Cal. 755, 227 P. 171.

[2] It is contended that the following portion of the above finding, "that thereafter said H. J. Exterstein without the knowledge, acquiescence or consent of either said Thomas Massey or plaintiff, inserted the name of defendant Pearl V. Exterstein in said certificate as transferee," is also without support in the evidence. In response to this claim, we have in the record the evidence of both Massey and the plaintiff that the certificate was issued in blank, and neither one of them knew that H. J. Exterstein had inserted in the certificate of stock the name of Pearl V. Exterstein, or the name of any other person. Appellant relies upon the fact that during this transaction the plaintiff was the secretary of the Associated Transit Company and signed the stock certificates as such officer and therefore he must have known that the name Pearl V. Exterstein had been inserted in said certificate. However, the blank stock certificate remained in the possession of H. J. Exterstein for nearly six months when it was with other certificates standing in Pearl V. Exterstein's name surrendered and certificate No. 39 for 4,400 shares issued in her name, which certificate included the 1,500 shares owned by the plaintiff. In any event, the weight of this evidence was for the trial court to decide, and, having decided it in favor of the plaintiff, and we believe correctly, the finding must stand. The entire record discloses that H. J. Exterstein was in charge of the business of the parties; that the plaintiff, although secretary in name, was the outside man of the trucking business and trusted the said Exterstein fully, and signed all documents given to him by the latter without reading or having them read to him; and, as said in part by the trial court in summing up the case, "The very ingeniousness of the plaintiff with respect to the evidence he gives, appears as good proof of

the correctness of his story as anything we could get." We think the findings of fact are sustained by the evidence.

[3, 4] Complaint is made of the admission in evidence of a conversation between the plaintiff Chapman, one Thomas Massey, and H. J. Exterstein, that occurred on July 20, 1925. In that conversation, Exterstein stated that, as the business was growing, it was necessary to organize a new corporation, and he stated to Massey that plaintiff had agreed to sign over to him (Massey) his 1,500 shares of stock in the old corporation, and that Massey was to sign the blank indorsement on the back, so that he (Exterstein) could assign the same to the new corporation, and then reissue to plaintiff the equivalent amount of stock of the new corporation; that that was the way it had to be done. It was further testified that plaintiff thereupon transferred his stock to Massey, and the latter signed the transfer thereof on the back, which was in blank. It is argued that this conversation was inadmissible because the defendant Pearl V. Exterstein was not present, and therefore it was not binding upon her. We are of the opinion that this objection is untenable for the reason that, at the time the conversation occurred, she had no connection with any of the affairs of either the old or the new corporation. A number of cases have been cited by appellant in support of her claim, but in each one the rule is applied where the facts show that the party having an interest in the property was not present. It is also argued that neither Massey nor the plaintiff could testify as to the above conversation because of the inhibition of subdivision 3 of section 1880 of the Code of Civil Procedure. It appears that H. J. Exterstein died in the month of December, 1929. The section above referred to relates to the testimony of parties or assignors of parties to an action against an executor or administrator of an estate upon a claim or demand against said estate. We think this objection is also without merit, for the reason that this action is not against an executor or administrator in her representative capacity, but against Pearl V. Exterstein personally, and, even if it were against her as the administratrix of the estate of her deceased husband, the action is not founded upon a claim or demand against said estate for money. In George v. McManus, 27 Cal. App. 414, 150 P. 73, it is held that the section cited applies to a money demand against an estate. To the same effect is Monnette v. Title Ins. & Trust Co., 107 Cal. App. 313, 290 P. 668. This action is for the recovery of certain shares of stock in the corporation held by Pearl V. Exterstein in her individual capacity.

[5, 6] It is also claimed that the court erred in permitting Mr. Massey to testify that the reason given by Exterstein for having the stock issued in the name of his wife was that he could not own anything because he had too many judgments against him. Appellant claims that this was prejudicial to her because it does not appear whether this remark was made concerning the 1,500 shares of stock issued to Pearl V. Exterstein in 1923, or the stock transferred by Chapman to Massey, because there is no evidence in the record that Exterstein ever held any stock in the company. The court refused to strike out the evidence for the reason that the motion came too late. However, irrespective of this ruling of the court, we cannot see that any prejudicial error occurred. Had the appellant desired to clear the matter up, it was her privilege to examine the witness further. Neither do we believe that the record in the action between Thomas Massey v. Carl A. Hagelin, concerning other stock in the Associated Terminal Company, had any place in the record in this action. It had no bearing upon the question of ownership of the stock here in controversy. The plaintiff was asked by counsel for the appellant if there was any other secretary of the defendant company outside of himself on January 27, 1926, to which he answered he was such until Mr. Smith took the books. He was then asked: "I mean, if you were the secretary at that time and signed the certificate, why, you had notice to whom it was issued, did you not?" Objection was sustained to this question. We think that the question called for a conclusion. The subject and circumstances surrounding the signing of the certificates were fully developed on the trial, and it was for the trial court to determine whether plaintiff knew to whom the certificate was issued.

Counsel has called our attention to an error in the conclusion of law and the judgment. The court found that the plaintiff (respondent) is the owner of 15/44 of the 1,000 shares of the preferred capital stock of the defendant corporation. In computing the number of shares on this basis, the court, in both the conclusions of law and the judgment, fixed the number of shares of preferred stock owned by plaintiff as 359.25, whereas the correct computation should be 340.90 shares of preferred stock. It is therefore ordered that in accordance with the findings in this case the conclusion of law number 1 be amended by striking therefrom "359.25" and that "340.90" be inserted in lieu thereof. It is further ordered that the judgment herein in favor of the plaintiff be amended by striking therefrom the figures "359.25" and inserting in lieu thereof "340.90," and, as so amended, that the judgment of the trial court be, and it is, affirmed. The plaintiff will recover his costs.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

122 Cal.App. 680

RUTLEDGE v. DOMINGUEZ, City Clerk.

Civ. 8375.

District Court of Appeal, Second District, Division 2, California.

April 19, 1932.

1. Municipal corporations ⟹129.

Constitutional provision that officer sought to be recalled shall not be candidate for office applies to state, not municipal, officers (Const. art. 23, adopted in 1911; St. [Ex. Sess.] 1911, p. 128; St. 1931, pp. 565, 566, §§ 12, 13; Const. art. 11, § 8 and § 8½, subd. 4; City Charter of Los Angeles, § 291).

2. Constitutional law ⟹20.

Courts will give weight to legislative interpretation of Constitution.

3. Constitutional law ⟹20.

Act providing for municipal officers' recall *held* entitled to special weight in construing constitutional provision, adopted in same year, for recall of state officers (Const. art. 23, adopted in 1911; St. [Ex. Sess.] 1911, p. 128).

4. Municipal corporations ⟹129.

Court cannot construe unambiguous city charter provision for election of recalled officer's successor as subject to constitutional method of recalling state officers, because officer recalled by majority vote may be re-elected by less than majority (Const. art. 23, adopted in 1911; City Charter of Los Angeles, § 291).

Application by H. J. Rutledge for a writ of mandate to Robert Dominguez, city clerk of the city of Los Angeles.

Peremptory writ denied.

Charles A. Son, of Los Angeles, for petitioner.

Erwin P. Werner, City Atty., and Frederick von Schrader, Asst. City Atty., both of Los Angeles, for respondent.

Joseph Scott, H. L. Carnahan, E. J. Fleming, George B. Bush, Walter Casey, and R. D. Knickerbocker, all of Los Angeles, amici curiæ, for respondent.

IRA F. THOMPSON, J.

This is an application for the writ of mandate to compel the respondent city clerk of Los Angeles to omit from the ballot the name of John C. Porter as a candidate for election to the office of mayor. The controversy arises in this manner: A petition for the recall of Mayor Porter has been circulated and been found to be sufficient. The special election for that purpose has been fixed for the 3d day of May, 1932. The city charter provides in section 291 as follows:

"The ballots used at every recall election shall have printed thereon, as to every officer whose recall is to be voted on thereat, the following question:

"'Shall (inserting the name of the officer sought to be removed) be removed from the office of (inserting the name of his office) by the recall?'

"And opposite such question to be voted on, and to the right thereof, the words 'Yes' and 'No' shall be printed on separate lines, with voting squares. If an elector shall stamp a cross (X) in the voting square after the printed word 'Yes,' his vote shall be counted in favor of the recall of such officer, and if he shall stamp a cross (X) in the voting square after the word 'No,' his vote shall be counted against such recall.

"On such ballots, under each question, there shall also be printed the names of all persons who have been nominated as candidates to succeed the person whose removal is sought, in case he shall be removed from office by vote of the electors. The nomination of such candidates shall be made as hereinafter provided, except that the person whose removal is sought shall be deemed a candidate, and unless, within five days after the date of the city clerk's certificate to the petition, he resigns his office, or declines, in writing duly signed and verified by him, and filed with the city clerk, to be a candidate, his name shall be printed on the ballot the same as if he had been regularly nominated in accordance with the provisions of this article."

[1] It is now contended that this language is in conflict with article 23 of the State Constitution, and particularly that portion which refers to the form of the ballot, and provides that: "The name of the person against whom the petition is filed shall not appear on the ballot as a candidate for the office." The article is long and we hesitate to quote it at length, but must give sufficient of its language to demonstrate that the procedure and manner of recall therein covered was intended to apply solely to elective officers of the state. It begins as follows: "Every elective public officer of the *State of California* may be removed from office at any time by the electors entitled to vote for a successor of such incumbent, *through the procedure and in the manner* herein provided for, which procedure shall be known as the recall, and is in addition to any other method of removal provided by law." (Italics ours.) It is to be immediately noted that had it been the intent to make the section of the organic law all inclusive it would have been sufficient to say: "Every elective public officer," without the limitation imposed by the words "of the State of California." The article then proceeds to fix the percentage of voters necessary to sign the recall petition, and says that it shall be

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⟹For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes "at least twelve per cent. of the entire vote cast at the last preceding election for all candidates for the office, which the incumbent sought to be removed occupies (provided that if the officer sought to be removed is a *state officer* who is elected in any political subdivision of the *state*" it shall be signed by at least twenty per cent. of the vote cast. It is then said that the petition shall be "addressed to the *secretary of state* and filed with the clerk or registrar of voters, of the county or city and county in which the petition was circulated"; and a further provision is incorporated: "That if *the officer sought to be removed was elected in the State at large,*" the petition must be circulated in at least five counties. It is then said that when the petition is certified "to *the Secretary of State*" he shall submit it "*to the Governor,*" who shall thereupon "order and fix a day for holding the election" and also cause "publication of notice" for the holding thereof. The article then proceeds to provide that the ballot shall contain the alleged reasons for the recall and the answer of the officer thereto, and says that any person may be a candidate. It then provides for the form of the ballot, and gives the language already quoted concerning the candidacy of the officer whose recall is sought. The next paragraph deals with the manner of circulating the petition and its verification, concluding with provision that when it shall have been examined and certified it shall be submitted "*to the Secretary of State.*" Next it is provided that "the secretary of state" shall certify his receipt of the petition, and further that the recall shall be deemed to be filed "*with the secretary of state*" upon receipt by him of a certificate showing the petition to be signed by the requisite number of electors. It is said: "If at any recall election the incumbent whose removal is sought is not recalled, he shall be repaid from the State treasury any amount legally expended by him as expenses of such election and the Legislature shall provide appropriation for such purpose, and no proceedings for another recall election of said incumbent shall be initiated within six months after such election." The succeeding paragraph provides that if it is sought to recall the Governor, the duties imposed upon him by the article shall be discharged by the Lieutenant Governor; and, if the secretary of state is sought to be removed, his duties, in such event, shall fall upon the state controller.

Here, then, is a full and comprehensive scheme providing for the recall of officers of the state. Not one word has been said about county or municipal officers. The reason why all of that to which we have referred makes no mention of county or municipal officers, but is confined to and applicable only to elective officers of the state, is made manifest by the two following paragraphs of the article which we quote in full, and which read:

"The recall shall also be exercised by the electors of each county, city and county, city and town of the State, with reference to the elective officers thereof, under such procedure as shall be provided by law.

"Until otherwise provided by law, the legislative body of any such county, city and county, city or town may provide for the manner of exercising such recall powers in such counties, cities and counties, cities and towns, but shall not require any such recall petition to be signed by electors more in number than twenty-five per cent. of the entire vote cast at the last preceding election for all candidates for the office which the incumbent sought to be removed occupies. Nothing herein contained shall be construed as affecting or limiting the present or future powers of cities or counties or cities and counties having charters adopted under the authority given by the Constitution."

It seems to us self-evident that the provision which it is said the charter impinges upon is solely applicable to state officers, and so it did to this court in the case of Cohn v. Isensee, 45 Cal. App. 531, 188 P. 279, 280. That case involved the construction of sections 1196 and 1197 of the Political Code, dealing with the general subject of elections and "An act to provide for the recall of elective officers of incorporated cities and towns." St. (Ex. Sess.) 1911, p. 128. In the opinion in that case, this court, speaking through Mr. Presiding Justice Finlayson, said: "In determining the question with which we are confronted—the proper construction to be placed upon the act for the recall of elective officers of incorporated cities and towns—we are not embarrassed by any possible conflict between the comprehensive scheme for recall elections provided by the Constitution itself, where the person sought to be recalled is a state officer, and a general law of the Legislature. (See article 23 of the Constitution for the scheme provided thereby for the recall of an elective public officer of the state.) The Legislature, by this same article of the Constitution, is expressly empowered to enact laws prescribing the procedure for the recall of elective officers of cities and towns. The language of the organic law is: 'The recall shall also be exercised by the electors of each county, city and county, city and town of the state, with reference to the elective officers thereof, under such procedure as shall be provided by law.' It was pursuant to this authorization that the Legislature, at its special session held shortly after article 23 was adopted, passed the act of January 2, 1912, providing for the recall of elective officers of incorporated cities and towns." The quoted language was not necessary to the decision of the case, but we give it here simply for the purpose of illustrating the impression made upon the court by a reading of the constitutional article.

[2, 3] There is an additional reason which materially tends to support the conclusion to which we have come. It is a familiar rule of law that the courts will consider and give some weight to legislative interpretation. Legault v. Board of Trustees, 161 Cal. 197, 118 P. 706, 39 L. R. A. (N. S.) 519; Northwestern Mutual Life Ins. Company v. Roberts, 177 Cal. 540, 171 P. 313. In this regard it is to be noted that the Legislature, in the act to which we have already made reference, provided a complete plan and the procedure for the recall of elective officers of incorporated cities and towns. As indicated, this act was passed during the extra session of 1911, whereas the constitutional article was adopted October 10, 1911. Hence the enactment amounts to a contemporaneous legislative enactment, and for that reason is entitled to more than ordinary weight. A reading of the act clearly indicates that the Legislature considered the article of the Constitution as do we. But that is not all. The Legislature in 1931 passed a new "act to provide for the recall of elective officers of incorporated cities and towns" (approved May 8, 1931, St. 1931, p. 563), in which enactment sections 12 and 13 read as follows: "Sec. 12. The clerk shall cause to be printed and mailed to each elector at least ten days prior to the election, sample ballots upon which shall be printed the statement of the proponents which was published with the notice of intention heretofore mentioned, followed by the answer, if any, of the officer sought to be recalled. There shall also be printed thereon the following question: 'Shall (name of person against whom the recall petition is filed) be recalled from the office of (title of the office)?' Following which question shall be the words 'Yes' and 'No' on separate lines, with a blank space at the right of each, in which the elector shall indicate by stamping a cross (X) his vote for or against such recall. In case more than one person is sought to be recalled at the same election, the statements and answers for each person shall be printed in a separate column, and the question of recall shall be reprinted for each person separately. Sec. 13. There shall also be printed on the ballot the following question: 'If the recall prevails shall the council fill the vacancy or vacancies by appointment or call a special election for that purpose?' Following the question shall be the words 'By appointment' and 'By special election' on separate lines, with a blank space at the right of each in which the elector shall indicate by stamping a cross (X) his vote for appointment or election." Comment is unnecessary, because it is obvious that the Legislature considered the language invoked in the present action to be applicable solely to state officers. It should also be noted that the charter provision of the city here in question passed under the scrutiny of, and received the approval of, the Legislature before becoming operative.

Moreover, the plain construction which we feel the article bears on its face rationalizes the whole constitutional scheme. Section 8 of article 11 of the Constitution provides for organization of cities under a freeholders' charter, which charter when "approved by a majority of the members elected to each House it shall become the organic law of such city or city and county, and supersede any existing charter and all laws inconsistent therewith." The section further says: "It shall be competent in any charter framed under the authority of this section to provide that the municipality governed thereunder may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to general laws." Section 8½ of the same article provides that freeholders' charters may empower the city operating thereunder to do certain things, and subdivision 4 thereof says: "For the manner in which and the times at which any municipal election shall be held and the result thereof determined; for the manner in which, the times at which, and the terms for which the members of all boards of election shall be elected or appointed, and for the constitution, regulation, compensation and government of such boards, and of their clerks and attaches, and for all expenses incident to the holding of any election. It shall be competent in any charter framed in accordance with the provisions of this section, or section eight of this article, for any city or consolidated city and county, and plenary authority is hereby granted, subject only to the restrictions of this article, to provide therein or by amendment thereto, the manner in which, the method by which, the times at which, and the terms for which the several county and municipal officers and employees whose compensation is paid by such city or city and county, excepting judges of the superior court, shall be elected or appointed, and for their recall and removal, and for their compensation, and for the number of deputies, clerks and other employees that each shall have, and for the compensation, method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employees. All provisions of any charter of any such city or consolidated city and county, heretofore adopted, and amendments thereto, which are in accordance herewith, are hereby confirmed and declared valid."

It will be seen that cities operating under such charters, of which Los Angeles is one, is not only given full control over municipal affairs, but also the authority to provide for the manner and method of electing as well as recalling and removing its officers. It cannot be doubted that the election or recall of a mayor is a municipal affair, but, if it could, this specific provision would dispel all doubt upon the subject. Hence, when article 23 was adopted and power given to the Legislature to regulate by law the procedure of the recall, so far as it applied to cities and towns, it was necessary, unless a conflict were to be created, to provide, as the article does, that: "Nothing herein contained shall be construed as affecting or limiting the present or future powers of cities or counties or cities and counties having charters adopted under the authority given by the Constitution." This sentence just quoted for the second time makes clear that the power of cities operating under freeholders' charters shall be as full and complete as was intended by section 8½ of article 11.

[4] It is asserted that the charter provision making it possible for the elective officer to be recalled by a majority vote and elected to the place thus made vacant by the highest number of votes cast for a candidate, which may be less than a majority, results in a paradoxical situation, and therefore we should construe the provision to be subject to the method provided for state officers in the article of the Constitution. There is no ambiguity in the section of the charter. Its meaning is plain and intelligible. It is equally clear that the city has the right to adopt its own provisions to govern the recall. We have no right to interfere with the voice of the people as expressed in the charter. State ex rel. Smith v. Barbur, 73 Or. 10, 144 P. 126. Were we to attempt to so construe the charter provision, we would necessarily be departing from the judicial function and assuming to exercise the legislative prerogative.

For the reasons given, the order has already been made denying the peremptory writ of mandate, with the reservation that this opinion would be later filed.

We concur: WORKS, P. J.; CRAIG, J.

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122 Cal.App. 784

Louis GOODMAN, Petitioner, v. Robert DOMINGUEZ, City Clerk of the City of Los Angeles, Respondent.

Civ. 8373.

District Court of Appeal, Second District, Division 2, California.

April 19, 1932.

Application for writ of mandate prayed to be directed to respondent as city clerk of the city of Los Angeles to compel him to omit from ballot at a recall election the name of John C. Porter as a candidate for mayor.

Writ denied.

Arthur Brigham Rose and Joseph L. Fainer, both of Los Angeles, for petitioner.

Erwin P. Werner, City Atty., and Frederick von Schrader, Asst. City Atty., both of Los Angeles, for respondent.

Joseph Scott, H. L. Carnahan, E. J. Fleming, George B. Bush, Walter Casey, and R. D. Knickerbocker, all of Los Angeles, amici curiæ for respondent.

IRA F. THOMPSON, J.

This case involves the identical questions raised and passed upon in Rutledge v. Dominguez, City Clerk, etc. (Cal. App.) 10 P.(2d) 1027, and, for the reasons stated in the opinion rendered this day therein, the order has been made denying the peremptory writ of mandate with the reservation that this opinion would be later filed.

We concur: WORKS, P. J.; CRAIG, J.

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123 Cal.App. 128

WILLIAMS v. REICH.

Civ. 8266.

District Court of Appeal, First District, Division 1, California.

April 28, 1932.

1. Deeds 🔑19.

Absent fraud, executed conveyance cannot be canceled for failure of consideration solely because promises, not being conditions subsequent, inducing execution but performable after execution, were not performed (Civ. Code §§ 1689, 3406).

2. Deeds 🔑19.

Promise to marry *held* not "condition subsequent," so as to require cancellation of unconditional conveyance made on promise, where promisor did not agree to reconvey if not marrying (Civ. Code §§ 1689, 3406).

[Ed. Note.—For other definitions of "Condition Subsequent," see Words and Phrases.]

3. Appeal and error 🔑882(3).

Appellant cannot rely on theory not in pleadings or findings.

4. Deeds 🔑210.

In action to cancel conveyance, finding that sole consideration for agreement to convey was grantee's continued promise to marry grantor *held* not sustainable.

Finding was not sustainable, since the covenant to reconvey part of the realty theretofore conveyed to the grantee, promising to marry grantor, expressed in the agreement to reconvey, constituted consideration for the agreement.

Appeal from Superior Court, Los Angeles County; James W. Bartlett, Judge.

Action by George Williams against Clara Reich to set aside conveyance of real property. From an adverse judgment, defendant appeals.

Reversed.

M. C. Spicer and W. O. Graf, both of Los Angeles, for appellant.

A. P. Michael Narlian and Joseph N. Beardslee, both of Los Angeles, for respondent.

OGDEN, Justice pro tem.

This is an appeal from a judgment in favor of plaintiff rescinding and setting aside, upon the ground of failure of consideration, a conveyance of real estate executed by plaintiff to defendant, and a written agreement entered into by the parties, the terms of which are set forth below.

The complaint contains three counts. The first count alleges the conveyance to defendant by plaintiff of three parcels of property by deed executed upon the sole consideration of the promise of defendant to marry plaintiff; the subsequent execution by defendant of a reconveyance to plaintiff of parcels two and three thereof, and the execution of a written agreement by the parties providing that at the expiration of five years defendant shall convey to plaintiff a one-half interest in and to parcel one, or, if it be sold or exchanged before that time, pay to plaintiff one-half of the proceeds thereof, and that during said five years defendant shall be entitled to the sole use and possession of the premises, plaintiff therein covenanting to pay the unpaid balance of the purchase price thereof, and not to molest or interfere with the title or possession of defendant during said period. The original complaint alleged duress in the execution of this agreement, but during the course of the trial an amendment was allowed substituting for such allegations one to the effect that the agreement was entered into by plaintiff upon the sole consideration of a continued promise of marriage. It was further alleged that, after the execution of the conveyance and the erection of a dwelling house thereon by plaintiff, and subsequent to the written agreement, defendant refused to comply with her promise of marriage, and that the consideration for both the execution of the conveyance and the written agreement by plaintiff had entirely failed. Whereupon plaintiff prayed that they both be set aside and canceled. The second and third causes of action concern alleged amounts of money due plaintiff on account of advances and rent for the use of the premises, but as judgment was rendered against appellant on the first count only they are unimportant here. Judgment was rendered canceling the deed of conveyance to the first parcel and the written agreement referred to above, directing defendant to execute and deliver a deed to the premises to plaintiff, and to deliver to him possession thereof.

The findings of the trial court upon which the judgment is based follow the language of the complaint as amended, and are substantially as follows: That in February, 1927, the defendant promised to marry the plaintiff provided he would convey to her three parcels of real property and erect a dwelling house upon parcel one thereof; that, in reliance thereon and in sole consideration thereof, the plaintiff did execute and deliver to defendant deeds to said parcels, and erected a dwelling house upon parcel one thereof; that, on or about the 10th day of May, 1928, the defendant reconveyed to plaintiff parcels two and three, and entered into the written agreement with plaintiff set forth in the complaint and hereinabove described; that the only consideration for the execution of the written agreement by plaintiff was the continued promise of marriage of defendant; that thereafter defendant refused to comply with her promise to marry plaintiff or to reconvey to him parcel one despite the repeated demands therefor of plaintiff; that the only consideration for the execution and delivery of said deed of conveyance to parcel one has wholly failed by reason of the refusal of defendant to marry plaintiff, and that the property so deeded by plaintiff to defendant was in trust only for the benefit of plaintiff under said promise of marriage. From these facts the trial court concluded that the consideration for the execution and delivery of the deed to parcel one of the real property has wholly failed, and that by reason thereof the plaintiff is the owner of said parcel, and entitled to a deed thereto from defendant, and that the deed of conveyance and the written agreement be canceled and annulled.

It is apparent from the foregoing that the judgment canceling both the deed of conveyance to the property and the agreement of the parties is predicated solely upon a failure of consideration in that the promise of marriage was not performed.

[1] Although, in general, instruments will be canceled by courts of equity for failure of consideration in a material respect (sections 1689 and 3406, Civ. Code), this is not the rule in the case of an executed conveyance to land. It has been repeatedly held that, in the absence of fraud, a conveyance of real estate, fully executed on the part of the grantor, cannot be set aside for a failure of consideration on the sole ground that the promises and agreements, not amounting to conditions subsequent, which induced its execution, and which by the terms of the contract under which the deed is made were not to be performed until after its execution, have not been

performed. Lawrence v. Gayetty, 78 Cal. 126, 20 P. 382, 12 Am. St. Rep. 29; Schott v. Schott, 168 Cal. 342, 143 P. 595, 597; Duckworth v. Watsonville Water, etc., Co., 170 Cal. 425, 150 P. 58; Tillaux v. Tillaux, 115 Cal. 663, 47 P. 691; Tisdale v. Bryant, 38 Cal. App. 750, 177 P. 510; White v. Hendley, 35 Cal. App. 267, 169 P. 710.

Respondent relies upon the cases of More v. More, 133 Cal. 489, 65 P. 1044, Brison v. Brison, 90 Cal. 323, 27 P. 186, McRae v. McRae, 67 Cal. App. 480, 227 P. 933, and Muir v. Hamilton, 152 Cal. 634, 93 P. 857, but in each of these cases fraud was involved, rendering them inapplicable to the case at bar. Fraud, either actual or constructive, is neither alleged nor found in the case before us. There is no allegation or finding that the promise of marriage, which the court found to be the sole consideration for the execution of the deed, was made fraudulently or without any intention to perform the same.

[2] Nor can the promise to marry respondent be considered as a condition subsequent. The record does not show, nor is it found, that there was any agreement by appellant to reconvey if she did not marry respondent. The deed of conveyance appears to have been absolute and unconditional.

As stated in Schott v. Schott, supra: " 'The plaintiff saw proper to accept the verbal promise of the defendants to do certain things without any agreement or understanding that the failure to do the acts as promised should be a condition, or in any way affect the validity of the deed, or entitle him to a reconveyance.' Under such circumstances, in the absence of fraud, actual or constructive, defendant would have no right to rescind, or to have the deed set aside."

[3] Although there is in the record some testimony tending to indicate that the property was originally conveyed to appellant in trust as a matter of convenience, according to respondent in order that she might manage it while he was away, and according to the appellant to avoid recovery upon a contemplated judgment, such was not the theory of the pleadings or of the findings, and cannot be relied upon by respondent upon this appeal.

[4] Nor can the finding, that the only consideration for the execution of the written agreement was the continued promise of appellant to marry respondent, be sustained. The covenant, expressed in the agreement itself, on the part of appellant to reconvey to respondent a one-half interest in the property at the expiration of five years, constitutes ample consideration for its execution by respondent. Appellant thereby obligated herself to do that which, so far as the findings indicate at least, she was not legally bound to do.

From the foregoing it appears unnecessary to discuss the further contentions of appellant relating to the failure of respondent to give notice of rescission, and whether the cause of action was changed by amendments to the complaint filed during the course of the trial.

The judgment is reversed.

We concur: TYLER, P. J.; KNIGHT, J.

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122 Cal.App. 688

ECCLESTON v. GALE et al.

Civ. 4542.

District Court of Appeal, Third District, California.

April 19, 1932.

1. **Execution** ⚷250.

Mere inadequacy of price is not in itself sufficient to set aside sale of corporate stock under execution.

2. **Execution** ⚷251(1).

Inadequacy of price, breach of trust of director in corporation, and other evidence, *held* sufficient to justify setting aside sale of corporate stock under execution.

Appeal from Superior Court, Los Angeles County; J. C. Needham, Judge.

Action by C. W. Eccleston against Sue C. Gale and others. From the judgment, defendants appeal.

Affirmed.

John B. Haas, and John D. Home, both of Los Angeles, for appellants.

Newby & Newby, of Los Angeles (Dee Holder, of Los Angeles, of counsel), for respondent.

ANDERSON, Justice pro tem, delivered the opinion of the court.

This is a case wherein 315,752 shares of stock were sold to satisfy a judgment of costs amounting to the sum of $9, which judgment was sold to the defendant Sue C. Gale for the sum of $16.14.

An examination of the transcript seems to show that one of the defendants in the case, Rex C. Gale, was a director and secretary in the corporation named as Centrifugal National Concentrator Company; that the stock sold herein was stock owned by the plaintiff herein, which was sold to the defendant Sue C. Gale, who was the mother of said Rex C. Gale.

The court found that neither the said plaintiff nor his attorneys had any actual notice of said sale; that the plaintiff did not know that a levy had been made upon said stock for the purpose of satisfying said judgment for costs until on or about the 2d day of May, 1929; and that the said Rex C. Gale, acting as secretary of the defendant corporation, at the time he made the return upon the sheriff's writ of execution, gave no notice or information to plaintiff or his attorneys that said stock had been levied upon by said defendant corporation, nor did he inform said plaintiff that said stock had been sold at execution.

The court also found that the impending sale of said stock was intentionally kept secret from the said plaintiff and his said attorneys by the said Rex C. Gale and the defendant Sue C. Gale for the purpose and with the intent of selling said stock secretly, so as to eliminate the said plaintiff as a stockholder of defendant corporation, and the court found that the only persons present at the sale were the said Rex C. Gale, Earl Gale (a representative of the said Sue C. Gale), and John D. Home, attorney for defendant corporation and for Rex C. Gale and Sue C. Gale.

The whole evidence is replete with an abundance of facts tending to show that there was a conspiracy to place C. W. Eccleston and his stock where they could not interfere with the defendants' control of the corporation.

[1, 2] We believe it is unnecessary to prolong the discussion of the facts in the case. It is self-evident that the defendants intended to perpetrate a fraud upon the plaintiff. The mere inadequacy of the price paid for the judgment we understand is not in itself sufficient to set aside a sale; however, this, together with the shocking state of facts and circumstances revealed in evidence, compels the court to unhesitatingly affirm the judgment.

We cite the following authorities in support of the judgment: Mississippi & Missouri Ry. Co. v. Cromwell County, 91 U. S. 643, 23 L. Ed. 367, 368; Odell v. Cox, 151 Cal. 70, 90 P. 194; Haish v. Hall, 90 Cal. App. 547, 265 P. 1030; Hyman v. Stern, 61 Cal. App. 656, 215 P. 911; Fortin v. Sedgwick, 133 Iowa, 233, 110 N. W. 460, 12 Ann. Cas. 337; Johnson v. Avery, 60 Minn. 262, 62 N. W. 283, 51 Am. St. Rep. 529.

Scores of other cases of like tenor are cited in respondent's brief.

The sale was also voidable because of the breach of trust of the defendant Rex C. Gale. Wickersham v. Crittenden, 93 Cal. 17, 29, 28 P. 788; Sims v. Petaluma Gas L. Co., 131 Cal. 656, 63 P. 1011; Tafft v. Presidio, etc., R. Co., 84 Cal. 131, 24 P. 436, 11 L. R. A. 125, 18 Am. St. Rep. 166; Baxter v. Boston-Pac. Oil Co., 81 Cal. App. 187, 253 P. 185; Davis v. Rock Creek L., F. & M. Co., 55 Cal. 359, 36 Am. Rep. 40.

Defendant cites the case of Rauer v. Hertweck, 175 Cal. 278, 165 P. 946, to justify a reversal in this case. We fail to see its application; it can be distinguished in many instances, as respondent has shown in his brief.

All other objections have been considered, but we have decided to affirm the judgment as it stands.

The judgment is affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

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122 Cal.App. 698

CENTRIFUGAL NAT. CONCENTRATOR CO. v. ECCLESTON et al.

Civ. 4590.

District Court of Appeal, Third District, California.
April 19, 1932.

1. Corporations 🔑197.

Power of corporation commissioner to impose regulations against fraud in stock sales *held* not to vest him with power to deny owner right to vote all his stock (Const. art. 12, § 12; Deering's Gen. Laws 1923, Act 3814, § 4).

2. Corporations 🔑197.

That stockowner waived right to vote his stock because corporation commissioner compelled him so to do *held* not forfeiture of right to vote, since basis of waiver was commissioner's void order (Const. art. 12, § 12; Deering's Gen. Laws 1923, Act 3814, § 4).

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by the Centrifugal National Concentrator Company against C. W. Eccleston and others. From an adverse judgment, plaintiff appeals.

Affirmed.

John B. Haas and John D. Home, both of Los Angeles, for appellant.

Newby & Newby, of Los Angeles (Dee Holder, of Los Angeles, of counsel), for respondents.

ANDERSON, Justice pro tem., delivered the opinion of the court.

This is a case where the defendant is the owner of more than 300,000 shares of stock held in the plaintiff corporation, being a majority of the stock. An order was made by the corporation commissioner denying the defendant the right to vote other than a very limited number of shares of said stock.

We think the order of the commissioner was and is unauthorized and void, under section 4 of the Corporate Securities Act (Act 3814, Deering's Gen. Laws 1923, p. 1411), as the act read at the time the order herein was issued: "If he finds that the proposed plan of business of the applicant is not unfair, unjust, or inequitable, that it intends to fairly and honestly transact its business. and that the securities that it proposes to issue and the methods to be used by it in issuing or disposing of them are not such as, in his opinion, will work a fraud upon the purchaser thereof, the commissioner shall issue to the applicant a permit authorizing it to issue and dispose of securities. * * * The commissioner may impose such conditions as he may deem necessary to the issue of such securities." The permit or order of the corporation commissioner is found in the transcript.

[1] The underlying reason for the passage of the statute was to protect the public against the perpetration against it of acts of fraud in the issuance and sale of stock; its sole purpose was to disclose and uncover the hidden acts of the fraudulent—not to prohibit legitimate business or suppress the exercise by an individual of valid and constitutional rights which could not under any circumstances constitute a fraud upon the public. The object of the statute is to confer power upon the corporation commissioner to make regulations to prevent the perpetration of fraud; but "the power to pass reasonable regulations in such a case bears no relationship to the power to prohibit or suppress." In re Dart, 172 Cal. 54, 155 P. 63, 65, L. R. A. 1916D, 905, Ann. Cas. 1917D, 1127. So in this case, the power of the state corporation commissioner to impose reasonable regulations to safeguard the public against fraud and oppression in stock sales does not for a moment vest him with the power to override the state Constitution. Section 12, art. 12, Const.

The defendant Eccleston has purchased the stock in like manner as any other person may have purchased stock, and paid cash therefor; he has transferred to the corporation a property right of the value of approximately one-half million dollars; he has received from that corporation certificates of its stock of like face value. It would be as logical to argue that a person who has bought $500,000 worth of stock and paid for it in cash should be deprived of the right to vote the same. Could a greater fraud be perpetrated upon any one by the commissioner than for him to force Eccleston to waive his right to vote his stock? The Constitution has given the owner of stock the right to vote it because it is he who is, in the last analysis, liable for the debts of the corporation in proportion to the stock owned by him. Every one who enters a corporation by buying stock therein knows that those who control the greater number of shares of the stock may have the control of the corporation in every way.

In Toledo Traction, Light & Power Co. v. Smith (D. C.) 205 F. 643, 658, the court said: "It is said that this statute is vicious, in that it affords an opportunity, if so construed, to oppress the minority. That may be, but minorities in corporations have always the court's protection against the tyranny of the majority, and it would seem that the oppression of the minority by the majority is not likely to be as mischievous to the corporation itself as if the conditions were reversed. Our construction is in sympathy with the tenor of judicial decision." See, also, People v. Emmerson, 302 Ill. 300, 134 N. E. 707, 21 A. L. R. 636; Brooks v. State ex rel. Richards, 3 Boyce (26 Del.) 1, 79 A. 790, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915A, 1133; Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237; People's Home Savings Bank v. Superior Court, 104 Cal. 649, 38 P. 452, 29 L. R. A. 844, 43 Am. St. Rep. 147; Harvey v. Lineville Imp. Co., 118 N. C. 693, 24 S. E. 489, 32 L. R. A. 265, 54 Am. St. Rep. 749; Simpson v. Nielson, 77 Cal. App. 297, 299, 246 P. 342; City of Los Angeles v. Owens River Canal Co. (Cal. App.) 7 P.(2d) 1064.

[2] The fact that Eccleston waived his right to vote because the commissioner compelled him so to do, does not forfeit his right to vote, for the reason that the basis of Eccleston's waiver is the void order of the commissioner. For enlightenment on this feature the following authorities may be considered: 5 Cal. Juris. 641; Pacific Telephone & Telegraph Co. v. Eshleman, 166 Cal. 640, 137 P. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822; In re Dart, 172 Cal. 47, 155 P. 63, L. R. A. 1916D, 905, Ann. Cas. 1917D, 1127; Toledo, St. L. & K. C. R. Co. v. Continental Trust Co. (C. C. A.) 95 F. 497, 525; Rice v. McCarthy, 73 Cal. App. 655, 239 P. 56; City of Los Angeles et al. v. Owens River Canal Co. (Cal. App.) 7 P.(2d) 1064.

We feel that the determination of the question, that the order made by the commissioner that the defendant had no right to vote all of the stock owned by him is and was void, is determinative of the whole case. All subsequent acts, elections of directors, electing of officers, levying assessments, sales of stock, etc., fall under the declaration declaring the order of the commissioner void, as these acts can have no existence in law thereafter.

The judgment is affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

123 Cal.App. 151

HARTFORD ACCIDENT & INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 8210.

District Court of Appeal, Second District, Division 1. California.

April 28, 1932.

Master and servant ⚷367.

Newsboy, selling newspaper under arrangement with another newsboy, and without right to return unsold copies, *held* not compensable "employee"; position being analogous to independent contractor.

[Ed. Note.—For other definitions of "Employee," see Words and Phrases.]

Certiorari to Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act by Wilford Farrow, a minor, by Ethel Farrow, his guardian ad litem, opposed by the Hartford Accident & Indemnity Company. To review an award of the Industrial Accident Commission, the Indemnity Company petitions for certiorari.

Award annulled.

George L. Greer and Donald E. Ruppe, both of Los Angeles, for petitioner.

A. I. Townsend, of San Francisco, for respondents.

TAPPAAN, Justice pro tem.

Petitioner by writ of certiorari seeks a review of an award made by respondent Industrial Accident Commission in favor of respondent Wilford Farrow, a newsboy, and prays that the award be annulled.

The injury for which compensation was awarded, was sustained by respondent Farrow while engaged as a newsboy in the selling of newspapers upon the streets of the city of Los Angeles. Petitioner is the insurance carrier for the newspaper held chargeable by the award with the payment of compensation. The evidence introduced at the hearing before the commission, though conflicting as to some of its details, was to the effect that petitioner's insured engaged the injured boy as a newsboy to sell its papers, and had the right to discharge him in the event it so desired. Petitioner stresses the fact that the newsboy in this case did not have the right to return the papers delivered to him for sale, but that in the event any such papers were unsold at the end of the day, the newsboy was required to pay for such papers.

The sole question presented to the Industrial Accident Commission and to this court is a question of law as to whether the injured newsboy came within the category of a compensable employee, within the meaning and intent of the Workmen's Compensation Act, or at the time of his injury he occupied the relation analogous to that of an independent contractor in the vending of the newspapers and so was not entitled to an award under the provisions of said act.

Petitioner cites and relies upon the case of New York Indemnity Co. v. Industrial Acc. Comm. (Cal. Sup.) 1 P.(2d) 12. The facts as presented by the record in the instant case, when compared with those in the above-cited case, differ to no material extent. The following language used in that case is, except as to some minor details, fully sustained by the record presented here [page 13 of 1 P.(2d)]: "There was some dispute in the evidence as to just what amount of control or regulation was exercised over newsboys by the district manager; but the evidence in that regard seems to go no further than the following extent, to wit: That certain specified corners or places upon the public streets were allotted, when unoccupied, to particular newsboys applying for the same, who received instructions from the district manager not to intrude upon or interfere with the corner or place allotted to another. Each particular newsboy was expected and in fact required to be active and vigilant in making sales of a prescribed minimum number of each of said newspapers at or near his designated place; in short, to be a 'hustler' in making sales. Otherwise his allotted place or corner would be given to another newsboy and he would be refused further copies by the district manager."

The evidence presented here tends to show that the engagement under which the injured boy sold the newspapers was of even more vicarious and uncertain tenure than that involved in the case just quoted. The original arrangement to sell the papers was made with respondent's brother. This brother was the one who made the cash settlements. Respondent worked or not, at will. He sold two other papers and accounted to them for his sales. The engagement was for no fixed term and the right to discharge, in fact, amounted only to a refusal to extend credit and furnish papers.

The finding of the commission upon the facts present before it amounted to an erroneous legal conclusion which this court possesses jurisdiction to review. New York Indemnity Co. v. Industrial Acc. Comm., supra.

The award as made to the applicant herein should be, and the same is hereby, annulled.

We concur: CONREY, P. J.; YORK, J.

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123 Cal.App. 94

CATTON v. KERNS et al.

SHAW v. SAME.

Civ. 391.

District Court of Appeal, Fourth District. California.

April 26, 1932.

Rehearing Denied May 11, 1932. Hearing Denied by Supreme Court June 24, 1932.

1. Automobiles 🔑246(58).

Instruction as to act requiring pedestrians to walk near left edge of highway *held* improper in actions for injuries to pedestrians standing near highway (St. 1923, p. 517, § 150½, as added by St. 1929, p. 546, § 66).

Defendants' answers alleged plaintiffs' negligence in standing on highway in careless manner, while uncontradicted evidence showed that plaintiffs were standing near traveled portion of highway and had not started toward such portion when struck.

2. Automobiles 🔑217(1).

Statute requiring pedestrians to walk near left edge of highway does not apply to pedestrians crossing highway (St. 1923, p. 517, § 150½, as added by St. 1929, p. 546, § 66).

3. Appeal and error 🔑1064(1).

Instruction as to act requiring pedestrians to walk near left edge of highway in actions for injuries to pedestrians standing near highway *held* reversible error (St. 1923, p. 517, § 150½, as added by St. 1929, p. 546, § 66).

Appeals from Superior Court, Fresno County; C. E. Beaumont, Judge.

Actions by Thomas R. Catton and Raymond R. Shaw, respectively, against Claude Kerns and another. Judgments for defendants, and plaintiffs appeal.

Reversed and remanded.

Gallaher & Jertberg and Hartley F. Peart, all of San Francisco (Russel Shearer, of San Francisco, of counsel), for appellants.

Wakefield & Hansen, of Fresno, for respondents.

BARNARD, P. J.

These two actions, both brought to recover damages for personal injuries, were tried together, and, by stipulation, have been consolidated on this appeal.

About 2 o'clock on the morning of January 1, 1930, the two plaintiffs and their wives left the Sunnyside Country Club, and drove westerly along the highway toward Fresno; the car being driven by the plaintiff Shaw. After proceeding about a mile and a half from the country club, they decided to return to the club. The car was stopped, and the two plaintiffs got out and walked into a field on the north side of the highway, while Mrs. Shaw took the wheel and turned the automobile around so that it faced in an easterly direction. She stopped the automobile on the south side of the highway, opposite the place where the plaintiffs had left the road. There is some evidence that, when the automobile was stopped, its left front wheel was past the middle of the highway, and that the automobile then faced slightly in a northeasterly direction. About three minutes after Mrs. Shaw turned the automobile around, the plaintiffs returned to the highway, but, before starting across the same to enter the car, they stopped at a point north of the highway, where one of the men was telling the other a story. According to the plaintiffs' witnesses, the point at which they stopped was three or four feet north of the traveled portion of the highway, while according to the defendants' version this point was about eighteen inches or two feet north of this traveled portion. While the plaintiffs were thus standing, neither one of them facing the east, the defendant Kerns approached in an automobile driving west. Kerns testified that he thought the plaintiffs' car was moving toward the north side of the road, and that he pulled over to his right, and while so proceeding his car struck the plaintiffs, causing the injuries complained of. It appears that the traveled portion of the highway was sixteen feet in width. These actions, which followed, were tried with a jury, both resulting in verdicts for the defendants, and from the judgments which followed this appeal is taken.

[1, 2] The main point relied upon for reversal is that the court erred in instructing the jury as follows: "You are instructed that in the year 1929 the California state legislature added section 150½ to the California Vehicle Act [as added by St. 1929, p. 546, § 66]. You are instructed that section 150½

of the California Vehicle Act was in full force and effect at the time of the accident in question. The section of the Vehicle Act hereinbefore referred to is in words as follows: 'It shall be unlawful for any pedestrian to walk along and upon any highway outside of a business or residence district otherwise than close to his left-hand edge of the highway.' "

We think this contention must be sustained, and that the giving of this instruction was not proper, in view of the pleadings and the evidence. The only negligence on the part of the appellants which is alleged in the answers filed by the respondents is that each respective plaintiff "stood and maintained himself on said Butler avenue in a careless, reckless and negligent manner." The evidence shows, without contradiction, that for more than three minutes before the time they were struck the appellants had not been upon the traveled portion of this highway; that they alighted from their car on the north side of the highway and proceeded into a field; that upon their return they stopped, and were standing somewhere from a foot and a half to four feet north of the traveled portion of the highway; and that they had not started, and were not about to start toward the traveled portion of the highway at the time they were struck. The only reasonable inference from the entire evidence is that they intended, as soon as they were ready to proceed, to cross over to the south side of the highway in order to enter their car, which was standing there. There is no evidence whatever which would actually or by inference tend to show that either of them was walking, or intended to walk, along the highway for any distance whatever. Under such circumstances, we think it was error to give this instruction to the jury. Respondents argue that the intention of the Legislature in adopting this statute was to make it unlawful for a pedestrian to use a public highway in such a manner that he would not be facing the approaching traffic. We are unable to agree with this contention. It is hardly to be supposed that the Legislature intended by this statute to prevent a pedestrian from crossing a highway or that it intended to compel him to cross, if at all, without looking where he was going, which would inevitably result, if he be required to at all times face the other way. The requirement that a pedestrian proceed "close to his left-hand edge of the highway" is not very well applicable to a person crossing the road. We think the intention of the Legislature plainly appears from the language used, and that the statute applies to a pedestrian walking along a highway and not to one crossing the same. Without doubt this statute was adopted for the purpose of changing the previous custom of walking along the right-hand side of a road, and not in any degree for the purpose of regulating the conduct of a pedestrian who desires to go from one side of the road to the other. His duties and obligations are governed and controlled by other laws.

[3] With considerable care the respondents established by the testimony of various witnesses that the appellants were not looking toward or facing the car driven and owned by the respondents at the time or just before they were struck. In view of this evidence, it is readily seen that this instruction may have had a most important effect upon the jury in rendering their verdict. The jury may well have thought that the appellants could not recover, irrespective of other considerations, because they had not met the obligation apparently imposed upon them by this instruction, the effect of which may well have been considered by the jury to be that it was the duty of the appellants, while upon the north side of this highway, to face the traffic approaching on that side, which in this case meant the car driven and owned by the respondents. The question of whether or not the driver of respondents' car was negligent is a close one, and it is impossible to tell what the jury would have decided in this respect had this instruction not been given. There was evidence that the windshield on respondents' automobile was frosted to such an extent as to impair the vision of another occupant thereof; that this car was traveling at thirty-five miles per hour at the time of this collision; and that the driver of that car had from ten to twelve feet of clearance between the two appellants and their car, which was standing still. While the respondent Kerns testified that he thought the other car was moving as he approached, the preponderance of the evidence is to the effect that that car had been standing still for more than three minutes. The appellants had a right to have this question of fact determined by the jury under proper instruction as to the law, and we think it is a miscarriage of justice to have such a question of fact thus confused by an improper instruction, misleading in an important respect under the existing circumstances, and resulting in a situation where it cannot be told whether the jury actually decided the real question of fact involved, or whether they held that, irrespective of any question of such negligence on the part of the respondents, the appellants could not recover because of a supposed violation of a statute, in that they did not, while standing upon the left-hand side of the highway, face the traffic approaching on that side. As was said in Starr v. Los Angeles Railway Corporation, 187 Cal. 270, 201 P. 599, 603: "Under this condition it cannot be said that there is no miscarriage of justice when it cannot be ascertained from the record upon what theory the jury was authorized by the instructions

of the court to render its verdict, or upon what state of facts shown in evidence the verdict was reached."

Objection is also made by appellants to two other instructions given, which objections are, in our opinion, without merit, and which need not be here discussed.

For the reasons given, the two judgments appealed from are reversed, and the actions remanded for a new trial.

We concur: MARKS, J.; JENNINGS, J.

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123 Cal.App. 81

BATES v. McHENRY, Treasurer of Irr. Dist. (BANKS, HUNTLEY & CO. et al., Interveners).

Civ. 4628.

District Court of Appeal, Third District, California.

April 26, 1932.

1. **Waters and water courses 🔑230(6).**

Word "any," in irrigation district laws respecting payment of bonds and coupons, comprehends bonds or interest coupons of any issue, and there is no priority given to any bonds issued (St. 1897, p. 272, § 52, as amended by St. 1931, p. 172, § 1).

St. 1897, p. 272, § 52, as amended by St. 1931, p. 172, § 1, provides in part that upon presentation of "any" matured bond of irrigation district, treasurer shall pay same from bond principal fund, and upon presentation of any matured interest coupon treasurer shall pay same from bond interest fund. Word "any" does not necessarily mean only one, but may have reference to more than one or to many, and it has frequently been used in this enlarged and plural sense as meaning some or an indefinite number or quantity, one or more, or all, as case may be.

[Ed. Note.—For other definitions of "Any," see Words and Phrases.]

2. **Waters and water courses 🔑230(6).**

Bonds of irrigation district and interest coupons *held* payable in order of presentation, where there are insufficient funds to pay all (St. 1897, p. 272, § 52, as amended by St. 1931, p. 172, § 1).

3. **Waters and water courses 🔑230(6).**

Treasurer of irrigation district must either pay matured bond or interest coupon when presented, or, if funds are insufficient, must register same (St. 1897, p. 272, § 52, as amended by St. 1931, p. 172, § 1).

4. **Waters and water courses 🔑230(6).**

Where bonds of irrigation district and interest coupons are registered, treasurer must make payments, with added interest, as soon as sufficient money is available (St. 1897, p. 272, § 52, as amended by St. 1931, p. 172, § 1).

5. **Statutes 🔑220.**

Court must accept Legislature's interpretation of statute set forth by amendment as final (St. 1897, p. 272, § 52, as amended by St. 1931, p. 172, § 1).

Application by Charles D. Bates for writ of mandate to be directed to J. R. McHenry, as Treasurer of the Merced Irrigation District, in which Banks, Huntley & Company and another intervened.

Writ granted.

Bronson, Bronson & Slaven and James F. Peck, all of San Francisco, for petitioner.

Stephen W. Downey, of Sacramento, and Hugh K. Landram, and C. Ray Robinson, both of Merced, for respondent.

Orrick, Palmer & Dahlquist, of San Francisco, for interveners.

Mr. Justice PLUMMER delivered the opinion of the court.

The petitioner in this action is the owner of 94 bonds of the Merced irrigation district, a district duly organized and existing under and by virtue of the laws of the state of California, of the par value of $94,000, upon which there became due and payable on the 1st day of January, 1932, the sum of $2,820 as interest thereon, evidenced by coupons attached to said bonds. The intervener Banks, Huntley & Co. was, on the 1st day of January, 1932, the holder of interest coupons on bonds issued by said district in the sum of $80,720.50, which coupons were due and payable on the 1st day of January, 1932. Intervener West Coast Life Insurance Company on the 1st day of January, 1932, was the holder of due interest coupons against said district in the sum of $3,000. On the 1st day of January, 1932, there became due to the owners of registered bonds, as interest, the sum of $3,420; the coupons representing said sum having been detached from bonds issued by said district and turned over to the treasurer thereof. In addition to the coupons which we have mentioned, there was, on the 1st day of January, 1932, presented for payment, additional interest coupons, so that the aggregate value of interest coupons presented on that date was the sum of $315,605.50, in addition to the interest due on registered bonds. All of this sum became due on the 1st day of January, 1932. On the 2d day of January, 1932, the treasurer of the district received by registered mail additional interest coupons in the sum of $25,632, all of which coupons became due on the 1st day of January, 1932. The due dates of interest on the bonds involved in this action were fixed as of January 1st and July 1st of each year. The latest tabulation presented to this court shows that there has been presented to the respondent as treasurer of the Merced irrigation district, for payment, interest coupons in the sum of $473,820, and that there is now on hand in the bond interest fund of said district the sum of about $260,000. On the 1st day of January, 1932, there was in the hands of the respondent, as treasurer of said district, available for paying interest coupons, the sum of $216,915.41.

At the time of the presentation of interest coupons to the respondent and demand made for the payment thereof, payment was refused on the ground that there was not sufficient money in the bond fund of said district to pay the oustanding interest coupons then due. Registration of unpaid interest coupons was likewise refused.

The record in this case shows the order of presentation of interest coupons, and without setting forth the amount of the interest coupons, and by whom presented, it is sufficient to state that at the date of the presentation by the First National Bank in Merced, of interest coupons in the sum of $97,882.50, which presentation included the coupons belonging to the petitioner herein, there was in the bond fund of said district sufficient money to pay all of the coupons that had been presented to the respondent for payment, and also to pay the whole of the interest coupons presented for payment by the First National Bank of Merced, including the interest coupons belonging to the petitioner herein. It likewise appears that at the time of the presentation by the interveners herein of the several interest coupons held by them respectively, there was not sufficient money in the bond fund of said district to pay any portion of the coupons so presented by the interveners, if payment had been made to those persons who, prior thereto, had presented interest coupons of said district for payment. The record, however, before us now does show that upon the interest coupons presented by the intervener Banks, Huntley & Co., after paying all of the coupons presented prior to the presentation made by intervener, there is in the bond fund of said district approximately $15,000 which would be applicable to the payment on coupons presented by said intervener in the event that payment on bond interest coupons should be paid in the order of their presentation.

It is contended on the part of the petitioner that payment of interest coupons should be made by the treasurer of the district in the order of their presentation, so long as there are any moneys in the bond interest fund of the district available for such purpose, and that upon the expiration of the funds available for such purpose, the respondent, as treasurer of the district, should register the coupons so presented, in the order of their presentation, which interest coupons would bear interest thereafter at the rate of 7 per cent., and the bondholders thereof would be entitled to payment in the order of the registration of such interest coupons.

On the part of one of the interveners herein it is contended that where there is not sufficient money in the bond interest fund of the district to pay all of the outstanding coupons, or coupons which become due upon a certain date, in this instance on the 1st day of January, 1932, then and in that event the treasurer should make payament pro rata upon the interest coupons presented, irrespective of the order of their presentation, and that each coupon holder would be entitled to payment upon his coupon of a sum of money proportionate to the fund on hand, as his coupon bore to the total outstanding due interest coupons of the district.

Section 52 of the California Irrigation District Laws, as amended in 1931 (St. 1931, p. 172, § 1), so far as pertinent here, reads as follows: "Upon presentation of any matured bond of the district, the treasurer shall pay the same from the bond principal fund, and upon presentation of any matured interest coupon of any bond of the district, the treasurer shall pay the same from the bond interest fund. If money is not available in the fund designated for the payment of any such matured bond or interest coupon, it shall draw interest at the rate of seven per cent per annum from the date of its presentation for payment until notice is given that funds are available for its payment, and it shall be stamped and provision made for its payment as in the case of a warrant for the payment of which funds are not available on its presentation." The amendment in 1931 simply provided for two funds, and did not change the meaning or legal effect of the section.

Subsequent to the hearing of this cause a number of affidavits had been filed relative to the order of presentation of the coupons for payment, and also as to the sufficiency of the presentations. Without referring to the affidavits, or setting forth the matters contained therein, it is sufficient to say that the record amply establishes presentation of interest coupons in such amounts, preceding the presentation made by the interveners herein, as to give the petitioner and the interveners the status with reference to their presentation and demand for payment and registration of coupons, just as we have stated.

The portion of section 52 of the California Irrigation District Laws which we have quoted specifically provides that upon the presentation of any matured bond, or of any matured interest coupon, or any bond of the district, the treasurer shall pay the same from the bond interest fund. There is no provision in the section that payment shall be withheld until all of the matured bonds, or until all of the matured interest coupons have been presented. If there is any money in the fund available for payment, the section makes it the duty of the treasurer to pay the same. It is then provided that if there is no money in the bond interest fund available for paying matured bonds or matured coupons, they shall bear interest at the rate of 7 per cent. per annum thereafter until notice is given that funds are available for payment, and they shall be stamped, as in case of a warrant for payment where funds are not available on presentation.

We do not need to set forth the method of procedure relating to the payment of warrants, further than to state that stamped and unpaid interest coupons or bonds follow the same procedure, and the holders thereof are entitled to payment immediately upon funds coming into the hands of the treasurer of the district, available for such purpose, and in the order in which they are registered.

[1] The word "any," used in section 52 of the California Irrigation District Laws, is sufficiently broad to comprehend the bonds or interest coupons of any issue so that there is no priority given under the statute to any of the bonds issued by the irrigation district.

In 3 C. J. 231 are quoted a number of decisions where the word "any" has been construed, from which we select the following: "While 'any' is derived from 'one,' and indeed, has been used as synonymous with 'a' or 'an,' or as referring to 'anybody,' 'anyone,' or any person or anyone of a number, anyone out of many, any other, or either, it does not necessarily mean only one person, but may have reference to more than one, or to many, and indeed, it has been frequently used in this enlarged and plural sense as meaning 'some,' or an indefinite number or quantity; one or more, or all, as the case may be."

[2] A reference to the cases quoted in 3 C. J., supra, shows that the word "any," as used in section 52, supra, would apply to any due bond or interest coupon that might be presented, and that any such bond or interest coupon is entitled to payment upon presentation, if there is money in the bond interest fund equal to the value of the bond or the value of the interest coupon so presented.

[3, 4] This interpretation of the section is strengthened by the fact that provision is made for the registration of bonds and interest coupons in the event that there is not sufficient money in the treasury of the district available for payment and the allowance of an additional rate of interest. While the bonds are issued and placed upon the market, bearing interest, in this case, in no instance exceeding 5½ per cent., the section provides for payment of interest at the rate of 7 per cent. during the period of time when the holder of the bond or interest coupon is required to wait for payment after the same becomes due if he elects to have his bond or interest coupon registered. Again, the treasurer of the district has authority to perform two acts: He must either pay the bond or interest coupon when presented, or register the same. The irrigation laws do not confer upon the treasurer of the district any authority to prorate payments. If the money is there and the bond or interest coupon is due, his legal duty is to pay. If money is not there, his legal duty is to register the bond and interest coupon and make payment, with the added interest, as soon as sufficient money is available.

We do not need to enter into any discussion of what acts are necessary to constitute presentation of bonds or interest coupons, in order to charge the treasurer with the duty to pay, but will content ourselves with the statement that the record before us sufficiently establishes acts on the part of those presenting coupons to fill all such requirements.

Our attention has been called to only two California cases which may in any way bear upon the questions involved herein. In Meyer v. Porter, 65 Cal. 67, 2 P. 884, it was held that mandamus would issue to compel an officer to perform the legal duty incumbent upon him to pay interest coupons or bonds which had become due, even though other holders of like securities have not presented them for payment, or have not instituted any action to compel payment. So far as we have been able to ascertain, however, the authority under which the bonds and coupons in the case of Meyer v. Porter, supra, were involved, no provision was made such as we find contained in section 52 of the California Irrigation District Laws. The decision simply goes to the effect, therefore, that the plaintiff in the action was entitled to a writ commanding payment, irrespective of the existence of other bondholders who had not instituted any action.

Again, in the case of Meyer v. Widber, 126 Cal. 252, 58 P. 532, the court had before it a mandamus proceeding to compel payment of certain Dupont street bonds and coupons. In this action it was held that the party instituting the mandamus proceedings was entitled to a decree directing payment, irrespective of the existence of other holders who had not demanded payment, or if demand had been made, had taken no action.

Again, it appears that the act of the Legislature under which the bonds involved in this case were issued, contained no similar provisions relative to payment upon presentation, found in section 52, supra. The dissenting opinion written by Chief Justice Beatty, and concurred in by Justices Temple and Henshaw, presents views and arguments which we think applicable here: That upon presentation and demand for payment, the treasurer of the irrigation district, the respondent in this proceeding, was charged with the legal duty to make payment, and it was his duty to make payment in the order in which the coupons were presented and demand made for payment.

One of the interveners calls our attention to the case of Thomas v. Patterson Co., Treasurer, etc. (Bancroft, Intervener), 61 Colo. 547, 159 P. 34, 37, and the case of Norris et al. v. Montezuma Valley Irr. Dist. et al. (C. C. A.) 248 F. 369, and also to the text found in McQuillan & Dillon on Municipal Corporations, relying upon these cases. However, we think the wording of section 52, supra, distinguishes the instant case and renders the holding of the Colorado Supreme Court, supra, and of the federal court, supra, inapplicable. In both of the cases referred to questions involving interest coupons on district irrigation bonds were presented to the court. Also, the question of priority of payment between different issues was presented. In the Patterson Case the court propounded this question: "Has any coupon holder the right to have the funds in the hands of the treasurer applied in the payment of his coupons in preference to others of the same issue due at the same time, when there is insufficient [money] to pay all, because the one holder may present his for payment before another, or perchance may be first in line, or be recognized first, arbitrarily or otherwise, by the county treasurer?" And then answer as follows: "The statute does not require that coupons shall be paid in the order of their presentation for payment; but, to the contrary, it in substance provides that the funds realized from the collection of taxes levied to pay interest maturing on any issue of bonds in a specified year is for the benefit of all holders of interest coupons which can be legally paid out of such funds. * * *" After referring to the declaration in the pleadings, the court further said: "We think this declaration specially applicable to the facts here, as well as based upon sound reasoning, and that it would be a miscarriage of justice where two people, as in this case, like Thomas and Bancroft, both holding coupons against a trust fund pledged to the payment of all such coupons, and where both, if not others, were present at the opening of the office at the time they were due, to allow the one who might first be recognized by the county treasurer to receive any priority over the others, who were there also, or who thereafter presented their coupons within a reasonable time. In such case the weight of authority is that there should be no distinction made between them, and that all have a reasonable time within which to present their coupons for payment without losing their rights." Citing, Shelley v. St. Charles County Court (C. C.) 21 F. 699; Southern Bank v. Louisiana National Bank et al., 32 La. Ann. 290; Sibley v. Mobile, 22 Fed. Cas. page 57, No. 12829. In the Patterson Case there likewise appears a rather strong dissenting opinion.

In Norris v. Montezuma Valley Irr. Dist. et al., supra, following the Patterson Case, the court held (quoting from the syllabus): "Under Colorado irrigation statutes, the county treasurer was not required to pay coupons from bonds of an irrigation district in the order of presentation, but the fund available, insufficient to pay all coupons, was to be allotted to all holders of coupons who presented them within a reasonable time after they were due." This case also was decided by a divided court.

An examination of the Colorado Irrigation District Laws found in Session Laws of Colorado for 1905, beginning on page 246, discloses that the language of the section referring to payment of bonds and interest coupons differs materially from that of section 52 of the California Irrigation District Laws. Section 17 of the Colorado Irrigation District Act reads as follows: "*Bonds—Payment—Lien.* Said bonds, and the interest thereon, shall be paid by revenue derived from an annual assessment upon the real property of the district, and the real property of the district shall be and remain liable to be assessed for such payments as herein provided." There is no provision in the Colorado act providing for the registration of either bonds or interest coupons. No provision is made for an increase in the interest thereon in the event that any holder of a bond or interest coupon is not paid upon the date of its maturity. There is no provision in any of the sections of the Colorado act directing the treasurer to make payment upon presentation of any bond or interest coupon if money is available, or to register the same if funds are not available for payment. These provisions we think distinguish the California act from the Colorado act, and specify an orderly procedure.

Again, we may repeat there is nothing in the California act which authorizes the treasurer to withhold payment and await a collection or presentation of all the interest coupons, and then pay pro rata. The Legislature undoubtedly perceived the confusion that would follow such a procedure. Thus, in this case, it appears that between the 1st day of January, 1932, and the 1st day of July, 1932, there was both a possibility and a probability of there being presented for payment or registration, interest coupons in the sum of $477,000, or thereabouts, and that at the date of the hearing of this case there was in the bond interest fund of the district the sum of about $260,000, and that additional money is coming into the hands of the treasurer from time to time. Taking $477,000 as the basis, the treasurer would then be required to pay, upon presentation of a coupon, such proportion as the coupon presented bore to the total amount due, and as money thereafter came, figure it out and remit to each coupon holder what we will call a dividend bearing a like sum or proportion as the money received bore to the whole value of the outstanding coupons. Likewise, the result would follow that if all the coupons were not presented, one might never get full payment even though the funds were in the treasury of the district sufficient to cover the amount of the coupons presented.

Again, to show that the decisions based upon the Colorado statute are inapplicable, one question only need be presented: When would the treasurer be legally bound to register unpaid coupons or unpaid portions of coupons? That this procedure would involve endless confusion seems to us self-evident, and led the Legislature to make the provision it has made.

In answer to the statement that the treasurer of the district might act arbitrarily, it is sufficient to say that the officer whose duty it is to make payment would probably render himself liable upon his official bond, if any one suffered damage by reason of any such actions.

While the word "any" is sometimes construed to mean "all," as contended for by interveners, yet it seems manifest to us that such interpretation cannot be given to the use of the word "any" as employed by the Legislature in section 52, supra. If that were the intent of the Legislature, the wording would have been: "When all the interest coupons that are due have been presented, the treasurer shall make payment." It cannot be that the Legislature intended to tie up the fund until the last interest coupon had been presented for payment. Furthermore, any such interpretation would eliminate entirely the wording in the section providing for the registration of unpaid coupons. We do not need to follow the argument of counsel as to whether the words relating to payment are directory or mandatory. Whether he is commanded to pay or directed to pay is not decisive of the questions here involved. However, the Legislature used the word "shall" instead of the word "may," which indicates that the duty is imposed upon the treasurer to make payment if there are sufficient funds available for that purpose. Even though the word "may" had been used when the rights of third parties are involved, the word "may" as to what an officer shall do is held to be mandatory. County of Los Angeles v. State of California, 64 Cal. App. 290, 222 P. 153; Stockton Plumbing & Supply Co. v. Wheeler, 68 Cal. App. 592, 229 P. 1020.

Again, it is not a question as to whether there are sufficient funds to pay all interest coupons that might be presented for payment, but if there are sufficient funds on hand to pay any interest coupon that is presented.

There is a clear distinction between the provisions made for the payment of bonds and interest coupons under the irrigation district laws of this state, and the marshaling of assets to make payment on the bonds of any insolvent concern, or where there is only one fund out of which payment of bonds can be made. Where there is only one fund, or where all the assets of an insolvent concern are to be marshaled and payment made to creditors, equity will undoubtedly prorate the payments so that all bondholders or creditors may share therein. In the case at bar there is a continuing obligation on the part of the district to make payment, and there are provisions in the irrigation district laws for the enforcement of that continuing obligation. While the interest-bearing coupons all become due on a fixed date, the Legislature realized that while taxes all become due and payable on a certain date, that payment is made by owners of property in the district from time to time, and that several months may elapse between the first and final payments, and that while there might be money in the hands of the treasurer of the district to make payment of a considerable number of the coupons on the due date thereof, a considerable time might elapse before full payment could be made. Realizing this, and also in view of the fact that the legal value of the use of money, and, likewise, the legal value of the deprivation of the use of money in this state, is fixed at the rate of 7 per cent. per annum, the Legislature has provided that in the event any interest coupon holder does not receive payment upon the date of the presentation of his interest coupon for payment, he may have the coupon registered so that it will draw the legal rate of interest and be fully compensated for the time during which he is deprived of the principal amount of the coupon. Thus, absolute equity is meted out between the coupon holder who receives instant payment and the coupon holder whose payment is deferred. Again, the priority seemingly enjoyed by the coupon holder who receives instant payment is reversed in favor of the holder who has his interest coupon registered. For example, if A presents a coupon and receives payment, and B presents his coupon and has it registered, B will receive payment on his registered coupon and interest thereon in full before A can receive any more payments upon subsequently maturing coupons.

In addition to this, the irrigation district laws provide that if the proper officers do not levy sufficient taxes to pay the maturing coupons, they can be compelled to do so by any interested party. All parties having agreed that under the act of the Legislature approved April 14, 1913 (Stats. 1913, p. 23), registered bondholders are entitled to payment in the order of their registration, it is unnecessary for us to lengthen this opinion by consideration of the rights of registered bondholders.

As if to offset or counteract the interpretation given to the Colorado irrigation district laws, the Legislature of this state has in fact given its own interpretation as to how and when bonds and interest coupons are to be paid, and the acts to be performed in the event that payment is deferred from time to time. Section 52 of the Irrigation District Laws of California, in relation to the payment of interest coupons, contained only the following sentence: "Upon the presentation of the coupons due, to the treasurer, he shall pay the same from the bond fund." Stats. 1897, p. 272. The remainder of the section deals with the redemption of bonds, advertising, etc., and is not pertinent here. Realizing the incongruity and confusion that would result from the failure to fully provide for the acts and things to be done relative to the payment of bonds and interest coupons, and to provide an equitable method by which every bondholder would be fully compensated, whether by prompt payment or deferred payment, the Legislature amended section 52 of the California Irrigation District Laws, and after specifying that the treasurer must pay the interest coupon upon presentation, added the following sentence: "If funds are not available for the payment of any such matured bond or interest coupon, it shall draw interest at the rate of seven per cent per annum from the date of its presentation for payment until notice is given that funds are available for its payment, and it shall be stamped and provision made for its payment as in the case of a warrant for the payment of which funds are not available on its presentation." Stats. 1919, p. 667, § 11. Thus, whatever views of the section may be entertained by court or counsel as to what would be equitable, the Legislature, in express terms, has provided an equitable procedure by providing that the person who holds a bond or coupon upon which payment is deferred shall receive the full legal value of the use of the money, and has in this manner given its own interpretation of section 52, supra, so far as involved in this case.

[5] In view of the Legislature's own interpretation as thus clearly set forth by its amending section 52, supra, there remains only one duty to be performed by the court, and that is to accept the interpretation as not only equitable but final.

The parties hereto, in open court, having stipulated that if the court determined that payment should be made as contended for by the petitioners, then and in that case the respondent should be directed to make payment to the interest coupon holders, following the order of their presentation, and not to direct payment simply to be made upon the coupons held by the petitioner and the interveners who have appeared in this action.

The order of the court, therefore, is that a writ of mandate issue in this cause, directed to the respondent, to forthwith proceed to make payment in full of any and all interest coupons, in the order in which they were presented for payment, until the entire fund in his hands, available for that purpose, is exhausted, and then to forthwith proceed to register any and all interest coupons on which payment is not made, if so demanded by the holders thereof.

We concur: PRESTON, P. J.; THOMPSON, J.

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123 Cal.App. 70

KINNEY v. POSTAL TELEGRAPH-CABLE CO. et al.

Civ. 8274.

District Court of Appeal, First District, Division 1, California.

April 26, 1932.

1. Conspiracy 🔑6.

Elements of civil conspiracy are formation and operation of conspiracy and damages from act in furtherance thereof; cause of action being damages suffered.

2. Conspiracy 🔑18.

Allegations defendants entered into conspiracy to defraud plaintiff and committed certain acts thereunder, to state cause of action, must be connected with facts which, if true, would be wrongful.

3. Conspiracy 🔑6.

Telegraph company's inability to furnish sender copy of night letter until six weeks after sending *held* no basis for conspiracy liability, where message was delivered twelve hours after filing, and sender suffered no damage.

Facts disclosed that sender filed night letter with telegraph company in which he directed certain mortgage company to apply designated funds to specified obligation in connection with 5,000-acre ranch to avoid forfeiture, and that three days later sender requested a copy of the message, which telegraph company was unable to furnish; original message having been mislaid or lost. Thereafter sender charged company with shady practices, and brought action for company's conspiracy with mortgage company and another to defraud sender out of his property, without showing that telegraph company knew of, or was in any way connected with, mortgage company or transaction in question, and notwithstanding message was shown to have been delivered within twelve hours after filing, as disclosed by telegraph company's records and photostatic copy of message, and acknowledgment of receipt by mortgage company.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by William A. Kinney against the Postal Telegraph-Cable Company and others. From a judgment of dismissal, plaintiff appeals.

Affirmed.

William A. Kinney, in pro. per.

Haas & Dunnigan, and H. C. Johnston, all of Los Angeles, for respondents.

KNIGHT, J.

The purpose of this action, as stated by plaintiff in the opening paragraph of his complaint, was to recover "damages, actual and punitive, suffered by him at the hands jointly of defendants herein, to-wit: the sum of three hundred thousand dollars ($300,000), for a joint, unlawful, criminal, wilful, oppressive and fraudulent confederation together and conspiracy on the part of all and each of the defendants herein directed against complainant and aimed, designed and intended to harrass and oppress him and to do him intentional wrong and destroy and injure and dissipate his property and to deprive him of credit and the means of obtaining a livelihood, and to acquire his property without consideration or return, by said means." Three of the ten defendants sued, namely, Postal Telegraph-Cable Company, a corporation, its Los Angeles superintendent and manager, W. W. Morrison, and C. A. Holzer, interposed a general demurrer to the complaint, and it was sustained without leave to amend. Pursuant to the order so made, judgment of dismissal was entered, from which plaintiff has appealed. The remaining seven defendants are residents either of New York or Canada, and, so far as the record shows, were not served with summons.

The action was filed and the appeal is presented by appellant in propria persona. The complaint and the exhibits attached thereto cover some 213 pages of the printed transcript. As stated by appellant in his brief, he "proceeds, at great length, by a recital of facts, to elucidate and explain the details of the conspiracy"; but an examination of the pleading shows that most of the matters set forth therein related to a controversy then existing between appellant and others which is wholly foreign to any charge made against these respondents. It appears therefrom that, pursuant to an arrangement entered into between appellant and the defendant Peterson, a real estate broker residing in New York, the latter organized a corporation under the laws of Delaware, known as the Nova Scotia Live Stock & Development Company, Limited, for the purpose of acquiring from the defendant Canada Permanent Mortgage Corporation of Halifax, Nova Scotia, under an installment contract, for a fixed price of $6,500, a 5,000-acre ranch situate in Nova Scotia, which formerly belonged to appellant and was sold at foreclosure sale to the mortgage corporation in liquidation of a loan of $8,000 made to appellant, which at the time of the foreclosure proceedings had been reduced to $6,000; the intention and expectation of appellant and Peterson being to resell the ranch, through Peterson's efforts, for $100,000. After some of the installments on the purchase price had been paid to the mortgage corporation, part of the money therefor being furnished by appellant and part by Peterson, a dispute arose between appellant and Peterson as to the extent of the ownership of each in the corporate stock of said corporation, which eventually led to charges of trickery and fraud being made by appellant against Peterson; whereupon appellant, claiming to be the owner of 51 per cent. of the stock of said corporation, served on Peterson notice of revocation of the latter's authority to sell the ranch. Thereafter appellant made efforts to effect a sale thereof for $25,000, but up to the time this action was commenced he was unsuccessful in finding a purchaser.

While this controversy was going on, and on September 26, 1927, appellant filed in the Los Angeles office of the respondent telegraph company, to be transmitted by "night letter," a message addressed to the mortgage corporation at Halifax, for which he paid said telegraph company $1.20. The message read as follows: "Useless delaying for Peterson to pay Apply money sent by me immediately to payment September obligation. Have specific authority from Peterson do this Last to payments so made. Wire me care Postal—balance immediately Peterson has no title to fifty-one per cent Forwarding proofs attested by Peterson." Appellant called at the telegraph office several times during the next three days to ascertain whether a response had been received to his message, but there was none; and on September 29 he asked for a copy of the message he had sent, intending to preserve the same as evidence in the event the mortgage corporation should afterwards deny having received it, but the employees were unable to find the original message or any record of the payment of the money for its transmission; and for that reason they expressed doubts about any such message having been filed at that office; however, they stated that the search therefor would be continued. The complaint then goes on to allege that "By that time complainant knew that he was the victim of a fraud, satisfied as he was that both the telegram and the money could not have been lost and disappeared the same night, except by design; complainant also knowing in that connection that the mortgage company in any attempt to steal at least one hundred thousand dollars ($100,000) worth of property by forfeiture or otherwise, for nothing, had a supreme and vital motive to deny that they ever received the notice contained in the missing telegram, that said R. C. A. Peterson had no title to the 510 shares of the capital stock of the Nova Scotia Company, which, in fact, belonged to complainant." And the next day, September 30, appellant sent a second telegram to the mortgage corporation in substantially the same words over the wires of the Western Union Company. However as developed during the next few days and as the exhibits attached to the complaint show, the message filed with the respondent telegraph company on the evening of September 26 was in fact delivered to, and receipted for by, the mortgage corporation at Halifax at 8:42 the following morning, September 27; and, instead of wiring an acknowledgment thereof as requested, it replied thereto on the same day by mail, sending the letter to appellant's address in Seabright, Santa Cruz county, and appellant admits having received the letter on October 6. The next day, October 7, appellant notified the respondent company of the receipt of the letter, and a week later, to wit, on October 15, he received a second letter from the mortgage corporation, dated October 1, again acknowledging receipt of appellant's telegram, and stating that the payment referred to therein had been applied as directed in the telegram, a statement of account being inclosed in the letter; and appellant immediately forwarded a copy of the letter to the respondent company. Moreover, shortly afterwards the respondent company succeeded in obtaining from its Halifax office a photostatic copy of the missing original message, and on November 25, approximately two months after the message was sent, but a year prior to the commencement of this action, delivered said photostatic copy to appellant, informing him at the same time by letter that the mortgage corporation acknowledged having received the same at Halifax at the time above mentioned.

It further appears from the allegations of the complaint and the exhibits attached thereto, that, as soon as appellant learned that the original message was missing, and despite the expressed willingness on the part of the respondent company and its officers and employees to continue a thorough search therefor in its local and foreign offices and to deliver a copy thereof to him when found, he began and thereafter continued, even after receiving proof of the delivery of the message and the receipt of a photostatic copy thereof, to charge respondents, not only with corruptly conniving and conspiring with Peterson and the mortgage corporation to cheat and defraud him of his property, but also with the commission of sundry crimes, characterizing the loss of the original message and the record of the payment of the toll for its transmission as embezzlement, and referring to respondents as "liars," "rascals," and "highwaymen," and stating in his final letter to said company, dated December 1, 1927, "* * * I shall see to it that public attention is drawn to your methods, and that you are ear-marked as conductors of rascally and shady business."

[1, 2] With respect to actions for civil conspiracy, it is well settled that the essential elements thereof are the formation and operation of the conspiracy and damage resulting to plaintiff from an act or acts done in furtherance of the common design; that the cause of action is the damage suffered. Mox Incorporated v. Woods, 202 Cal. 675, 262 P. 302, 303; 5 Cal. Jur., 528. Says the court in the case cited, in quoting from an earlier case (Revert v. Hesse, 184 Cal. 295, 193 P. 943): "It is a general and well-settled principle of law that, where two or more persons are sued for a civil wrong, it is the civil wrong resulting in damage, and not the conspiracy, which constitutes the cause of action." And again, in Moropoulos v. C. H. & O. B. Fuller Co., 186 Cal. 679, 200 P. 601, the court declares that conspiracy is not actionable unless the combination results in the perpetration of an unlawful act or of some injurious act by unlawful means. In other words, it is held that a conspiracy, however atrocious its purpose, is not the subject of civil action, unless it results in damage to the complaining party. Herron v. Hughes, 25 Cal. 556, 560; Davitt v. American Bakers' Union, 124 Cal. 99, 56 P. 775. Furthermore, it is held generally that a complaint which contains nothing more than bare allegations that the defendants entered into a conspiracy to defraud plaintiff and committed certain acts in furtherance thereof does not state a cause of action, unless those acts are connected with a showing of facts which, if true, would support the charge that they were wrongful (Moropoulos v. C. H. & O. B. Fuller Co., supra); inferences, generalities, presumptions, and conclusions being insufficient (Davitt v. American Bakers' Union, supra).

[3] In the present case the complaint utterly fails to allege any fact or circumstance showing in the remotest degree any violation

of duty on the part of these respondents. As will be observed, the company was employed and paid by appellant merely to transmit over its wires, as a night letter, a telegraphic message from Los Angeles to Halifax at regular rates; and it affirmatively appears from the complaint that it fully and promptly performed its duty in that behalf; that the message was transmitted and delivered in Halifax to the party to whom it was addressed within twelve hours after it was filed in its Los Angeles office. And, so far as the complaint and the exhibits show, the only basis for the vituperative charges made by appellant against said company, its officers and employees, was the fact that three days after the message was filed he asked for a copy thereof for the purpose, as he asserted, of preserving it as evidence in the event the addressee afterwards denied having received it, and that respondent company was unable for some six weeks thereafter to deliver such copy because, as it claimed, the original message had been mislaid or lost. But, as will be noted, appellant suffered no damage whatever therefrom because within a week after the message was filed he received a written acknowledgment from the party to whom it was sent that they had received the message, and that they had complied with the directions contained therein; and within five weeks thereafter the respondent company furnished appellant with a photostatic copy of the message, together with an acknowledgment of the receipt thereof by the addressee and the date, hour, and minute of its delivery. And, in any event, appellant has not called to our attention any statutory or contractual obligation on the part of telegraph companies requiring them as such to furnish at any and all times and under all circumstances copies of messages filed with them for transmission. Nor does the complaint allege any fact or circumstance whatever tending even inferentially to connect respondents with any conspiracy which appellant asserts existed between others to defraud him. For aught the complaint shows, neither the respondent company nor any of its officers or employees ever heard of the Nova Scotia property or any of the parties connected therewith, or of the controversy existing between appellant and Peterson; and the indulgence in opprobrious language does not serve the purpose of allegations of material facts.

From the foregoing, it is evident that in its present form the complaint does not state, nor could it by amendment be made to state, a good cause of action against respondents, and therefore the trial court was justified in sustaining the demurrer without leave to amend.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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